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John Phillip Reid. *Legislating the Courts: Judicial Dependence in Early National New Hampshire.* DeKalb: Northern Illinois University Press, 2008. 232 pp. $34.00 (cloth), ISBN 978-0-87580-387-6.

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Breaking the Bench: Judicial Subordination and Submission in the Early American Republic

Recent U.S. Supreme Court nominations have resurrected reactionary buzzwords like "judicial activism" and "rogue justices," fueling political and popular challenges to court authority in the United States. Such charges have stoked fears that state and federal judges are prone to exceed their constitutional bounds by legislating from the bench. These concerns run counter to another enduring perception–that the American judiciary should be independent of the other branches, free from polarizing political influences. This independence is constitutionally limited, especially where courts lack legislative financial authority and executive prerogative to destabilize legal order. In his most recent work, *Legislating the Courts: Judicial Dependence in Early National New Hampshire,* John Phillip Reid shows that this paradox is deeply rooted in early American conversations on the scope and strength of American courts, especially at the state level. As a follow-up to *Controlling the Law: Legal Politics in Early National New Hampshire*, Reid's book resumes his lifelong interest in holding the Granite State up as the ideal case study for exploring evolving understandings of the separation of powers during the first decades of independence.[1] Leaning principally on state and federal legislative records, New Hampshire newspapers, and the writings and correspondences of leading players–most notably William Plumer and Jeremiah Smith–Reid argues that the nation's earliest jurists were at the mercy of legislators' political predilections and authoritative jealousies.

Reid seeks to dislodge two flawed tropes in early American judicial histories: Americans have always believed that legal success depends on a truly independent judiciary, and federal courts offer the best theater for studying judicial history. Instead, he shows that debates over state courts and judges–in particular, those in New Hampshire–also reveal deep concerns over judicial independence. Reid finds a tale that braids popular republicanism, legislative supremacy, and judicial subordination. Despite the number of capable jurists and eager public servants, Congress and New Hampshirites ultimately secured the public's wishes by fixing law-shaping authority firmly in the hands of their representative legislators. In turn, legislators preserved their own authority by subordinating the judiciary to their statutory agendas, reducing the courts to administrative branches of the executive branch.

The New Hampshire state constitutions of 1784 and 1792 failed to enshrine a permanent judicial structure or process. Without this fundamental security, the General Court (New Hampshire's state legislature) was free to use many legislative and pseudo-adjudicative tools to check judicial autonomy. For example, the legislature restricted the terms and conditions of judicial service. Many judges were subject to legislative appointment. Judicial terms of one to seven years were relatively short, compared with federal placements for life or "good behavior." The legislature was even more restrictive in interpreting the constitutional obligation to pay "permanent and honorable" salaries to its superior court judges (p. 54). The assembly revisited and revised salaries, sometimes annually, tying judges' livelihoods to legislative whim. In fact, some salaries were set so low that it discouraged many able legal minds–including the venerated Smith–from seeking these handcuffed positions. The New Hampshire assembly also undermined judicial authority by "restoring" aggrieved litigants to law. Dissatisfied parties could petition the legislature to review civil case rulings. In addition, legislators voted to remand cases or order new jury trials. Here, the General Court followed a legislative path to render appellate court decisions: "*Be it enacted …* [t]hat a new trial be granted" (p. 65). Such language reveals the blended legislative and judicial functions of the assembly.

Congress and the New Hampshire legislature most

often demonstrated their superiority over judicial matters by removing disfavored, ineffective, or abusive judges from their seats. This truly revealed the unbalanced understanding of separated powers in the early republic. The most efficient method of control was to "address" judges from office. With or without cause, with or without public notice or justification, legislators could simply vote to remove individual judges. An even more drastic method was to remove an entire bench by repealing the statute that created that court. For example, President Thomas Jefferson and fellow Republicans were eager to oust many of the Adams administration's last-minute Federalist appointments. Congress repealed the Judiciary Act of 1801 and eliminated the Federalist-dominated circuit court, thus throwing Judge Smith out of office. Fourteen years later, the New Hampshire General Court followed the federal example and restructured its judiciary, replacing the Supreme Judicial Court with a wholly new Superior Court of Judicature. Then-sitting Chief Justice Smith was once again legislated from his judicial position.

