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A Tale of Two Paradigms: Judicial Review and Judicial Duty

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Introduction

What is the role of judges in holding government acts unconstitutional? The conventional paradigm is "judicial review." From this perspective, judges have a distinct power to review statutes and other government acts for their constitutionality. The historical evidence, however, reveals another paradigm, that of judicial duty. From this point of view, presented in my book *Law and Judicial Duty*, a judge has an office or duty, in all decisions, to exercise judgment in accord with the law of the land.[1] On this understanding, there is no distinct power to review acts for their constitutionality, and what is called "judicial review" is merely an aspect of the more general duty of judges in all of their decisions.

The difference between these paradigms has contemporary implications. If one assumes the judicial review paradigm, it is difficult to find constitutional authority for constitutional decisions, and it therefore seems that early American judges in the 1780s, and especially after 1789, must have created their own most significant power—as if they lifted themselves up by their bootstraps to achieve a power their constitutions apparently did not give them. The judicial review paradigm thereby implies that constitutional decisions have only a rather contingent authority and that the judges have a remarkable degree of power, including a discretionary power of their own rule.

The other paradigm, in contrast, envisions the judicial role in terms of duty. As traditionally understood by common lawyers, judges have an office of judgment rather than of will—an office, moreover, in which they must decide in accord with the law of the land. From this perspective, judges have no distinct power over the constitutionality of government acts, but rather must make decisions on such matters because it is part of their office or duty.

The implications of this vision are thus diametrically opposite to those of the judicial review paradigm. For example, when considered as a matter of duty, constitutional decisions have the deep, even

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

profound authority of an ordinary exercise of judicial office. At the same time, judges have no power beyond their duty, and they therefore have to make constitutional decisions in the same way as their other decisions, merely in accord with the law of the land.[2]

Which paradigm is to be believed? Well, at least for historical inquiry, the answer must rest on the evidence. This Essay, therefore, evaluates each of the two paradigms in relation to the evidence.

I. Judicial Review

The judicial review paradigm rests on a curious approach to history. It begins with the modern assumption that there was a power of "judicial review" and then observes that there is very little early evidence of it. This might already be enough to give one pause; but not, apparently, among scholars of judicial review.

On account of the presupposition about the existence of judicial review, the central problem has seemed to be the lack of adequate authorization for it in American constitutions. The U.S. Constitution states that the judges in every state shall be bound by the supreme law of the land, including the Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[3] This is only a narrow slice of the constitutional decisions made by state judges, and it does not include any constitutional decisions by federal judges. As a result, the constitutional authority for judicial review has been an open question.

The conventional answer is that the judges developed their own power. Although judges in England and the colonies did things that, in retrospect, have seemed like judicial review, it was only state and then federal judges after American Independence who held sovereign statutes void. It therefore seems that the judges created judicial review—if not quite out of whole cloth, then at least by developing it and establishing it with the authority of precedent.

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2 Professor Ann Althouse succinctly captures these points in her evocative phrase about "the grandeur of the ordinary." Ann Althouse, *The Historical Ordinariness of Judicial Review*, 78 GEO. WASH. L. REV. 1123, 1123 (2010) (emphasis omitted).

Her questions, moreover, recognize exactly the point of collision between the old ideals and the new: the centrality of human will. In the older ideals, the foundation of legal obligation was authority, and as a result, legal obligation had to be found in the intent of the lawmaker—most fundamentally the intent of the people, and derivatively the intent of their legislature. In contemporary ideals, however, the intent of a past lawmaker is expected to give way to the will of current judges.

3 U.S. CONST. art. VI.

This account of the development of judicial review, usually culminating in the 1803 case of *Marbury v. Madison*,[4] is appealing for many reasons. It explains how judicial review arose notwithstanding the absence of any clear constitutional authority. It offers a gratifyingly heroic vision of how American judges contributed to modern institutions and political theory. It even, to the satisfaction of some judges, hints at a judicial power over judicial review and, thus, over the application of constitutional law.

Is this judicial review paradigm, however, consistent with the evidence? Three basic points of conflict should be enough to reveal the paradigm's inadequacy.

