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No one was surprised that the framers of the U.S. Constitution separated and defined the powers and responsibilities of the legislative and executive branches in Articles I and II of the U.S. Constitution.[1] Where political power was concentrated, it was widely understood despots would emerge to threaten individual rights and freedoms. The Constitution's creation of a separate and supreme "judicial Power of the United States," however, was surprising, and it remains the 1787 Convention's most innovative constitutional achievement.[2] Article III's judicial branch not only was set apart from Congress and the Presidency but the federal judiciary was designed to be composed of judges whose intellectual independence would be promoted by stable tenure and compensation provisions that would partially insulate them from the temporary musings and charged buffetings of popular, electoral, and political opinions.[3]

Both students of the Supreme Court of the United States and scholars of the U.S. Constitution and of American political development commonly must admit they lack a complete understanding of the intellectual and institutional foundations that preceded Article III's achievement of a new, independent, and coequal federal judiciary. Whereas the former are not

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1. *See* U.S. CONST. art. I; U.S. CONST. art. II.
2. U.S. CONST. art. III, § 1.
3. *See generally* U.S. CONST. art. III.

necessarily chastened by their historical ignorance, the latter are fully aware that without an accurate history of the emergence and development of the idea and practice of judicial independence, the origins and constitutional effects of this independence will remain obscured, poorly understood, and underappreciated. Eminent early American historians like Gordon Wood and Jack Rakove, among others, have noted for decades that the solution to this lingering intellectual deficit requires the completion of a thorough study of the ideational and practical conditions that made an independent American judiciary possible.[4] Only after completing this history will we be able to account for the transformation by which the once marginal and executive-controlled colonial judiciaries and their often legislative-dominated and partisan American state progeny gave way not only to independent state judiciaries but, most importantly, to the independent, coequal, and now, anything but marginal, U.S. Supreme Court.[5] Contemporary advocates for a Court and federal judiciary that would be more acquiescent to the political branches, more responsive, popular, and cosmopolitan, and less restrained by the formalities of precedent and a written constitution seem wholly unaware of the constitutional innovations and safeguards they unwittingly would be discarding. Careful forensics of the parameters of the past thus establish limits on the credibility of the historical fictions that too often ground the unchallenged rhetoric employed by these advocates.

The massive scholarly effort required to complete the long sought history of the emergence of judicial independence in the United States has dissuaded many from the attempt, which makes Scott Douglas Gerber's *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787* all the more commendable and a remarkable scholarly achievement.[6] Parts of this story of American judicial independence, Gerber previously has offered in several article-length case studies of colonial and early state practices, but the book expands the story in noteworthy ways to showcase the full breadth and scope of his theoretical and archival research and

4. *See, e.g.*, Gordon S. Wood, *The Origins of Judicial Review*, 22 SUFFOLK U. L. REV. 1293 (1988); Gordon S. Wood, *Judicial Review in the Era of the Founding*, *in* ROBERT A. LICHT, IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? (Robert A. Licht, ed., 1993); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997); The Gilder Lehrman Institute, *Jack Rakove: Establishing an Independent Judiciary in the Founding Era*, VIMEO, http://vimeo.com/37200823 (last visited Dec. 18, 2012).

5. Gordon S. Wood, *The Origins of Judicial Review*, *supra* note 4, at 1304-05. *See also* Gordon S. Wood, *Judicial Review in the Era of the Founding*, *supra* note 4, at 153; Rakove, *supra* note 4.

6. SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787 (Oxford University Press, 2011).

historical synthesis.[7] Part I of the book surveys the development of the essential ideas of a mixed and balanced constitution in the various works of Aristotle, Polybius, Marsilius of Padua, Fortescue, Contrarini, Charles I, Montesquieu, and John Adams.[8] Against the backdrop of these ideas, Gerber recounts the deliberations and decisions of the 1787 Constitutional Convention that yielded Article III.[9] Unsatisfied with this surface history of an independent judiciary, in Part II Gerber meticulously examines the colonial and early state judicial practices that preceded and informed the creation of each of the thirteen original state judiciaries after 1776 and of the new federal judiciary at the 1787 Convention.[10] Each state receives a detailed filled, chapter length legal and judicial history that is a delight to read and that allows Gerber to conclude that "there were hints of judicial independence in almost all of the colonies."[11] In several colonies, judicial independence was effectively manifested as far back as the mid-seventeenth century.[12] Gerber's research further reveals that before 1787 nine of thirteen states guaranteed judicial tenure in terms of good behavior, while seven provided secure judicial salaries, and only four states provided for judicial removal by impeachment only.[13] Part III offers a summary reflection on the relationship between the previously examined ideas and practices of judicial independence, the contours of the Constitution's Article III, and the development of the practice of judicial review as a means of protecting individual rights and the constitutional safeguard of a limited constitution.[14]

A Distinct Judicial Power concludes with an interesting—although unexpected—Appendix, which offers a chapter-length recognition and critique of the arguments of three highly regarded law school professors who advocate in different ways for a theory of "popular

7. *See* Scott D. Gerber, *The Origins of an Independent Judiciary in New York, 1621-1777*, 28 SOC. PHIL. & POL'Y 179 (2011); Scott D. Gerber, *The Origins of an Independent Judiciary in North Carolina, 1663-1787*, 87 N.C. L. REV. 1771 (2009); Scott D. Gerber, *The Origins of the Georgia Judiciary*, 93 GEORGIA HISTORICAL QUARTERLY 55 (2009); Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067 (2008); Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 YALE L.J. 223 (2007); Scott D. Gerber, *Unburied Treasure: Governor Thomas Burke and the Origins of Judicial Review*, 8 HISTORICALLY SPEAKING 29 (2007); Scott D. Gerber, *The Myth of Marbury v. Madison and the Origins of Judicial Review*, *in* MARBURY V. MADISON: DOCUMENTS AND COMMENTARY (Mark A. Graber & Michael Perhac eds., 2002); SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL (Scott Douglas Gerber ed., 1998).

8. *See* GERBER, *supra* note 6, at 3-37.

9. *See id.* at 27.

10. *See id.* at 41-321.

11. *See id*. at 326.

12. *Id.* at 325-26.

13. GERBER, *supra* note 6, at 329.

14. *See id.* at 325-43.

constitutionalism"—that is, the idea that American constitutional law and the role of the judiciary should not be determined by independent judges, but by the people or their representatives in elections or the elected branches.[15] Given the book's extended and revealing history of the origins of American judicial independence, the explicitness of the recognition and critique of popular constitutionalism, which never asserts or requires a stake in historical accuracy, seems both ironic and a stinging indictment of the prevailing scholarly standards of the American legal academy.

15. *See id.* at 345-61.