

## CONTESTING THE JUDICIAL POWER IN THE STATES

G. ALAN TARR\*

Scott Gerber's *A Distinct Judicial Power* brilliantly traces the development of the Article III model of an independent judiciary from its colonial origins to the Philadelphia Convention.<sup>1</sup> Although Article III defines the federal courts, few states today fully embrace that model.<sup>2</sup> Article III guarantees federal judges tenure during good behavior, but only Massachusetts and New Hampshire follow the federal example.<sup>3</sup> Article III establishes a system of presidential appointment and senatorial confirmation, but only California, Maine, New Hampshire, and New Jersey use a system of executive appointment with confirmation by another body, and even those states' processes vary somewhat from the Article III model.<sup>4</sup> For example, in California the appointed judges run in periodic retention elections,<sup>5</sup> while in New Jersey they serve a term of 7 years after which they must be re-appointed by the governor and confirmed by the senate to serve to the retirement age of 70.<sup>6</sup> Finally, Article III protects federal judges against reduction in their salaries, but some states permit such reductions as long as they are part of an across-the-board

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\* Director, Center for State Constitutional Studies, and Distinguished Professor, Department of Political Science, Rutgers University-Camden.

1. See generally SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787* (2011).

2. See *id.* at xv.

3. For information on the mode of selection and tenure in office of judges in the American states, see *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, <http://www.judicialselection.us/> (last visited Feb. 1, 2011).

4. See *id.*

5. *Judicial Selection in the States: California*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=CA](http://www.judicialselection.us/judicial_selection/index.cfm?state=CA) (last visited Feb. 1, 2011).

6. *Judicial Selection in the States: New Jersey*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=NJ](http://www.judicialselection.us/judicial_selection/index.cfm?state=NJ) (last visited Feb. 1, 2011).

reduction of the salaries of state officials or prohibit raising the salaries of sitting judges as well as lowering them.<sup>7</sup>

Differences in the status of Article III judges and their state counterparts are not new. States have charted their own paths, looking more to the practices in sister states than to the federal system.<sup>8</sup> During the eighteenth century, several states introduced removal by address, under which judges could be removed from office without trial by vote of the state legislature.<sup>9</sup> During the nineteenth century, most states instituted partisan election of judges and reduced their tenure.<sup>10</sup> And during the twentieth century, some states introduced the recall of judges, some instituted nonpartisan election of judges, and others adopted “merit selection” of judges—a system under which the governor appoints from a list of candidates selected by a purportedly neutral judicial selection commission.<sup>11</sup>

This Essay traces the states’ efforts to define the “distinct judicial power” in the decades after independence and the adoption of the Federal Constitution. The contours of that power were contested for much of the antebellum era as debates raged over the role of the judiciary in a republican polity. Two issues dominated that debate: from whom should judges be independent and what should be the scope of their responsibilities? Only after consensus was reached on these issues could discussion begin about what influences impinged on the performance of that function.

### I. INDEPENDENT OF WHOM?

Some early state constitutions contained stirring rhetoric on judicial independence. The Massachusetts Declaration of Rights of 1780, for instance, proclaimed “the right of every citizen to be

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7. See, e.g., KAN. CONST. art. III, § 13 (authorizing across-the-board reductions); WASH. CONST. art. IV, § 13 (banning changes to salary during a judge’s term in office); WYO. CONST. art. V, § 17 (same).

8. See G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE AMERICAN STATES 94–95 (forthcoming 2012).

9. See, e.g., MASS. CONST. of 1780, ch. 3, art. I; PA. CONST. of 1776, § 23; S.C. CONST. of 1778, art. XXVII. For current constitutions that retain provisions on removal by address, see, for example, MD. CONST. art. IV, § 4; OR. CONST. art. VII, § 20; WASH. CONST. art. IV, § 9; and WIS. CONST. art. VII, § 13.

10. TARR, *supra* note 8, at 93.

11. See *id.* at 164.

tried by judges as free, impartial and independent as the lot of humanity will admit,"<sup>12</sup> and the Maryland Declaration of Rights of 1776 noted that "the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People . . . ."<sup>13</sup> Institutional arrangements under eighteenth-century state constitutions, however, emphasized judicial accountability to state legislatures.<sup>14</sup> As John Phillip Reid has noted: "Short terms with election and reelection voted by the same lawmakers who set rates of compensation and paid their salaries made judges more dependent than independent."<sup>15</sup> Even those Massachusetts "judges as free, impartial, and independent as the lot of humanity will admit"<sup>16</sup> could be removed upon the address of both houses of the state legislature.<sup>17</sup> In emphasizing judicial accountability to state legislatures, early state constitutions "represented the culmination of what the colonial assemblies had been struggling for in their eighteenth-century contests with the Crown."<sup>18</sup>

State judges in the decades after independence might have been appointed by the executive, by the legislature, or by some combination of the two, but state legislatures generally dominated judicial selection.<sup>19</sup> This legislative dominance served republican ends. In most states, only legislators were directly elected by the people, and this fact, combined with their short term of office, encouraged the belief that the legislature embodied the people, whereas other branches did not.<sup>20</sup> Given this understanding, legislatures seemed the safest repository of the appointment power.<sup>21</sup> In addition, legislative dominance was a response to Americans' suspicion of executive power in general

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12. MASS. DEC. OF RIGHTS, art. XXIX.

