

CONCLUDING THOUGHTS FROM ADA, OHIO

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A recent issue of the *Journal of Legal Education* contains an impressive empirical study that most law professors can confirm without the use of the complicated “network analysis” employed by the study’s authors: Both law faculty hiring and how quickly new paradigms of legal scholarship suffuse the academy turn in no small part on whether the candidate trying to land a top law school teaching job or the proponents of the legal movement attended Harvard or Yale.¹ That is what makes it so remarkable that a Symposium was convened at Harvard Law School on March 29, 2011, to discuss the issues of judicial independence raised in a new book by a law professor from Ohio Northern University.² That the commentators included such academic luminaries as Steven G. Calabresi, William R. Casto, Charles G. Geyh, Stephen B. Presser, Jed H. Shugerman, G. Alan Tarr, and Mark V. Tushnet compels me to try to explain, albeit briefly, how this could have occurred and why it matters that it did.

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1. See Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76, 84, 98–100 (2011). For another discussion of the elitism in American legal education that uses humor rather than statistics to raise concerns, see Scott Gerber & Kevin Hawley, *A Graduation Missive on Elitism in the Law: Or, as Larry David Would Put It, “I need a little more flair. I don’t have enough flair,”* FINDLAW’S WRIT, May 11, 2007, http://writ.news.findlaw.com/commentary/20070511_hawley.html.

2. I received both my J.D. and Ph.D. from the University of Virginia (UVA). UVA is a terrific academic institution, but in the eyes of the legal elite it falls short because it is not Harvard or Yale.

I. FROM ADA, OHIO TO CAMBRIDGE, MASSACHUSETTS

It means more to me than the distinguished scholars who commented on *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787* can ever know that they had such a positive reaction to my book.³ But I suspect that most of them would not have known about the book had it not been published by a leading academic press such as Oxford University Press. Why did Oxford decide to publish the book? Because, unlike the way in which publication decisions are made by law students who run the nation's law journals, my manuscript was sent out by an experienced acquisitions editor for anonymous peer review by scholars in my field. Apparently, it did not matter to the acquisitions editor or to the anonymous peer reviewers that I neither attended Harvard or Yale nor taught at Harvard or Yale. All they cared about was whether I had written an important book. Fortunately for me, they concluded that I had, which was nice to hear after spending a decade or so researching and writing it.

The fact that my book was published by Oxford University Press was almost certainly a necessary condition for the decision to convene a Symposium at Harvard. It was not, however, a sufficient condition. I have no doubt whatsoever that the Symposium became a reality only because Steven Calabresi thought the subject of judicial independence to be significant enough that the *Harvard Journal of Law & Public Policy* should host a Symposium about it. Although I have come to learn that Professor Calabresi is one of the most modest people in the American law professoriate, as co-founder and chairman of the Federalist Society, he also is one of the most important. I am grateful to the student editors for organizing the Symposium, and I am grateful to Professor Calabresi for encouraging and introducing the Symposium.⁴

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

4. I am also grateful to the Harvard chapter of the Federalist Society for co-sponsoring the Symposium, to Eugene Meyer and the national office of the Federalist Society for providing financial support, and to the distinguished participants for helping to make the event such a wonderful experience. I am likewise thankful to the Political Theory Project at Brown University for hosting me while I finished the book and while I tried to secure a publisher for it, and to the Social Philosophy and Policy Foundation for funding assistance.

II. ANSWERING GORDON WOOD'S CALL

The Symposium was both a lot of work and an enjoyable event. More important than any of that, however, is why it matters that it took place. A number of the participants were kind enough to reduce their remarks about judicial independence to writing. I have learned much from reading them. I would be remiss if I did not devote the remainder of these concluding thoughts to explaining why I wrote *A Distinct Judicial Power* and to suggesting several lessons that can be gleaned from it.