A. No Evidence of a Concept of Judicial Review

An initial awkwardness with the judicial review paradigm concerns the concept itself: There is no evidence that seventeenth- and eighteenth-century judges described their constitutional decisions as "judicial review."[5] Indeed, it is difficult to find seventeenth- or eighteenth-century evidence that the judges thought there was, by any name, a distinct judicial power over constitutional questions.[6]

This absence of evidence about a concept of judicial review, or any other distinct judicial power over constitutional questions, complicates the attempt to find judicial review in the eighteenth century. It is, however, only the first of a series of evidentiary troubles.

B. English Decisions

Another problem with the judicial review paradigm arises from the English evidence. Contrary to the assumptions of historians of "judicial review," English judges were already holding government acts unconstitutional.

Of course, English judges could not hold acts of Parliament unconstitutional, but this had little to do with their lack of power or Parliament's sovereignty.[7] On the contrary, this obstacle arose primarily from the status of Parliament as the high court—what some called the

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

5 According to surviving manuscripts, seventeenth-century English judges occasionally alluded to their "review" of decisions or even of municipal acts, but not a distinct power, let alone as to constitutional questions. *See* HAMBURGER, *supra* note 1, at 188–89.

6 For a rare hint of such a power from a lawyer rather than a judge, and in a most unusual case, see *id.* at 443 (quoting JAMES M. VARNUM, THE CASE, TREVETT AGAINST WEEDEN 27–28, 35–36 (Providence, John Carter 1787)).

7 *Id.* at 395–97.

"supreme court."[8] From this point of view, the courts of King's Bench and Common Pleas were merely "inferior courts," which could not overturn a decision of a higher court.

Otherwise, however, English judges could hold government acts unlawful, including acts of the Crown. The king was *the* sovereign, and in the Middle Ages he was very powerful. Nonetheless, from early times, the judges held his acts unlawful. For example, in the fourteenth century, the judges could not overturn the acts of Parliament because this was a higher court, but they sometimes had to decide that the king's acts were unlawful.[9] By the seventeenth and eighteenth centuries, when ideas about the English constitution had become widespread, the judges even held acts of the Crown unconstitutional. For example, in 1763, Chief Justice Pratt held the search warrant for John Wilkes unconstitutional.[10] In 1705, Chief Justice Holt even held an act of the House of Commons unconstitutional.[11] Moreover, the judges regularly reached such decisions about local legislation, whether domestic municipal enactments or colonial statutes.[12]

The judicial review paradigm conflicts with these English decisions. They were early, they were English, they relied on an unwritten constitution, and they covered all types of government acts, except the acts of a higher court. And none of this is compatible with suppositions about a late, American creation of a distinct judicial power of review.

C. Early American Decisions

A further problem with the judicial review paradigm is that it cannot explain the early American decisions—in particular, the state constitutional decisions from the 1770s and 1780s. Most such decisions have been ignored by historians and lawyers because they do not fit the judicial review paradigm, but that is precisely why they are important.

1. The Exclusion of Early American Decisions

The judicial review paradigm narrows the evidence by making many American decisions from the 1780s seem irrelevant. For example, if judicial review was centrally about holding statutes unconstitu-

8 *Id.* at 239.

9 *Id.* at 240–41.

10 *Id.* at 216–17.

11 *Id.* at 215–16.

12 *Id.* at 180–88, 255–80.

tional, then decisions about executive and judicial acts appear to be of only peripheral significance. Similarly, if American judges created judicial review, then the study of judicial review must become a hunt for precedent in cases, especially high court cases. As a result, judicial resolutions and advisory opinions seem beside the point, and lower court cases appear nearly insignificant. This reduces the American evidence from the 1780s to about a half dozen state supreme court cases—thus presenting judicial review as a late and largely federal development.