13. MD. DEC. OF RIGHTS, art. XXXIII.

14. See JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 7 (2009) (contending that his story of judicial dependence in New Hampshire is "representative of what was occurring in all American jurisdictions, except the federal").

15. *Id.* at 8.

16. MASS. DEC. OF RIGHTS, art. XXIX.

17. MASS. CONST. of 1780, ch. III, art. 1.

18. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 161 (1969).

19. See *id.* at 148.

20. See *id.* at 148–50.

21. See *id.*

and of the executive appointment power in particular.<sup>22</sup> As Gordon Wood has noted, “the power of [executive] appointment to offices” was perceived as “the most insidious and powerful weapon of eighteenth-century despotism,”<sup>23</sup> so none of the initial state constitutions gave the governor alone the power to appoint judges.<sup>24</sup> By the close of the eighteenth century, Delaware (1792) and Pennsylvania (1790) did authorize unilateral gubernatorial appointment,<sup>25</sup> but seven states continued to lodge the appointment power exclusively in the legislature.<sup>26</sup> The remaining states allowed the governor to appoint judges but required that appointees be confirmed by an executive council or the legislature.<sup>27</sup> Even where governors participated in the selection process, their control over the composition of the bench was quite limited.<sup>28</sup> In several states, the governors were largely creatures of the legislature, with legislatures choosing governors for short terms and with governors dependent upon the legislature for their continuation in office,<sup>29</sup> and this undoubtedly influenced their choices.

Once selected, judges remained under legislative scrutiny. It has been noted that the Revolutionaries intended to increase legislative interference in the court structure and in judicial functions.<sup>30</sup> During the colonial era, popular assemblies regularly “restored losing litigants to the law” by granting them new trials, thereby checking abuses by unelected judges.<sup>31</sup> After independence, those who lost in court might still appeal to the legislature for redress and legislators could order new trials or pass private bills that provided them with the compensation

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22. *See id.*

23. *Id.* at 143. Wood also suggested that for state constitution makers “emasculat[i]on of their governors lay at the heart of their constitutional reforms in 1776.” *Id.* at 149.

24. *Cf. id.* at 148–50.

25. *See id.* at 148–49 n.41.

26. *See* EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 101–35 (2005).

27. *See id.*

28. *See id.* at 160.

29. *See id.* at 162–63; WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTION OF THE REVOLUTIONARY ERA* 266–67 (2001).

30. HAYNES, *supra* note 26, at 161.

31. REID, *supra* note 14, at 8–10; *see also* PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 526–35 (2008).

denied them at trial.<sup>32</sup> This practice continued into the nineteenth century, with the Rhode Island Legislature overturning adjudicated verdicts almost until the Civil War.<sup>33</sup>

Judges who issued unpopular rulings could be called before the legislature to explain their decisions. In 1786, for example, after the Rhode Island Supreme Court invalidated a law requiring creditors to accept paper money in payment for debts, the justices were summoned before the legislature. Although the legislature took no immediate disciplinary action, it only reappointed one of the justices when their terms expired.<sup>34</sup> When all else failed, a legislature might get rid of judges by enacting “ripper bills” that abolished the judges’ positions or the court on which they sat,<sup>35</sup> because the structure of state court systems typically was not entrenched in the state constitution. Thus in 1807, after the Ohio Supreme Court struck down a law extending the jurisdiction of justices of the peace, the legislature passed a resolution depriving the offending justices of their positions when their terms expired.<sup>36</sup> New Hampshire twice legislated out of office all justices of its supreme court by repealing the statute that created the tribunal and establishing another court in its place.<sup>37</sup> In 1821, New York’s new constitution reduced the membership of its supreme court from five to three and terminated the incumbents’ positions when the con-

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32. REID, *supra* note 14, at 10.

33. *Id.*

34. See MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 24–25 (1988). The case *Trevett v. Weeden* was one of the earliest examples of judicial review. For discussion of early judicial review in the states, see SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 35–37 (1990). *Bayard v. Singleton*, a North Carolina case, provides an example of legislative intervention in ongoing litigation by calling judges to account. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 67 (2004).

35. See REID, *supra* note 14, at 13.

36. The controversy involved the interpretation of the tenure clause of the Ohio Constitution of 1802, which provided that judges “shall hold their offices for the term of seven years, if so long they behave well.” OHIO CONST. art. III, § 8. In the case of judges appointed mid-term, the question was whether their appointment was for the remainder of the unexpired term or for a new full term. The controversy was resolved with repeal of the resolution depriving the judges of office, with those judges newly appointed to take their place likewise retaining their seats. See DONALD F. MELHORN, JR., LEST WE BE MARSHALL’D: JUDICIAL POWERS AND POLITICS IN OHIO, 1806–1812, at 71–73 (2003).