The answer to why I wrote the book is simple: I had just finished writing a book on Clarence Thomas's jurisprudence,⁵ and I was thinking about what to take on next. I kept coming across stray comments here and there by Gordon S. Wood, the preeminent historian of early America, that someone needs to write a book about the origins of judicial independence in the United States. Professor Wood said so four decades ago in his magisterial *The Creation of the American Republic*,⁶ and he said so many times thereafter.⁷ He issued his most detailed statement on the matter in an endowed lecture at Suffolk University Law School:

In the massive rethinking that took place in the 1780s nearly all parts of America's governments were reformed and reconstituted—reforms and reconstitutions often justified by ingenious manipulations of Montesquieu's doctrine of "separation of powers." But the part of government that benefited most from the rethinking and remodeling of the 1780s was the judiciary. There in the decade following the Revolution was begun the remarkable transformation of the judges from much-feared appendages of crown power into one of "the three capital powers of Government"—from minor magistrates tied to the colonial executives into an equal and independent entity in a modern tripartite government.

5. See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

6. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 625 (1969).

7. See, e.g., GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 407–08 (2009); Gordon S. Wood, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 52–53 (Amy Gutmann ed., 1997); Gordon S. Wood, *Judicial Review in the Era of the Founding*, in *IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 153, 157 (Robert A. Licht ed., 1993); see also Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *STAN. L. REV.* 1031, 1060–61 (1997) (concurring with Professor Wood's call for a study on the origins of an independent judiciary).

The story, amazingly, has never been told. For all our studies of the Supreme Court and its great decisions, we have no history of the emergence of the independent judiciary at the end of the eighteenth and beginning of the nineteenth centuries—perhaps because we take a strong independent judiciary so much for granted. It's a remarkable story—one of the great political and cultural transformations in American history, and it was accompanied by one of the great propaganda efforts in our history: to get people to believe that judges appointed for life were an integral and independent part of America's democratic governments—equal in status and authority to the popularly elected executives and legislatures—was an extraordinary accomplishment and one to which many contributed in the decades following the Revolution.⁸

Given that the subject, at least as I conceived it, married three of my intellectual interests—law, history, and political theory—I decided to give it a try. The result, some ten years later, was *A Distinct Judicial Power*, a book that chronicles how the original thirteen states and their colonial antecedents treated their respective judiciaries.⁹ The focus is on *when* and *why* the state judiciaries became independent.¹⁰ Of course, the Federal Constitution drafted in 1787 made the federal judiciary independent: The federal courts form a separate branch of government, federal judges are afforded life tenure during good behavior, and a federal judge's salary cannot be diminished while he is in office.¹¹ The principal aim of *A Distinct Judicial Power* is to shed light on the federal model by exploring the experiences of the original states.¹² My objective, quite simply, is to identify the origins of Article III. I leave it to others to decide whether Article III articulates the ideal model of judicial independence. After all, the ma-

8. Gordon S. Wood, *The Origins of Judicial Review*, 22 SUFFOLK U. L. REV. 1293, 1304–05 (1988).

9. GERBER, *supra* note 3. Professor Wood proved prescient when he advised me in a 1999 e-mail that my project would be a “vast” undertaking. See E-mail from Gordon S. Wood to Scott D. Gerber (Jan. 7, 1999, 09:29:02 EST), *quoted in* GERBER, *supra* note 3, at xvii.

10. See GERBER, *supra* note 3.

11. U.S. CONST. art. III, § 1.

12. See GERBER, *supra* note 3.

jority of states now elect their judges, and only Rhode Island follows the federal example of life tenure during good behavior.¹³

Part I of the book examines the political theory on which an independent judiciary was based.¹⁴ Chapter 1 traces the intellectual origins of a distinct judicial power from Aristotle's theory of a mixed constitution to John Adams's modifications of Montesquieu.¹⁵ (The book's title, *A Distinct Judicial Power*, is drawn from Adams's 1776 pamphlet, *Thoughts on Government*.¹⁶) It is a complicated story, but one that needs telling. Chapter 2 describes the debates during the framing and ratification of the Federal Constitution about the independence of the federal judiciary.¹⁷

Part II, the bulk of the book, chronicles how each of the original thirteen states and their colonial antecedents treated their respective judiciaries.¹⁸ This portion, presented in thirteen separate chapters, brings together a wealth of information—charters, instructions, statutes, and so on—about the judicial power between 1606 and 1787, and sometimes beyond.¹⁹ In the apt words of legal historian John Phillip Reid, "American histories of judicial independence invariably begin with origins in the federal courts and pay slight or no heed to what was happening in the states. That is a mistake."²⁰

Part III, the concluding segment, describes the influence the colonial and early state experiences had on the federal model that followed and on the nature of the regime itself.²¹ I explain

13. *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Jan. 30, 2012).