But if one puts aside the search for something that looks like a distinct judicial power over the constitutionality of statutes, then there is no longer any need to confine the evidence to what look like precedents for such a power. Indeed, it becomes apparent that the evidence extends far beyond the half dozen cases that have been canonized as precedents. To be sure, most of the relevant decisions do not fit the paradigmatic narrative; they were not all cases, they did not all concern statutes, and they were not all decided by state supreme courts. Nonetheless, the decisions that held government acts unconstitutional, or even merely came close to doing so, need to be considered. Rather than be excluded because they fail to fit the judicial review paradigm, this is all the more reason to study them.[13]

2. *The Conflict Between the Decisions and the Paradigm*

How exactly do the state decisions from the 1770s and 1780s call into question the idea of judicial review? In multiple ways.

First, these decisions held not merely legislation, but all sorts of government acts unconstitutional, and they thereby suggest that there was nothing distinctive about holding legislation unconstitutional.[14] Rather than a distinct judicial power over legislation, these decisions involved something more general.

Second, the decisions began relatively early, which is inconsistent with the view that the judges established judicial review after slowly

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13 One of the obstacles to taking this more expansive view of the evidence has been practical. The best sources for early constitutional decisions, whether English or American, lie mostly outside printed reports, and even historians who write on the subject do not usually bother to search systematically through the relevant state archives, county courts, religious societies, and other repositories. This was why I began my book merely as an attempt to edit and publish the manuscripts—the original goal being to produce reports of unreported, or at least underreported, decisions.

14 HAMBURGER, *supra* note 1, at 359–77 (discussing judicial resolutions and advisory opinions).

and tentatively exploring this power during the 1780s.[15] In fact, the early chronology of the decisions suggests that the judges were doing something that was already familiar to them and that they could simply take for granted.

Third, the decisions from the 1780s include some decisions under the Articles of Confederation. It is often suggested that the Framers of the U.S. Constitution developed judicial review in 1787 as a means of enforcing federal law and that it only later became a broader power of constitutional enforcement.[16] Already before the drafting of the U.S. Constitution, however, state judges were holding state statutes unconstitutional under the Articles of Confederation. And they did this without controversy.[17] Evidently, not only judicial review, but also the federal application of it, did not have to be invented in 1787 or later.

Fourth, the evidence from the 1770s and 1780s includes not only cases, but also other sorts of decisions. In particular, the evidence includes judicial resolutions and advisory opinions.[18] To be sure, these decisions did not always carry the authority of precedent, but they show that it is a mistake to assume that constitutional decisions arose from the logic of deciding cases. A case-centered account of "judicial review" is usually based on a reading of *Marbury v. Madison*—a reading that misunderstands Chief Justice Marshall and that, more seriously, seems to justify the fascination with precedents.[19] The earlier evidence, however, makes clear that, whatever judges were doing when they held acts unconstitutional, they did not think it was necessarily confined to cases.

Fifth, and most profoundly, the evidence includes many lower court decisions. In the judicial review paradigm, only supreme court decisions seem to matter, for only high courts could have made precedents that would have established the authority of judicial review. And only these courts, according to the paradigm, would have had the power to impose this new judicial role on legislatures. It is therefore

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15 *See, e.g.*, State v. Clerk of Perquimans County (N.C. Super. Ct. 1778), *discussed in* HAMBURGER, *supra* note 1, at 384–91; Holmes & Ketcham v. Walton (N.J. 1780), *discussed in* HAMBURGER, *supra* note 1, at 407–22.

16 A prominent advocate of this view, Jack Rakove, even argues that judicial review was conceptually impossible before 1787. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1034 (1997), *quoted in* HAMBURGER, *supra* note 1, at 15.

17 *See* Opinion of Justices of Mass. Supreme Judicial Court (June 22, 1785); Bayard v. Singleton (N.C. Super. Ct. 1787), *both discussed in* HAMBURGER, *supra* note 1, at 597–01.

18 *See* HAMBURGER, *supra* note 1, at 359–77.

19 *Id.* at 7–9.

revealing that lower courts—county courts and inferior courts—frequently discussed constitutional questions and regularly held government acts, even statutes, unconstitutional.[20] Whatever these lower courts were doing, they could not have been exercising, let alone creating or establishing, an ambitious new judicial power against the other branches of government.

D. Illustrations of Early State Decisions

A quick recitation of a few early state decisions can illustrate the sort of American evidence on which the theory of judicial review runs aground. It is not possible here to recite all of the evidence, but a few concrete examples can at least give a sense of its depth and detail.

