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## Another Return to “First Principles”

STEPHEN B. PRESSER\*

Scott Douglas Gerber likes to write on “First Principles.” His path-breaking work on the jurisprudence of Clarence Thomas (Gerber was one of the first to overcome the legal academy’s rather overwhelming prejudice against Justice Thomas, and to demonstrate the depth and breadth of Thomas’s constitutional vision) was given that explicit title,<sup>1</sup> and now, with the publication of his Oxford University Press book, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*, Gerber has given us a major work on the very foundations of the rule of law in America.<sup>2</sup> It is an honor to be invited to contribute comments on Gerber’s book, it is a delight to see my own law school recognize Gerber’s contribution, and it is a pleasure to be one of the thirteen persons to whom this latest work of Gerber’s is dedicated. I do not pretend to have any sort of objectivity here—I have been encouraging Gerber’s teaching and scholarship for most of his career, and I find his to be one of the most refreshing voices in the legal academy. Gerber is not exactly a conservative, nor is he a traditional academic liberal, but he is something perhaps even rarer—a scholar of deep intellectual honesty, not afraid to buck the trends of legal academic popularity.

Gerber, like many of us, appears disturbed by a failure on the part of many current constitutional law professors to be disturbed by the manner in which our courts, and the Supreme Court of the United States in particular, appear to be making it up as they go along, with relatively little attention paid to the original understanding of the Constitution, or to the First Principles that our eighteenth-century Founders believed were crucial to any polity that purported to be a government of laws, not men.<sup>3</sup> Thus, to remind us of what we may now be missing, *A Distinct Judicial Power* goes back to

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\* Raul Berger Professor of Legal History, Northwestern University School of Law; Professor of Business Law, Kellogg School of Management, Northwestern University; Harvard College AB 1968; Harvard Law School JD 1971. A version of these remarks was originally delivered at a Symposium on Gerber’s book organized by the Harvard Law School Federalist Society, and held in Cambridge, Massachusetts, on March 29, 2011.

1. See generally SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999) [hereinafter GERBER, *FIRST PRINCIPLES*].

2. SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787* (2011) [hereinafter GERBER, *A DISTINCT JUDICIAL POWER*].

3. See generally *id.* at 41-321.

the beginnings and explores the effort to implement the First Principles of the rule of law in the thirteen colonies and in the early republic.<sup>4</sup> For my purpose—a short summary of Gerber’s book, and the reasons for its importance at this time in our history—the most important of those First Principles are two: 1) the notion, advanced by Montesquieu that liberty is best preserved if there is *a separation of the legislative, executive, and judicial powers*,<sup>5</sup> and 2) the idea that for the separation of powers to be effective *the judiciary must be guaranteed independence* through the provision of good behavior tenure, guaranteed salaries not subject to legislative reduction, and the capability of holding void legislative or executive acts that exceed the permissible bounds under the Constitution.<sup>6</sup>

*A Distinct Judicial Power* now takes its place as the most comprehensive review available of American colonial and early republican constitutional development in all of the original thirteen polities. The politics, jurisprudence, and legislation of each of these nascent states on the eastern seaboard is explored in more comprehensive a manner than anyone has ever done, and there is a wealth of historical materials never before brought together under one cover.<sup>7</sup> This will now become the indispensable reference for anyone seeking to understand early American conceptions of the judiciary and the rule of law. But it is not simply the ink-stained drudges of the constitutional and legal history fraternity who will owe a debt to Gerber—*A Distinct Judicial Power* ought to serve to remind all of us interested in the principles of good government and citizenship of the seminal importance of late eighteenth century ruminations such as John Adams’s *Thoughts on Government* (1776),<sup>8</sup> and the “Essex Result” [or Resolves] (1778),<sup>9</sup> two simple and powerful statements, riffing on Montesquieu’s notions and ruminating on the manner in which a republic ought to operate.

Examining the manner in which the *Thoughts on Government*, Essex Resolves, and other similar writings influenced the formation of the state

4. See generally *id.*

5. See THE FEDERALIST NO. 78 (Alexander Hamilton) (for the most important enduring statement of this idea of Montesquieu’s and its influence on the American Constitution).

6. See GERBER, A DISTINCT JUDICIAL POWER, *supra* note 2, at 21-23, 27-37.

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

8. See generally John Adams, *Thoughts on Government*, in 1 THE FOUNDERS’ CONSTITUTION 107 (Philip B. Kurland & Ralph Lerner eds., 1986), available at [http://press-pubs.uchicago.edu/founders/print\\_documents/v1ch4s5.html](http://press-pubs.uchicago.edu/founders/print_documents/v1ch4s5.html).