37. REID, *supra* note 14, at 13.

stitution went into effect.<sup>38</sup> Similarly, in 1823, Kentucky abolished its supreme court and created a new one with new judges after the legislature failed to muster the two-thirds vote necessary to impeach those justices who had invalidated a law providing for debt relief.<sup>39</sup>

Some state constitutions guaranteed that the people's representatives could control judges' continuation in office. Fewer than one-third of eighteenth-century state constitutions established short terms of office for judges.<sup>40</sup> In states with periodic reappointment, legislators largely determined whether judges would remain in office.<sup>41</sup> The remaining eighteenth-century state constitutions, reacting to British imposition of service during the pleasure of the Crown, provided for judicial tenure during "good behavior."<sup>42</sup> But even in the twelve states in which, by 1800, judges served during good behavior, legislatures scrutinized the judiciary.<sup>43</sup> Today, good behavior is understood as a synonym for life tenure. During the early decades of the Republic, in contrast, good behavior was understood as a standard of conduct enforceable by the legislature.<sup>44</sup> As a contemporary commentator noted, the nebulous character of that standard virtually invited legislators to apply it "according to disaffection on the one Hand; or Favour on the other."<sup>45</sup>

The legislature might act against "misbehaving" judges through impeachment; the grounds for impeachment under early state constitutions were broader than those under the

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38. PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 83 (1996).

39. See Theodore W. Ruger, 'A Question Which Convulses a Nation': *The Early Republic's Greatest Debate about the Judicial Review Power*, 117 HARV. L. REV. 826, 850-51 (2004). The controversy in Kentucky led temporarily to the simultaneous operation of two supreme courts. See *id.* at 853.

40. See HAYNES, *supra* note 26, at 101-35.

41. See *id.*

42. See *id.*

43. See *id.*

44. As John Phillip Reid observed, "For political theorists who interpreted the doctrine of consent broadly, all officers of the state, including the judiciary, were answerable to the people, and in constitutional theory 'the people' did not refer to those citizens possessed of the right to vote but to the representatives whom they elected to the legislature." REID, *supra* note 14, at 4.

45. *Return of the Town of Sutton on the Massachusetts Constitution of 1778*, in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 237 (Oscar & Mary Handlin eds., 1966).

Federal Constitution.<sup>46</sup> States that defined impeachable offenses in their constitutions did so expansively: New York (1777) and South Carolina (1778) permitted impeachment for “mal and corrupt conduct;”<sup>47</sup> New Hampshire (1784) for “bribery, corruption, malpractice, or maladministration in office;”<sup>48</sup> and New Jersey (1776) for “misbehavior.”<sup>49</sup> Other states declined to define—and thereby limit—the grounds for impeachment. For example, while the U.S. Constitution had limited impeachable offenses to “Treason, Bribery, or other high Crimes and Misdemeanors,” Georgia (1789), Kentucky (1799), and Tennessee (1796) all provided for impeachment without specifying what offenses justified removal.<sup>50</sup>

Some states supplemented impeachment with provisions authorizing the governor to remove judges upon address by two-thirds of the state legislature.<sup>51</sup> This offered an additional—and potentially more far-reaching—weapon for legislative control.<sup>52</sup> For one thing, the “address did not have to allege willful or criminal misconduct. It needed only a favorable vote by both houses, not an investigation or trial.”<sup>53</sup> Thus, judges were not guaranteed the basic elements of due process before they were removed. They did not have an opportunity to retain counsel, cross-examine their accusers, or call witnesses. Early state constitutions did not even require a specification of the grounds for removal, although some later state constitutions mandated that the basis be “stated at length in such address, and on the journal of each house.”<sup>54</sup> Thus, although the guarantee of tenure during “good behavior” implied that some misconduct had to be alleged, the inclusion of removal by address in state con-

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46. Maryland, however, did not authorize the legislature to impeach judges, permitting removal only “for misbehaviour, on conviction in a Court of Law.” MD. CONST. of 1776, art. XL.

47. N.Y. CONST. of 1777, art. XXXIII; S.C. CONST. of 1778, art. XXIII.

48. N.H. CONST. of 1784, art. XXXV.

49. N.J. CONST. of 1776, art. XII.

50. See GA. CONST. of 1789, art. I, § 9; KY. CONST. of 1799, art. IV, § 3; TENN. CONST. of 1796, art. IV, § 1–4.

51. See, e.g., MASS. CONST. of 1780, ch. III, art. I; S.C. CONST. of 1778, art. XXVII.

52. Although in theory, the governor had discretion as to whether to remove a judge on address by the legislature, in practice legislative address was usually a mandate rather than a request. Cf. REID, *supra* note 14, at 12.