In 1786, in the *Ten Pound Cases*, inferior court judges in New Hampshire held a state statute unconstitutional. Most of the judges were probably not even lawyers, and the very name of their court, the Inferior Court of Rockingham County, suggests the limited extent of their judicial power. Nonetheless, they resolutely, and with sophistication, held a popular enactment to be contrary to the state's constitution.[21] It is utterly improbable that such judges were choosing to exercise power against the legislature or that they were heroically developing new ideas of judicial authority.

Another example comes from Wilmington, North Carolina. The story began when the fateful Mary Brown came to Fayetteville. Many apprentices and servants soon visited her, often taking valuables from their masters' houses to pay for her services. Before long, even some masters were seeking her company. Many men of Fayetteville, however, regretted the loss of their goods and the degradation of their town and therefore took the law into their own hands. They forcibly expelled Mary Brown—together with her companion, Thomas Cabeen. This resourceful pair, however, then prosecuted the vigilantes of Fayetteville for a riot, thus subjecting them to extensive fines.[22] When the vigilantes complained in December 1785 to the legislature, it remitted their fines, but this created a constitutional problem: Could the legislature stand in the way of the judgment of a court? It was one thing for the state to receive the fines and then return them; but could it bar enforcement of a court's judgment?

The judges were then meeting at Wilmington, and perhaps they should have accepted the reality that they would probably not get an

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20 *Id.* at 378–80.

21 *Id.* at 422–35.

22 *Id.* at 555–56.

opportunity to decide the question in a case. The judges, however, were not content to watch silently while the legislature violated the state constitution. They therefore resolved that the legislature "had no power to remit or suspend the payment of fines until they should be paid into the Treasury."[23]

This decision does not appear in histories of judicial review, for the evidence is elusive, and being a mere resolution, the decision could not have been a precedent. But this is not to say it is unimportant as evidence. To be sure, a decision made outside of a case was outside the office of a judge and thus was without authority—a point subsequently emphasized by the North Carolina legislature.[24] Even so, resolutions such as that adopted by the North Carolina judges show that the judges did not need to establish their power in precedents or derive it from their role in deciding cases.

Yet another decision was *Holmes & Ketcham v. Walton*—decided by the New Jersey Supreme Court in 1780.[25] For over a hundred years scholars have questioned whether the court in *Holmes* held a state statute unconstitutional, because the case has seemed too early to be an example of judicial review, and because there is no evidence that the judges were establishing a precedent for a new judicial power.[26] The scholars, however, have thereby put the paradigm ahead of the evidence. Once one gives the evidence priority, it becomes apparent that, from the very beginning of the case, the governor and legislature assumed that the judges would feel obliged to hold the statute unconstitutional. In fact, all of the evidence overwhelmingly indicates that this is what the judges did.[27] Such an early decision, in 1780, together with the widespread understanding of what the judges would do, cannot be reconciled with the conventional assumption that the judges had to experiment in creating a new judicial power.

As if this were not enough, consider an even earlier example: the 1778 decision of the North Carolina Superior Court on behalf of manumitted slaves.[28] After North Carolina Quakers freed their slaves, the legislature passed a statute allowing county courts to capture them and sell them at auction. Some county courts, however, did this retrospectively, capturing and selling blacks who had been

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23 *Id.* at 558 (internal quotation marks omitted).

24 *See id.*

25 *Id.* at 407.

26 *Id.* at 415.

27 *See generally id.* at 407–22.

28 State v. Clerk of Perquimans County (N.C. Super. Ct. 1778), *discussed in* HAMBURGER, *supra* note 1, at 384–91.

manumitted prior to the adoption of the 1778 statute. Lawyers hired by the Quakers sought writs of certiorari on behalf of the blacks freed before the statute, and the Superior Court granted the first such request.[29] Upon receiving the record from below, the Court held that the county court had violated the rights of these blacks.[30] The judges made this decision only two years after the Declaration of Independence. And the judges (most of whom were probably slaveowners) thereby took a position that cut directly against the passionate sentiments of the society and its legislature. Was this a vigorous assertion of a new judicial power—one that allegedly was only beginning to evolve a decade later? Or was it something else?