9. Gerber refers to this work as the Essex Resolves, but it is also known as the Essex Result. See GERBER, A DISTINCT JUDICIAL POWER, *supra* note 2, at 86, 112. See generally *The Essex Result April 29, 1778*, in THE AMERICAN REPUBLIC: PRIMARY SOURCES 205 (Bruce Frohnen ed., 2002), available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=669&chapter=206162&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=669&chapter=206162&layout=html&Itemid=27).

and federal constitutions, Gerber does not simply explore the way in which they informed the conceptions of an independent judiciary, but much more importantly, Gerber explains the reason for the profound concern with late-eighteenth century judicial independence, namely the preservation of God-given natural rights (life, liberty, property, and the pursuit of happiness) and the belief that only the rule of law and true republican government could secure them.<sup>10</sup> Here, of course, Gerber is continuing a study felicitously begun in his earlier work demonstrating how the ideas of the Declaration of Independence came to fruition in the Constitution of 1787.<sup>11</sup>

Eighteenth-century Americans were aware that it is always prudent to recur to First Principles, but the time for such reflection has never been greater than at the present. Many thoughtful Americans, it seems to me, might properly wonder whether now, in the beginning of the twenty-first century, we still have the rule of law, natural rights, and republican government. One could point to a myriad of political and judicial conundrums that lead to such doubt, but to pick just one, it seems to me that all of this was involved in the struggle over the constitutionality of the Patient Protection and Affordable Care Act.<sup>12</sup> If, as expected, the Supreme Court of the United States agrees to settle the controversy now roiling the federal district and courts of appeals over the status of the Act's individual mandate, which, for the first time in history, requires virtually all adult Americans to purchase a product from private parties, we will soon know to what extent the protection of private property and the concept of limited government and the rule of law have any continued validity.<sup>13</sup> The Court will be required to tell us, for example, whether the Tenth Amendment's purported guarantee that the federal government is one of limited and enumerated powers is as robust as many of us have hoped, and additionally, whether our government might best be understood as a mechanism for rewarding favored political constituencies or, as the framers wanted, for rewarding civic virtue.<sup>14</sup>

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10. See GERBER, A DISTINCT JUDICIAL POWER, *supra* note 2, at 336-43.

11. See SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 19-90 (1995) [hereinafter GERBER, TO SECURE THESE RIGHTS].

12. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat 119 (2010). The Act was upheld by the Supreme Court of the United States in *National Federation of International Business v. Sebelius*, 132 S.Ct. 2566 (2012). This Commentary was written prior to the Supreme Court's decision upholding the Act.

13. Pub. L. No. 111-148, 124 Stat 119.

14. See U.S. CONST. amend. X. For my own take on these enduring problems, perhaps a bit more polemical than that of Gerber's, see generally STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION AND ABORTION RECONSIDERED (1994).

Looking at measures such as the Patient Protection and Affordable Care Act, and its individual mandate, one might well wonder whether we still have the respect for private property the framers wanted, or whether we are now more committed, as a society, to the goal of redistribution of national wealth and resources. A curmudgeonly conservative could, with some justification, worry about the continuing existence of the framers' conceptions of government as a means of preserving the rights of person and property, the theme of virtually all of Gerber's work to date, and this book in particular.<sup>15</sup> Which is not to say that Gerber is unaware that curmudgeonly conservatism like mine is not the only appropriate posture for constitutional jurisprudence. Indeed, one could look at some recent Supreme Court decisions such as *Citizens United v. Federal Election Commission*<sup>16</sup> and conclude that that the Court is too committed to the preservation of private property, especially that owned by corporations.<sup>17</sup>

One of the things that I have long admired about Gerber's scholarship is that he is deeply aware of the nexus between politics, constitutional interpretation, and academic discourse. For me, as important as his historical research for this book is, it is his wonderful Appendix, where he considers current threats to judicial independence and the rule of law, that has the most immediate impact.<sup>18</sup> Thus, *A Distinct Judicial Power* can be, and perhaps should be, read as a broadside against the concept of "popular constitutionalism," as it is expressed, for example, in the work of such law professors as Larry Kramer,<sup>19</sup> Mark Tushnet,<sup>20</sup> and Cass Sunstein.<sup>21</sup> These three are serious scholars and deep thinkers, and I am quite proud to number them among my friends and acquaintances, but I, and Gerber (I think), have some trouble with the essence of their thought, which seems to be that, ultimately, contemporary constitutional interpretation ought not really to be the preservation of an independent judiciary, but should be lodged, at least partially, in the hands of the public itself.