Reid also analyzes the constitutional process of impeachment, which required legislators to demonstrate sufficient offenses warranting a judge's removal. To highlight the use of this political tool in the early republic, Reid revisits the case of the colorful federal judge Thomas Pickering. Most scholars focus on Pickering's alcoholic proclivities and belligerent behaviors on the bench. Reid, however, insists that Pickering's alcoholic legacy has overshadowed his mental illness and debilitating fear of crossing rivers. His "hydrophobia" and mental frailty interfered with his ability to attend court and to perform effectively. Reid notes that Pickering's mental illness prompted impeachment proceedings against him, even though it was not an impeachable offense. Instead, he was charged on more indictable grounds, including drunkenness and maladministration. Once the U.S. Senate tried and removed Pickering from the district court, legislators throughout the country had a sufficient model to remove judges provided they could massage their reasons (even if political or personal) into indictable charges.

This book's most important contribution is Reid's consideration of judicial independence and its inherent advantages. He repeatedly explores contemporaries' understandings of the benefits derived from separated powers and judicial authority. Competing theorists believed that judges could "protect the laws from the people" as well as "protect people from government" (p. 115). Unfortunately, such discussions do not clarify *how* judiciaries can best do either of these. A legal system with an independent judiciary does not guarantee republican sensitivity to popular expectations or a common-law appreciation for legal precedent and institutional integrity. This book lacks a deeper study of judges' affirmative roles in checking the other branches and possibly the people themselves.

While readers should find Reid's tight and fluid prose persuasive, they would benefit from tables illustrating the number of challenges that New Hampshire jurists faced. It would be helpful to know how many times the legislature either threatened to or actually did remove a judge or a bench, or restore a party to law. Historically, Reid has typically shied from quantitative legal studies. But numerical illustrations might reveal (or perhaps undersell) the true extent of legislative dominance in New Hampshire. Of course, one reason to omit such tables is that they would fail to uncover the hidden effects legislative superiority might have had. Many of these controls were designed to keep judges in line, and thus in office. This leverage might have mitigated any potential abuses of judicial power. If Reid counted cases, it would shed no light on judges' silent choices to toe the line or honor popular sentiment, all for the sake of maintaining their heralded positions. Even so, tables on instances of removal or restoration would clarify the extent of actual, knowable threats to judicial autonomy.

One final criticism rests with the title's characterization of "Judicial Dependence." Surely the nascent court systems were dependent on legislative action and creativity to direct their development, especially when it came to institutional structure, terms, and salaries. However, it is a misnomer to label them dependent. Reid's title presumes that the absence of independence necessarily created a state of "dependence," intimating that the courts might have looked to legislatures for guidance, like doting wards or children. Instead, Reid really reconstructs a history of judicial subordination and submission, as if the early courts were young foals. If they were left unbroken or unbridled, they could run unpredictably wild. While not a fatal flaw, Reid's title poorly markets a much more nuanced story than "Dependence" suggests.

These criticisms aside, *Legislating the Courts* is a magnificently efficient and lucid study of judicial identity crises in the decades following the American Revolution. This book continues Reid's mission of exploring obscure or underappreciated matters to show how legal considerations shaped broader historical action, like nation-building and the creation of legal infrastructure in the early republic. This accessible book is a helpful read for all scholars of the early American republic, es-

pecially those non-specialists whose familiarity with the nation's first courts might be limited to considerations of the federal government, judicial review, and *Marbury v. Madison.*

Note

[1]. John Phillip Reid, *Controlling the Law: Legal Politics in Early National New Hampshire* (DeKalb: Northern Illinois University Press, 2004).

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