In sum, the judicial review paradigm runs up against the evidence. Neither English decisions nor early American decisions are consistent with the judicial review paradigm. Nor is there evidence that judges had a concept of a distinct power of judicial review. All of the evidence, however, can be explained with another concept.

II. Judicial Duty

The concept with which judges traditionally described what they did was the ideal of judicial office or duty. Although judicial review has been examined in innumerable articles and books, the common law ideal of judicial office has gone largely unstudied. Nonetheless, it is profoundly important—not least for understanding what is today called "judicial review."

A. Two Elements of Judicial Office

When early lawyers explained the office of a judge, they noted two basic elements—one of which was universal, the other of which was more local. Taken together, these aspects of judicial office shaped the character of much of the common law, including the role of judges in constitutional decisions.

Judicial office was understood to be, by its nature, one of judgment. The human soul was said to combine two distinct faculties, that of judgment and that of will—the conventional assumption being that the judgment informed the will. The faculties that were combined in the soul, however, were distinct offices in government. Judgment belonged to the judges, and will to the sovereign lawmaker. From this perspective, judgment had to be exercised independently of will—this

29 HAMBURGER, *supra* note 1, at 385–86.

30 *Id.* at 389.

being the foundation of the associated ideal of judicial independence.[31]

All of this, however, still left open the question of what law the judges should follow when exercising judgment. In the academic jurisprudence of the Continent, it was assumed that judges ultimately had to frame their decisions in accord with the full range of laws, which most immediately included the law of a prince, but ultimately included the law of nature. Recognizing that these academic ideals could threaten the distinctive laws of England, the English Crown responded very early by stating, in commissions to judges, that they were to decide in accord with the law of the land. As a result, the office or duty of common judges was not merely to exercise judgment, but more specifically to do so in accord with the law of their land.[32]

B. Significance for Constitutional Decisions

The duty of judges required them in their decisions to hold unconstitutional government acts unlawful and void. Thus, far from revealing a distinct judicial power, what judges did in such decisions was merely an aspect of their ordinary office or duty.

Duty was the foundation on which judges found the strength to hold government acts unlawful. In the Middle Ages, a judge was very vulnerable to his monarch—far more so than later judges would be to their legislative sovereigns. Nonetheless, already in the Middle Ages, judges felt obliged to hold unlawful royal acts void, and judges did so not because they had any power over the king or his acts, but rather because they were bound by their office or duty to exercise independent judgment in accord with the law of the land.[33]

The duty of judges was binding on them on account of their oaths. God was thought to be the highest of judges, and he therefore seemed the very model of independent judgment. When human judges took their offices, moreover, they swore to God that they would serve in their office of a judge, and this was understood to bind them to exercise judgment in accord with the law of the land.[34]

It is therefore no surprise that when judges had to reach decisions that cut against royal or, later, legislative expectations, they defended themselves by resting on their oaths and their office—by reciting their obligation to God and their duty to exercise independent judgment in

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31 *See id.* at 148–78.

32 *Id.* at 104–06.

33 *See id.* at 194–202.

34 *See id.* at 107–12.

accord with the law of the land. When the North Carolina judges in the spring of 1787 decided the constitutional question in *Bayard v. Singleton*, they explained that "the obligations of their oaths, and the duty of their office, required them in this situation, to give their opinion on that important and momentous subject."[35] Indeed:

> [N]otwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.[36]

This was a duty, a general duty of judicial office, not a distinct power.

What had changed in 1776? Not much. Put simply, colonial legislation gave way to state legislation. Before Independence, American legislation had been vulnerable to local or English decisions holding it unconstitutional. After Independence, this vulnerability continued under state constitutions. Parliamentary legislation had never been vulnerable—not even when, in the Middle Ages, Parliament was really just a part of the king's court, for it was the high court. Other legislation, however, both in England and America, had always been subject to judicial decisions about its lawfulness, and this did not change when America became a new nation.[37]

Thus, there was no revolution in judicial office. On the contrary, the traditional office or duty of a judge continued to bind the judges. And this duty, being undertaken by oath, gave the judges the strength to do what they could not have done merely through an exercise of power.