14. See GERBER, *supra* note 3, at 1.

15. *Id.* at 3.

16. See JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), in 4 THE WORKS OF JOHN ADAMS 193, 198 (Charles Francis Adams ed., 1851) ("The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.").

17. See GERBER, *supra* note 3, at 27.

18. *Id.* at 39.

19. *Id.*

20. JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 3 (2009).

21. See GERBER, *supra* note 3, at 325.

how the political theory of an independent judiciary investigated in Part I, and the various experiences of the original thirteen states and their colonial antecedents examined in Part II, culminated in Article III of the U.S. Constitution.²² I also explain how the principle of judicial independence embodied in Article III made the doctrine of judicial review possible and committed that doctrine to the protection of individual rights.²³

III. LESSONS FROM *A DISTINCT JUDICIAL POWER*

A Distinct Judicial Power is a long book that contains a lot of information, and I am reluctant to say much more about what I found from fear of leaving out something important. But I do feel compelled to make several general points. The first is that a book like this would have been impossible to write until fairly recently because the data necessary to do so—colonial and early state records—were not readily available in the past.²⁴ Richard B. Morris learned that lesson the hard way after the publication of his 1930 synthesis of American law, which Theodore F.T. Plucknett criticized for being based on poor research.²⁵ Plucknett wrote in a review of Morris's book: "Not until we have a series of state histories by authors solidly grounded in English legal history and in their own state archives, and treating the history of every state with minute accuracy and exhaustiveness, can any attempt be fruitfully made to write American legal history as a whole."²⁶ Fortunately for me, the secondary literature is much more complete than when Plucknett penned these words. This said, recourse to primary sources remained necessary, and I made exciting discoveries—such as a previously unidentified precedent for judicial review that I uncovered during my perusal of the early state records of North Carolina.²⁷

22. See *id.* at 325–26.

23. See *id.* at 329–43.

24. See Scott D. Gerber, *Bringing Ideas Back In: A Brief Historiography of American Colonial Law*, 51 AM. J. LEGAL HIST. 359, 372 (2011) (describing the greatly improved access to information for research in early American law).

25. See Theodore F.T. Plucknett, *Studies In The History Of American Law by Richard B. Morris*, 3 NEW ENG. Q. 574 (1930) (book review).

26. *Id.* at 576–77.

27. See *Questions and Propositions of the Governor* (July 25, 1781), in 19 THE STATE RECORDS OF NORTH CAROLINA 862 (Walter Clark ed., 1901; repr. 1994).

The second general point I need to make is about methodology. As I state in A Note on Methodology at the beginning of *A Distinct Judicial Power*:

I am a lawyer and a political scientist who takes history seriously. I am not a historian, and historians—including Professor Gordon S. Wood, whose work inspired this project—probably would approach this subject differently than I do. My focus is on the development of the *idea* of an independent judiciary. I discuss the origins of a distinct *judicial* power in light of what Montesquieu famously identified as three separate types of *government* power. This sometimes leads me to examine organic laws that were never put into full effect (e.g., the Fundamental Constitutions of Carolina of 1668/9) and to pay only indirect attention to what courts were actually doing—with the notable exception of judicial review, the ultimate expression of judicial independence. In other words, my legal and political science orientation requires me to devote considerable time to matters that some historians might view as non-judicial (or, worse yet, tangential). But, as political scientist Charles A. Kromkowski once told me, just as an architect needs the idea for a new building before it can be constructed and used by others, constitutional framers must formulate the idea for a new type of political institution before they establish it. Not surprisingly, the latter process takes time and will be costly to effect within any political landscape, developing through fits and starts, and from various fragments that others invariably created in the past.