53. PETER CHARLES HOFFER & N. E. H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805*, at 64 (1984).

54. KY. CONST. of 1799, art. IV, § 3.

stitutions potentially came close to service at the pleasure of the legislature (or at least an extraordinary majority of the legislature). Address allowed legislators to hold judges accountable not only in cases of clear wrongdoing, but also in instances where their performance could be characterized as “any misdemeanor in office . . .”<sup>55</sup> The Kentucky Constitution of 1799 made this clear, authorizing removal by address “for any reasonable cause, which shall not be sufficient ground for impeachment . . .”<sup>56</sup> In rejecting removal of federal judges by address, the delegates to the Constitutional Convention of 1787 indicated their understanding that removal by address potentially had greater reach than did impeachment.<sup>57</sup> Thomas Jefferson agreed with the analysis but not the conclusion. He favored a constitutional amendment to permit removal of federal judges by the president upon address by Congress, insisting that “[i]n a government founded on the public will, [judicial independence] operates in an opposite direction, and against that will.”<sup>58</sup>

No one doubted that judges in a republic should be free from influence or manipulation by the executive. Whether they also should be immune from influence by the people or by their agents in the state legislature was less clear. Brutus, a leading Anti-Federalist, put it best, arguing that the anti-monarchical arguments for judicial independence did “not apply to this country. We have no hereditary monarch; those who appoint the judges do not hold their offices for life, nor do they descend to their children. The same arguments, therefore . . . lose a considerable part of their weight when applied to the state and condition of America.”<sup>59</sup> If judges were completely “independ-

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55. KY. CONST. of 1792, art. IV, § 3; PA. CONST. of 1790, art. IV, § 3.

56. KY. CONST. of 1799, art. IV, § 3; *see also* PA. CONST. of 1790, art. V, § 2. This latter provision is particularly striking because it appears in the “more conservative” successor to Pennsylvania’s radical 1776 constitution.

57. On the debate over removal by address in the Constitutional Convention, *see* GERBER, *supra* note 1, at 30; CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 29–30 (2006).

58. Jefferson is quoted in Michael Zuckert, *Founder of the Natural Rights Republic*, in THOMAS JEFFERSON AND THE POLITICS OF NATURE 44 (Thomas Engeman ed., 2000); *see also* RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 71–72 (1971).

59. BRUTUS, *THE ANTI-FEDERALIST PAPERS* No. 78–79, *POWER OF THE JUDICIARY*, <http://www.wepin.com/articles/afp/afp78-79.html>.



ent of the people, of the legislature, and of every power under heaven," they would "soon feel themselves independent of heaven itself" and act tyrannically.<sup>60</sup> Thus, unchecked judicial power was in principle as dangerous as any other unchecked power. Tenure during good behavior exacerbated concerns regarding accountability. If there was no periodic assessment of judicial performance, then checks were needed to ensure that judges did not pursue a partisan or ideological or professional agenda, and the people or their representatives would have to supply those checks. Judges might take an oath to decide in accordance with the law and recognize their duty to decide cases without fear or favor, but those actions do not guarantee the impartial administration of justice.

## II. INDEPENDENT AS TO WHAT?

Even if judges should be safeguarded against undue external pressures so they can exercise their powers independently, what were those powers? The answer to this question was not self-evident. In fact, the definition of the judicial realm changed over time. From a twenty-first-century perspective, it might seem easy to distinguish those responsibilities that are inherently judicial. It might also seem obvious that only judges should shoulder those responsibilities, and equally obvious that they should deal only with those responsibilities. But from an eighteenth-century perspective, it was not.<sup>61</sup> The issue that has attracted the most scholarly attention has been judicial review of legislation: Did the state and federal Framers believe that judicial review was an appropriate exercise of judicial power, and if so, how broad was this power?<sup>62</sup> But during the

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60. *Id.*

61. Thus Andrew Hanssen has attributed the legislative power over judges during the initial decades of the Republic to, among other things, "the lack of a clearly distinct judicial role." F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 443 (2004).

62. This focus on judicial review is unfortunate, because

"[o]ur intensive focus on the question [of judicial review] is an artifact of what judicial review subsequently became and of our natural curiosity, as a result, to understand its origins. In trying to get a sense of the historical context, however, it is important not to exaggerate the significance of what was, in fact, insignificant to the vast majority of Americans."

KRAMER, *supra* note 34, at 71. In addition, the meaning of judicial review itself changed over time. To ask whether the Framers intended to establish judicial re-

first half century of the Republic, this was only one of a host of issues relating to the judicial function.