C. Compatibility with the Evidence

Unlike the judicial review paradigm, the ideal of judicial duty matches the evidence. First, the evidence shows that judges idealized their role in terms of their office or duty. When judges explained what they were doing, they spoke of their office or duty, and of the oaths by which they bound themselves to their office. They did this in England in the Middle Ages and in America beginning in the colonial era, and they continued to express such assumptions in the early Republic. Accordingly, if the ideals of the judges themselves are to be the basis

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35 *Id.* at 459 (internal quotation marks omitted).

36 *Id.* (internal quotation marks omitted).

37 *Id.* at 393–94.

for understanding what they were doing, it seems essential to focus on judicial office or duty.

Second, the judicial duty paradigm fits the evidence about English decisions. English judges had long felt obliged by their duty to hold unlawful government acts void—as long as these were not acts of the high court. And by the seventeenth century, judges even felt obliged to hold government acts unlawful and void on the ground that they were unconstitutional. Although this evidence cannot be explained by the judicial review paradigm, it makes sense as a matter of judicial duty.

Third, with regard to American decisions, the notion of judicial duty explains how judges could hold acts unconstitutional very early, even immediately after Independence. It explains how they could reach such conclusions about all types of government acts, including legislative acts. It explains why they reached such conclusions in a wide range of decisions, not just cases. It explains how they could hold state statutes unconstitutional for violating the Articles of Confederation. And it explains how even the lowest of judges could make constitutional decisions. Rather than exercise a distinct power over constitutional questions, such men were adhering to the duty that belonged to all judges, high and low.

Evidently, constitutional decisions were a matter of judicial office rather than judicial review. Far from having to invent a new power, American judges merely had to do their duty.

III. Conclusion

The judicial review paradigm, thus, has an older competitor, and the result is a stark contrast. Whereas the contemporary paradigm elevates power, the old ideal comes to rest on duty. To be precise, whereas the one imagines a distinct power of judges over the constitutionality of government acts, the other finds the constitutional decisions of judges within the general duty of judges, in all of their decisions, to decide in accord with the law of the land.

Thus, whatever choice is made between these paradigms, it is difficult to avoid recognizing that there is a choice. Instead of standing alone as the only possible paradigm, judicial review should be understood as an alternative—a relatively recent alternative—to the more general ideal of judicial duty.

A. The History

At least for purposes of history, it is a mistake to cling to the judicial review paradigm. There is simply no evidence that early judges, English or American, acted on the basis of such an understanding of their role; nor can such an understanding explain what they did. In contrast, there is much evidence that judges acted on their understanding of their office or identity as judges—on their understanding that they had to exercise judgment in accord with the law of the land.

Accordingly, when lawyers and scholars speak about judicial review in *Marbury v. Madison* and earlier cases, it should be recognized that they are projecting a contemporary concept on the past. Would it make sense to talk about "automobiles" in the eighteenth century? To be sure, there were four-wheeled vehicles then, but "automobile" implies a different sort of horsepower. In the same way, it is misleading to talk about judicial review in the eighteenth or early nineteenth centuries. This implies a sort of judicial power that the evidence does not support.

Of course, it is not surprising that many historians (including two commentators on this Essay) remain deeply attached to the judicial review paradigm.[38] But should historical scholarship adhere to a mod-

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38 Both of the historians who have written comments, Professors Mary Sarah Bilder and G. Edward White, defend the judicial review paradigm, albeit in very different ways.

Professor Bilder recognizes some of the weaknesses of the conventional accounts of judicial review, but her analysis remains within that paradigm. For example, although she concedes that "judicial review" is a modern label that has been imposed on the past, she resists the conclusion that a modern paradigm has been imposed along with it. Similarly, although Professor Bilder recognizes the need to go back before 1776, she revives the position that a distinct power of judicial review arose within seventeenth- and eighteenth-century decisions about corporate and colonial enactments. *See* MARY SARAH BILDER, TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006). In fact, the evidence is much deeper and broader, and it reveals not a power of judicial review, but merely judicial duty.