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15. See generally GERBER, A DISTINCT JUDICIAL POWER, *supra* note 2; GERBER, FIRST PRINCIPLES, *supra* note 1; GERBER, TO SECURE THESE RIGHTS, *supra* note 11.

16. 130 S. Ct. 876 (2010).

17. See *Citizens United v. FEC*, 130 S. Ct. at 886, 917 (expansively holding that corporations possessed First Amendment Rights to express preferences for candidates for political office, and striking down restrictions that barred corporate advertising critical of political candidates within a time close to elections).

18. See GERBER, A DISTINCT JUDICIAL POWER, *supra* note 2, at 345-61.

19. See generally LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

20. See generally Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991-1006 (2006) (defending Kramer's notion of popular constitutionalism).

21. See generally CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005) (a polemic against conservative principles of judicial interpretation).

True it is that "We the People" are the group that ostensibly accepted the Constitution, but, nevertheless, surely it is not radical to suggest, as Gerber does, that if we really take popular constitutionalism seriously, there is an end to the rule of law, republican government, and an independent judiciary. Perhaps Gerber even shares my concern that all this talk of "popular constitutionalism" is really just a means of undercutting the power and influence of the current five-person conservative majority on the United States Supreme Court. I think it is no coincidence, for example, that Cass Sunstein was one of the architects of the political left's 2006 broadside against the "judicial ideology" of the Bush nominees to the Court, and to the lower courts, which I, at least, regard as a sorry chapter in our political discourse.<sup>22</sup> The attempt to delegitimize the Court's five-person conservative majority is, it would seem, a possible pre-emptive strike against a decision tossing out the Patient Protection and Affordable Care Act or a broadside against *Citizens United*.<sup>23</sup>

A book like *A Distinct Judicial Power*, and a scholar like Gerber, perform the invaluable service of reminding us that the purpose of an independent judiciary is actually to protect the people from themselves, and true proponents of the rule of law, like Gerber, are aware that "popular constitutionalism" might be a prescription for tyranny. After all, it certainly can be argued that the purpose of the 1787 Constitution was to diminish the influence of the state legislatures who seemed bent, in the 1780s, on embarking on a program of suspending debts, interfering with contracts, and issuing increasingly inflationary paper money.<sup>24</sup> That document, still the frame of our federal government, was to establish a means of promoting commercial activity and making the country safe for entrepreneurs, for finance, and for the stability of private property and contract rights. Some of us do believe that this original conception of the Constitution is still the appropriate one, and that this good old Constitution (or, if you like, "The Constitution in Exile"<sup>25</sup>) is hostile to fundamental efforts at redistribution, such as the Patient Protection and Affordable Care Act. And while it may not have been the primary concern of the Constitution's framers and proponents, the Tenth Amendment reminds us that those framers and

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22. On this alarming episode, see generally Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427 (2008).

23. See Pub. L. No. 111-148, 124 Stat 119; *Citizens United*, 130 S. Ct. 876.

24. For the now-classic telling of that story, see generally the magisterial GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

25. For an account of the "Constitution in Exile" written for a popular audience, see generally ANDREW P. NAPOLITANO, *THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND* (2006).

proponents did not believe that the federal government was supposed to be the only government of any importance.<sup>26</sup>

While I was at Harvard Law School (1968-1971), the message our professors wittingly or unwittingly passed on to us was that all law was politics, and that message was later intriguingly trumpeted from Harvard podiums by proponents of Critical Legal Studies.<sup>27</sup> *A Distinct Judicial Power* is a timely reminder that while much of law is politics, not all of it is, and that there is real content to the First Principles of an independent judiciary, the protection of individual rights, and the rule of law itself.<sup>28</sup> To a hammer everything looks like a nail, and to a political scientist like Gerber, the Constitution looks like an exercise in political science, and, accordingly, this book is a celebration of the insight of a few brilliant political scientists, most notably Montesquieu, Adams, James Madison and Alexander Hamilton.<sup>29</sup> They sensed that a set of great ideas—separation of powers, an independent judiciary, and judicial review—were in the air, and the latter three of them set about actualizing those ideas in the Constitution of 1787, and several of the new state constitutions.<sup>30</sup> Not a bad thing to write about, and the risks to the rule of law and private property remain just as challenged as they were in the 1780s and 1790s.

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26. U.S. CONST. amend. X.

27. On that movement, see generally, for example, MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

28. See generally GERBER, *A DISTINCT JUDICIAL POWER*, *supra* note 2.

29. See, e.g., *id.* at 21-37.

30. See generally GERBER, *A DISTINCT JUDICIAL POWER*, *supra* note 2.