A. *The Shared Power of Judging: Other Branches*

Even if one assumes a distinct judicial function, such as dispute resolution on the basis of law, should that function be lodged exclusively in the judicial branch? Historically, the American judiciary shared responsibility for dispute resolution with the other branches of government. During the colonial period, there was an established practice of legislative adjudication that paralleled adjudication by the courts, reflecting in part a distrust of judges who owed their continuation in office to the favor of the Crown.<sup>63</sup> In addition, the flood of petitions to legislatures to resolve specific disputes led to a proliferation of private bills in which the legislature was making essentially judicial determinations.<sup>64</sup>

After independence, states established safeguards to prevent misuse of the legislature's adjudicative power—for example, state constitutions prohibited bills of attainder and retrospective laws.<sup>65</sup> Adjudication by state legislatures, however, did not cease. In some instances the legislature granted new jury trials, vacated default judgments, and established special tribunals to resolve particular disputes.<sup>66</sup> Indicative of the extent of this legislative restoring to law was Thomas Jefferson's complaint that the Virginia legislature had assumed "judiciary powers," and by "put[ting]

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view is anachronistic, because "no one meant to establish what eventually became judicial review; it could scarcely have been imagined. Like most developments in history, judicial review was unplanned and unintended." See Gordon S. Wood, *The Origins of Judicial Review*, 22 SUFF. U. L. REV. 1293, 1295 (1988).

63. See Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1407–08 (1998).

64. Even public bills may resemble judicial decisions. As James Madison noted in FEDERALIST No. 10: "[Y]et what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens." THE FEDERALIST NO. 10, at 56 (James Madison) (Clinton Rossiter ed., 1961). On the legislative output of colonial and early state legislatures, showing that creation of new law was the exception rather than the rule, see WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 14 (1994).

65. See, e.g., MASS. CONST. of 1780, art. XII (banning bills of attainder); N.H. CONST. of 1792, art. XXIII (banning retrospective laws).

66. John Reid suggests that "the most important function of special legislative adjudication was to serve as a substitute for an equity jurisdiction." REID, *supra* note 14, at 67.

their proceedings into the form of an act of assembly," had "in many instances decided rights which should have been left to judicial controversy . . ."67 Debate continued after independence as to whether the practice of legislative adjudication was appropriate only to the colonial situation, in which an unelected and unaccountable monarch might influence judges, or whether it should continue under a republican government, in which those who selected judges were themselves subject to popular control.68 And if legislative adjudication was to continue, what sorts of disputes were appropriate for legislative resolution?

The early history of the Republic reflects the varying views on these matters. Take, for example, the issue of divorce. In some states during the antebellum era, particularly in the South, divorce was viewed as a legislative responsibility, with divorces granted by the people's representatives on a case-by-case basis.69 In other states, particularly in the North, divorce was understood as a legal rather than a legislative issue.70 Thus, by 1800, New York, New Jersey, and all the New England states had divorce laws, and divorce cases took the form of ordinary lawsuits.71 In some states, divorce was a shared legislative and judicial responsibility. The Georgia Constitution of 1798, for example, authorized the legislature to grant divorces by a two-thirds vote after "the parties shall have had a fair trial before the superior court, and a verdict shall have been obtained authorizing a divorce upon legal principles."72 As this suggests, the boundaries between those disputes appropriate for legislative resolution and those appropriate for judicial resolution remained unclear—and sometimes contested.

This was particularly true when rulings might impose financial obligations on states. State legislatures claimed the power

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67. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 129 (J.W. Randolph ed., 1853).

68. See REID, *supra* note 14, at 4–10.

69. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 143–44 (3d ed. 2005).

70. See *id.*

71. See *id.* The Massachusetts Constitution of 1780 anticipated this transformation: "All cases of marriage, divorce, and alimony, and all appeals from the Judges of Probate, shall be heard and determined by the Governor and Council *until the Legislature shall, by law, make other provisions.*" MA. CONST. of 1780, ch. IV, art. V (emphasis added).

72. GA. CONST. of 1798, art. III, § 9.

to approve every grant of money from the public treasury, and this extended to money owed by the government to private claimants.<sup>73</sup> The doctrine of sovereign immunity meant that courts had authority to hear claims against the government only if authorized to do so by the legislature, and state legislatures often retained the power of resolving such claims.<sup>74</sup>

During the colonial era, nonjudicial bodies—typically, the governor and his council—also had the final say on appeals.<sup>75</sup> This coincided with the practice in England, where the House of Lords sat as the court of ultimate appeal.<sup>76</sup> The practice of nonjudicial bodies exercising ultimate appellate authority continued under several state constitutions. For example, under the New Jersey Constitution of 1776, the Governor and Legislative Council sat as the “Court of Appeals in the Last Resort”;<sup>77</sup> under the Vermont Constitution of 1786, the Governor and Council served as a court of impeachment;<sup>78</sup> and under the Delaware Constitution of 1776, appeal was from the Supreme Court to a “court” consisting of the president (the governor), three members appointed by the Legislative Council, and three members appointed by the House of Assembly.<sup>79</sup> Thus, even in the legal realm state courts might share power with other institutions of government.

### B. *The Shared Power of Judging: The Jury*

Even when the judicial branch alone resolved disputes, judges did not exercise sole authority but rather shared decisionmaking with juries, which ensured popular participation in the administration of justice. As Jack Rakove put it, “juries were the basic agents of decisionmaking in nearly every matter

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73. See Christine A. Desan, *Rights and Remedies in Chisholm v. Georgia*, in *THE HOUSE AND THE SENATE IN THE 1790S*, at 178, 181–82 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

74. See *id.* at 202.

75. Cf. HAYNES, *supra* note 26, at 105 (noting that Connecticut did not establish its “judiciary” until 1784).

76. See Glenn Dymond, *The Appellate Jurisdiction of the House of Lords*, HOUSE OF LORDS LIBRARY 1 (2007), available at <http://www.parliament.uk/documents/lords-library/hllappellate.pdf>.