One of the risks of remaining within the judicial review paradigm is the need to focus on precedents. This has been the modus operandi of historians of judicial review for more than a century, and Professor Bilder's comments aptly acknowledge the importance of not getting "bogged down in a search for precedents." Mary Sarah Bilder, *Expounding the Law*, 78 GEO. WASH. L. REV. 1129, 1132 (2010) [hereinafter Bilder, *Expounding the Law*]. At the same time, in defending the judicial review paradigm, she repeatedly refers to early American "precedents" for judicial review, as if American judges had to establish a distinct power of review. *Id.* at 1133, 1134. As has been seen, however, what is called "judicial review" was really a matter of judicial duty, and judges had for centuries done their duty by holding government acts unlawful and void. They had done this as to sovereign acts of the king and even as to legislation, other than acts of Parliament. As a result, early American judges did not need to establish precedents for a

ern paradigm that collides with the evidence? It is one thing to cling to the past; it is another to cling to an imaginary past.

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power of judicial review, and it is incongruous to refer to the early state constitutional decisions as "precedents" for "judicial review." *Id.*

When questioning the judicial duty paradigm, Professor Bilder suggests that "[t]he fact that the office was sometimes described using the term *duty* does not mean it necessarily had to involve duty." *Id.* at 1136. Although in the abstract this could be true, historically it depends on the evidence, and there is much evidence (some of which is recited in my book) that any office, including judicial office, was traditionally understood as a matter of duty. In the words of the leading eighteenth-century law dictionary, "the Word *Officium* principally implies a Duty, and in the next Place the Charge of such Duty." 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 718 (1778), *quoted in* HAMBURGER, *supra* note 1, at 105.

Professor Bilder also argues that early modern English law did not acknowledge a unified authority, but instead rested on a plurality of authorities. Bilder, *Expounding the Law*, *supra*, at 1137–40. This position stands in contrast to that taken by, among others, Henry VIII, Elizabeth I, Edward Coke, Matthew Hale, and William Blackstone. One of the most basic developments in modern law has been the reduction of plural authorities, which flourished in medieval Europe, to the centralized authority of the state. In England, this meant the royal and eventually Parliamentary authority expressed in the law of the land. As put by Tyndale, the king "ought not . . . suffer" clerics "to have a severall lawe by them selves," for "one kynge, one lawe, is Gods ordinau[n]ce in every realme." WILLIAM TYNDALE, THE OBEDIE[N]CE OF A CHRISTEN MAN AND HOW CHRISTE[N] RULERS OUGHT TO GOVERNE fol. lxxiii[v]–lxxix[r] (1548), *quoted in* HAMBURGER, *supra* note 1, at 60. Still today, this development remains profoundly important, for a unified system of legal authority in each state has been the essential means by which modern societies have accommodated diversity and established both modern government and modern liberty.

In the end, Professor Bilder's counterargument turns on a single linguistic observation—namely, the tendency of early English lawyers to speak of "the laws of the land." Bilder, *Expounding the Law*, *supra*, at 1137–40. The verbal difference between the words "law" and "laws" would ordinarily be a matter of different levels of generality—the *laws* of the land being merely elements of what was more generally the *law* of the land. For Professor Bilder, however, this is a basis to doubt the centralization of authority (including the centralized limits on authority) that has been among the most significant developments in modern law.

It is quite another matter to respond to Professor White's comments, for he takes issue with positions that my book does not defend. Methodologically, he categorizes the book as an "assault on Progressive historiography," on the ground that the book does not follow the approach to twentieth-century American legal history pioneered at the University of Wisconsin. G. Edward White, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145, 1149 (2010). It is true that my book does not adopt the Wisconsin approach, but it is unclear why this would make the book antiprogressive. Mere difference is not an attack. In particular, although the methodology developed at Wisconsin has been valuable for some questions about modern American legal history, it does not follow that it is particularly useful for evaluating sixteenth- through eighteenth-century ideals of law and judging. Professor White seems to recognize this when, after arguing for pages that my book's methodology is antiprogressive, he asks, "What does *Law and Judicial Duty* have to do with all this?" *Id.* at 1151. It is a good question.