My legal and political science orientation likewise explains my emphasis on texts, where constitutional ideas are memorialized, rather than solely on the surrounding contexts. This, for example, is why I invoke 1606, and not 1607, in the subtitle to the book: 1606 was the year in which the first effective Virginia charter was issued; 1607 was when the settlers landed in Jamestown. Let me be clear, however: context does matter. The lesson of this book is that the framers of the Constitution of the United States grounded their political theorizing in the political practices with which they were acquainted—some they liked, others they rejected—including those involving the judiciary. Despite these disciplinary differences, I hope historians can learn as much from me as I have from them.²⁸

28. GERBER, *supra* note 3, at xxi–xxii (internal footnotes omitted).

That is why I was so pleased when Professor Wood kindly provided a back cover blurb commending my book.²⁹

The third general point I would like to make is about constitutional theory. *A Distinct Judicial Power* is a book about legal history, but it also has something to say about modern debates in constitutional theory, particularly that involving “popular constitutionalism,” the constitutional “theory du jour”³⁰ that insists that constitutional law be defined outside of the courts by the people themselves, “whether we act in the streets, in the voting booths, or in legislatures as representatives of others.”³¹ Bluntly put, *A Distinct Judicial Power* includes an Appendix dedicated to illustrating that popular constitutionalism is wrong and should be rejected.³² As I suggest in the Appendix, Part I of my book articulates the political theory of an independent judiciary that I believe rebuts the policy arguments that Mark V. Tushnet and Cass R. Sunstein advance in their respective books about popular constitutionalism,³³ and Part II presents the colonial and early state history that calls into question the story Larry D. Kramer tells in his book.³⁴ I also describe in the Appendix *why* these three giants of the American law professoriate are trying to limit (Professor Sunstein and Dean Kramer) or eliminate (Professor Tushnet) judicial review itself: They are afraid that the now-conservative federal judiciary is rolling back too many of their preferred liberal rulings. They are announcing, if you will, a kind of judicial Brezhnev Doctrine: “What we have, we keep.”³⁵ More than anything else, the

29. Professor Wood wrote: “A deeply researched study of a much neglected subject—the origins of an independent judiciary.” I also was honored by blurbs from Richard A. Epstein and Sanford V. Levinson.

30. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

31. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181 (1999); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 91 (2004); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 5 (1999).

32. See GERBER, *supra* note 3, at 345.

33. *Id.* at 347–51.

34. *Id.* at 351–55.

35. *Id.* at 356–58; see also Scott D. Gerber, *The Judicial Brezhnev Doctrine*, 24 HARV. J.L. & PUB. POL’Y 309, 316 n.37 (2000) (reviewing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) and MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)) (“The ‘Brezhnev Doctrine’ was announced in November 1968 by then-Soviet leader

political theory and legal history presented in *A Distinct Judicial Power* indicates that the U.S. Supreme Court, as originally conceived, was expected to do what most of us still want it to do today: vigorously exercise judicial review to protect individual rights from—to borrow the title of Dean Kramer’s book—“the people themselves.”³⁶

The final general point I would like to make is that I hope that both the publication of *A Distinct Judicial Power* and the Symposium convened to discuss it demonstrate that significant legal scholarship is being done by at least some law professors who are not affiliated with Harvard or Yale. Several sitting U.S. Supreme Court justices seem to think so. For example, Ruth Bader Ginsburg and Anthony M. Kennedy wrote the dean of Ohio Northern University Pettit College of Law in May of 2011 to comment on the importance of *A Distinct Judicial Power*.³⁷ I was delighted to learn that. I was also delighted to participate in the Symposium, and I thank everyone involved for recognizing that sometimes hard work matters more than anything else.

Leonid Brezhnev to justify the Soviet invasion of Czechoslovakia. Brezhnev declared that the Soviet Union had a duty to maintain a correct vision of socialism in countries within the Soviet sphere of influence. The doctrine was extended in 1979 by the invasion of Afghanistan to countries not already within the Soviet sphere of influence. It was renounced by Mikhail Gorbachev in 1989.”).

36. KRAMER, *supra* note 31. As I mention in the Appendix, I greatly admire Dean Kramer and Professors Sunstein and Tushnet. I simply disagree with their influential work on popular constitutionalism. Indeed, Dean Kramer paid me the great honor of debating me at Stanford Law School about his work, while Professor Tushnet both read and made incisive comments on a draft of *A Distinct Judicial Power* and participated in the Symposium about it.

37. Letter from Justice Ruth Bader Ginsburg, U.S. Supreme Court, to Dean David C. Crago, Ohio N. Univ. Pettit Coll. of Law (May 18, 2011); Letter from Justice Anthony M. Kennedy, U.S. Supreme Court, to Dean David C. Crago, Ohio N. Univ. Pettit Coll. of Law (May 18, 2011).