77. N.J. CONST. of 1776, art. IX.

78. VT. CONST. of 1786, art. XI.

79. See DEL. CONST. of 1776, art. XVII. Although Georgia did not create a nonjudicial body to exercise ultimate appellate authority, neither did it create a judicial body for that purpose, forgoing a supreme court until 1846. MELVIN B. HILL, JR., *THE GEORGIA STATE CONSTITUTION* 8 (2011).

where the general authority of the state intersected with the private concerns and rights of citizens.”<sup>80</sup> It is hard to overestimate the importance early Americans attached to “the inestimable right of trial by jury,” the only right protected in all eighteenth-century state constitutions.<sup>81</sup> The jury’s importance lay in its popular character. As Alexis de Tocqueville noted: “The system of the jury as it is understood in America, appears to me as direct and as extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are equally powerful means of making the majority reign.”<sup>82</sup>

The key phrase in this quote is as “understood in America.” In Great Britain, a division of responsibility developed early on, with juries responsible for deciding questions of fact and judges questions of law.<sup>83</sup> Even prior to the Revolution, juries in America came to exercise the power of rendering judgment on matters of both fact and law in civil and criminal cases. As John Adams put it, the juror’s duty was to “find the Verdict according to his own best Understanding, Judgment, and Conscience, tho in Direct opposition to the direction of the Court.”<sup>84</sup> This view of the jury’s responsibility continued after independence, as early state constitutions attest.<sup>85</sup> The Pennsylvania Constitution of 1776 insisted that the existing right of trial by jury “ought to be held sacred,”<sup>86</sup> the Massachusetts Constitution echoed that language,<sup>87</sup> and the Georgia Constitution of 1777 expressly stated that “the jury shall be judges of law as well as of fact . . .”<sup>88</sup> In fact, several state legislatures extended trial by jury to types of cases that had formerly been tried without juries, such as admiralty cases and paternity cases.<sup>89</sup>

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80. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1064 (1997).

81. E.g., N.J. CONST. of 1776, art. XXII.

82. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261 (Harvey C. Mansfield & Delba Winthrop eds. and trans., 2000).

83. See Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 474 (2004).

84. SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 56 (1990).

85. Our account of the American jury during the eighteenth and nineteenth centuries relies generally on STIMSON, *id.* at ix, and on NELSON, *supra* note 64, at 165.

86. PA. CONST. of 1776, art. XI.

87. MASS. CONST. of 1780, art. XV.

88. GA. CONST. of 1777, art. XLI.

89. See NELSON, *supra* note 64, at 97.

This expansive understanding of the jury's role necessarily diminished the role of the judge. In fact, the judicial role in dispute resolution was even more circumscribed than the description of the jury's authority might suggest. Whereas in theory judges could influence case outcomes by summarizing the evidence in a case and instructing jurors as to the applicable law, in practice they rarely did so.<sup>90</sup> Trials were conducted before multijudge courts in many states, so when judges did charge the jury, jurors received *seriatim* charges, with each judge and both counsel giving their opinions of the law. As the Georgia Constitution of 1777 stated, "if all, or any of the Jury, have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion."<sup>91</sup> This in turn allowed jurors to choose whichever interpretation they judged most appropriate.<sup>92</sup> Thus, according to one contemporary account, trial judges did little more than "preserve order and see that the parties had a fair chance with the jury."<sup>93</sup>

During the colonial period, the jury's broad authority served to check abuses by judges who might be susceptible to the blandishments or threats of the Crown and to block unjust laws by refusing to give them effect.<sup>94</sup> After the revolution, the judicial selection changed but the rationale for jury power did not. Commentators analogized the jury to the lower house of the legislature, depicting the jury as representing the people in the administration of law and thereby forestalling judicial arbitrariness and lawlessness.<sup>95</sup> Thus, Thomas Jefferson famously described the jury as "curb[ing] judges and represent[ing] the people in the judicial branch."<sup>96</sup> In fact, Jefferson claimed that it was more important that the people be represented in the implementation of the law than in its creation.<sup>97</sup> For present purposes, what is striking is the expectation that the people would

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90. See FRIEDMAN, *supra* note 69, at 109.

91. GA. CONST. of 1777, art. XLI.

92. See NELSON, *supra* note 64, at 166.

93. STIMSON, *supra* note 84, at 49. *But cf.* Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 197 (2000) (arguing that the practice of judicial comment on evidence provided the judge with significant informal influence over juries).

94. See STIMSON, *supra* note 84, at 56–57.

95. See *id.* at 87–88.

96. *Id.* at 87.

97. See *id.*

control judicial behavior not only indirectly through selection and removal of judges, but also directly through their participation in judicial decisions.