It is apparent from Professor White's comments that he takes the thesis of my book to be that judges could hold statutes unconstitutional for violating natural law. He draws this conclusion from a passage in my book's introduction—a passage in which I am actually describing the views of other scholars. Professor White, however, assumes that in describing their views, "Hamburger previews his own interpretation." *Id.* at 1155. In fact, almost my entire book is about the authority of human lawmakers and about the duty of judges to follow the law of the

B. Contemporary Implications

The history has a range of contemporary implications—most generally, that the judicial review paradigm cannot rest on the eighteenth- or early nineteenth-century history. Perhaps the judicial review paradigm can be justified as a matter of contemporary law. Perhaps. But if so, it should stand on its own legs—on its contemporary merits—rather than on the crutches supplied by an historical illusion. Mistaken history is not a good foundation for law, and judicial review should not find support in an historical account that departs so far from the evidence as to partake of the character of myth.

More specifically, the older paradigm remains important for what it reveals about the depth of authority for constitutional decisions and the limits inherent in judicial power. The judicial review paradigm leaves doubts about the constitutional authority for judicial review and thereby opens up space for a judicial power over the application of constitutional law. In contrast, the judicial duty paradigm locates "judicial review" in the ordinary exercise of judicial office, thus requiring judges to decide in accord with the law of the land and giving their constitutional decisions the deep authority of their office.

Of course, judicial duty implies a degree of power, but only within the bounds of duty. Whereas the contemporary paradigm celebrates the assertiveness with which judges rise from the bench to exercise power over the application of constitutional law, the older paradigm confines judges to their duty. It assumes that judges must remain within their role as judges, and although it requires them

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land. The book is thus abundantly clear that common law judges could not hold statutes void for violating natural law.

Professor White's comments also attribute to me a central belief in the "ancient constitution," which he depicts as a sort of hodgepodge. *Id.* at 1157–58. My book, however, spends only a few pages on the "ancient constitution," and it does so merely in passing, as part of a discussion of constitutional custom. HAMBURGER, *supra* note 1, at 91–95. Moreover, rather than assume that the law of the land consisted of the sort of "medley" that White imagined, White, *supra*, at 1158, the book shows how English law came to be systematically reoriented along lines of authority.

Last but not least, Professor White's comments invert my main thesis. He writes: "for Hamburger . . . any time late eighteenth-century American judges scrutinized the actions of other branches or, for that matter, made decisions in ordinary common law cases, they were *exercising a kind of judicial review.*" *Id.* at 1158–59 (emphasis added). This is very odd, for rather than say that every decision in an ordinary case was a kind of judicial review, my book argues that what is today called "judicial review" was, in fact, an exercise of ordinary judicial duty. Professor White's understanding is thus exactly backwards. It assumes that my book makes an exaggerated argument about "judicial review," whereas the book actually argues that there was no such thing in the eighteenth century. It is not clear how anyone who read my book could think that it endorses a caricature of the paradigm it challenges.

merely to sit in judgment in accord with the law of the land, it places their expositions of the law on the broad and firm foundation of their office.

C. The Underlying Model of Judging

Ultimately, the old vision of judicial duty remains a model of how judges can understand their office, not merely in constitutional cases, but in all of their decisions. The common law ideal of judicial duty offers a conception of independent judgment—of judgment independent from external will and, even more basically, from a judge's own internal will or passion. It presents, moreover, an understanding of judgment that is tied to the law of the land.

This old ideal of judging is therefore valuable as a limit on power. In a system in which all persons and even all parts of government are subject to the law of the land, the traditional judicial duty completes the circle by confining the judges to exercising judgment and following the law of the land. It thereby gives individuals hope that they can get justice from judges who will exercise judgment, rather than will or passion, and who will settle disputes in accord with the law of the land, thus allowing individuals to rely on the law. In these ways, the ideal of judicial office long shaped the common law and the freedom enjoyed under it, and although the ideal has been much eroded, it remains the model that is most likely to preserve liberty under law.

The ideal of judicial duty thus reveals much that the judicial review paradigm has obscured. Whether for understanding the history or the law, the old ideal of judicial duty remains valuable.