Such broad power could be assigned to the jury, because, in John Adams's words, "[t]he general Rules of Law and common Regulations of Society . . . [were] well enough known to the ordinary Juror."<sup>98</sup> The authority of juries to determine the law in civil and criminal cases rested on the widespread understanding that ordinary citizens had as great an ability as judges to discern what the law was.<sup>99</sup> In part, this understanding stemmed from the fact that the gap between those with legal training and those without was not as broad as it is today.<sup>100</sup> In part, this understanding acknowledged that not all judges had legal training.<sup>101</sup> This was true not only for justices of the peace, generally local notables without formal legal training, but even for members of state trial and appellate courts.<sup>102</sup> Most importantly, the jury's authority reflected a particular understanding of the character and sources of the law. Most law was common law, rather than statutory law, and the common law was viewed as arising out of and reflecting the community, rather than as a form of law elaborated by legally trained professionals.<sup>103</sup> Indeed, the jury served as a "shield" for the local community against "outside interference," whether in the form of plaintiffs taking locals to trial or of appellate courts imposing legal obligations.<sup>104</sup> As Shannon Stimson put it, jury "powers . . . were premised by an epistemology of law utterly and irrevocably dependent upon local government and on the jurors' first-hand sense of the law."<sup>105</sup> Only after this view of the law changed would one find a shift in the responsibilities of the jury.

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98. *Id.* at 57. Adams's view was hardly eccentric. See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 47-49 (1976) (describing a Delaware landowner's argument that common people could understand the law well enough without lawyers).

99. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 439 (1999).

100. LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 277 (1984).

101. See Lerner, *supra* note 93, at 243.

102. See *id.* at 242-43.

103. See STIMSON, *supra* note 84, at 89 (discussing Jefferson's view of the legal profession).

104. F. THORNTON MILLER, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828*, at 27-28 (1994).

105. STIMSON, *supra* note 84, at 84.

### C. Judicial Power Beyond Judging

Although the American judiciary's role in dispute resolution might have been circumscribed during the colonial era, it also exercised powers beyond what might today be understood as judicial powers. As William Nelson has noted, "[t]he courts . . . protected life and property, apportioned and collected taxes, supervised the construction and maintenance of highways, issued licenses, and regulated licensees' businesses."<sup>106</sup> Thus, the lines separating legislative, executive, and judicial powers were "obscured."<sup>107</sup> This judicial involvement in legislative and administrative activities continued after independence, so that Stephen Skowronek could characterize American government during the nineteenth century as a system of parties and courts in which courts played a key administrative role.<sup>108</sup> This roleplaying was a matter of necessity. Throughout, and even beyond, the antebellum period, the States (and the federal government) lacked a developed administrative apparatus. Thus, as Alexis de Tocqueville observed, "what most strikes the European who travels through the United States is the absence of what is called among us government or administration."<sup>109</sup> Indeed, looking beyond the township, he noted that "one hardly perceives a trace of an administrative hierarchy."<sup>110</sup> Various factors, including distrust of executive power, contributed to this feature of American political life. For present purposes, the States tended to rely on the judiciary, especially justices of the peace but other trial and appellate judges as well, for administrative functions.<sup>111</sup> For example, the Georgia Constitution of 1798 instructed judges to appoint census takers,<sup>112</sup> and courts in Massachusetts and Vir-

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106. WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 13 (2000).

107. *Id.*

108. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 29 (1982). Skowronek argued that the courts "filled a governmental vacuum left by abortive experiments in the administrative promotion of economic development." *Id.* at 27.

109. TOCQUEVILLE, *supra* note 82, at 67.

110. *Id.* at 69.

111. See A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 43 (1981) (arguing this reliance on justices of the peace, usually local notables without legal training, seemed to empower long-standing local elites and frustrate popular control).

112. See GA. CONST. of 1798, art. I, § 25.



ginia were involved in “assessing taxes, directing expenditures on local projects, issuing licenses, and in general monitoring the counties over which they presided.”<sup>113</sup>

Judicial involvement in political matters extended to legislation as well. A prime example was New York’s Council of Revision, comprised of the governor, chancellor, and supreme court, which reviewed all pending bills and exercised a limited veto over their passage.<sup>114</sup> The Council assessed both the constitutionality and the wisdom of proposed legislation.<sup>115</sup> Although the Council attracted considerable attention at the Philadelphia Convention of 1787, where James Madison championed the concept, no other state followed New York’s lead, and ultimately dissatisfaction with judges assessing the desirability of legislation led to its elimination by unanimous vote at New York’s 1821 constitutional convention.<sup>116</sup>

Judicial responsibilities beyond judging also included the judges’ obligation to furnish legal advice to other branches of the government, enshrined in constitutional provisions requiring state supreme courts to issue advisory opinions upon request of the legislature or the executive.<sup>117</sup> One might view the opportunity to issue advisory opinions as an enhancement of judicial power similar to the abstract review exercised by constitutional courts today. In practice, however, providing advisory opinions subordinated the judicial branch to the legislative and executive branches, which had the judiciary at their beck and call but were not obliged to follow the courts’ legal advice.<sup>118</sup>

Finally, state judges sometimes took upon themselves a political role, defending the judicial branch against perceived invasions

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113. WOOD, *supra* note 18, at 154. Even juries undertook administrative tasks, being employed in North Carolina to “‘lay out roads’ and to ascertain ‘any damage to private property’ that occurred in the process.” See STIMSON, *supra* note 84, at 61.

114. N.Y. CONST. of 1777, art. III.

115. See GERBER, *supra* note 1, at 262–63.

116. See GALIE, *supra* note 38, at 42–43.

117. See, e.g., MASS. CONST. of 1780, ch. III, art. II. Of the ten states that now provide for advisory opinions, six were among the original thirteen states. See Comment, *The State Advisory Opinion in Perspective*, 44 *FORDHAM L. REV.* 81, 81 n.3 (1975).

118. See HAMBURGER, *supra* note 31, at 151–54 (discussing the monarchical use of advisory opinions to pressure judges); see also *id.* at 371–77 (discussing the use of advisory opinions in the United States to address structural issues, which forced judges to disappoint one or another contending party in the state legislature).

of their prerogatives by issuing resolutions attacking the constitutionality of legislative enactments.<sup>119</sup> These resolutions were issued not in the course of resolving disputes between contending parties but rather entirely on the initiative of the courts.<sup>120</sup> Such judicial efforts to defend the institutional interests of the judiciary were hardly an innovation; they had precedents in the actions of English judges since the early eighteenth century.<sup>121</sup>

A conflict in Virginia in 1778 illustrates the aggressive stance taken by some courts. The Virginia General Assembly enacted a law requiring judges of the Virginia Court of Appeals to sit on district courts in addition to carrying out their other responsibilities.<sup>122</sup> The Court of Appeals responded with a resolution claiming that the law effectively reduced judicial salaries by imposing responsibilities without providing any compensation for these new duties.<sup>123</sup> Whatever the merits of the controversy, in issuing the resolution the judges asserted a judicial authority to expound the law outside of cases and controversies when the integrity of the judicial branch was at stake. For judges to assume the role of political disputant often proved unproductive, because they were confronting the people's representatives. Nevertheless, their willingness to enter the political thicket underscores the lack of clarity as to the confines of judicial office.

State judges' wide-ranging responsibilities beyond dispute resolution in turn discouraged the development of discourse on judicial independence and accountability. Judicial independence and arguments in its favor are premised on a picture of judges engaged in the resolution of controversies. When judges' responsibilities extend beyond that core function—when they encompass political as well as judicial functions—they raise perplexing questions as to the appropriate scope of judicial independence and judicial accountability, as it becomes “inevitable that the line between what [is] political and what

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119. *See id.* at 524–26.

120. *See id.*

121. *Cf. id.* at 151–54.

122. Our account of the Virginia conflict and of judicial resolutions more generally relies on HAMBURGER, *id.* at 554–74. However, whereas Hamburger criticizes the judges for “overstep[ping] the limits of their authority,” *id.* at 554, the judges were merely emulating early seventeenth-century English judges, suggesting that the contours of the judicial office were not yet clearly demarcated.

123. *See id.* at 559–63.

[is] judicatory would be blurred.”<sup>124</sup> Or, from a different angle, the development of the modern argument for judicial independence required a distinct judicial function that differentiated the tasks of courts from those of other branches of government and confined the courts to those tasks.

#### CONCLUSION

This Essay suggests that in the decades after independence, the States developed a distinctive—and to modern eyes, unfamiliar—conception of the place of the judiciary in republican government. The line distinguishing the judicial branch from other branches and the judicial function from other functions proved to be unclear and permeable. Other governmental institutions undertook the resolution of disputes between parties, either through legislative remedies or by passing final judgment on appeals. Meanwhile, judges participated in assessing the wisdom of public policy, in administering the policies that were adopted, and in furnishing legal advice to the other branches of government. And those without legal training—whether jurors or non-lawyers appointed to the bench—played a crucial role in enunciating the law and resolving disputes.

For the contemporary debate on judicial independence to develop, significant changes had to occur in legal and political institutions, in legal and political practice, and in the law: Courts had to wrest from other governmental institutions exclusive control over the resolution of disputes and judges had to make effective a claim that their legal expertise gave them a preeminent claim to enunciate and interpret the law, and the judges had to claim that effective exercise of that responsibility required judicial independence. The nineteenth century witnessed the beginning of these changes, albeit not without a reaction from political forces championing a more “republican” perspective. The Article III version of the judicial function may have triumphed in 1787 at the federal level, but not at the state level, and the States’ distinctive constitutionalism continues to provide an alternative to the federal model.<sup>125</sup>

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124. WOOD, *supra* note 18, at 154.

125. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 3–4 (1998) (discussing a broader treatments of the distinctive constitutionalism of the States).