

Gerber, Scott Douglas. *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*. New York: Oxford University Press, 2011.

Scott Douglas Gerber's "Note on Methodology" makes crystal clear that I am not the reviewer he would have selected for *A Distinct Judicial Power*, his book on the origins of the American judicial branch. Gerber points out that while he is "a lawyer and a political scientist who takes history seriously," he is "not a historian, and historians . . . probably would approach this subject differently than I do" (p. xxi). He is absolutely right. I am an historian and, as he suggests, would approach this subject differently. Nevertheless, the subject is important and this is an interesting and valuable book. I will do my best to be fair to the author and to those readers of *Reason Papers* who are political scientists and philosophers. But I will also indicate how Gerber's approach might be bolstered by a more historical appreciation for the context of the documents he examines and a broader understanding of what constitutes an independent judiciary.

I will first provide an outline of the task Gerber has set himself and his approach to discovering the "origins" of an independent judiciary. His aim is to explain how each of the thirteen colonies treated its respective judiciary and "*when* and *why*" these judiciaries became independent. Through this he hopes to shed light on the federal model laid out in Article III of the U.S. Constitution. The book is divided into three parts. The first examines the intellectual origins of an independent judiciary, a journey in "the history of ideas" (p. 3). Gerber seeks this history in a selection of classical and Renaissance authors with the addition of a short list from the eighteenth century. In an aside, he apparently thinks little of his readers' knowledge of history since he feels it necessary to inform them that "the Renaissance" is "the historical age that followed the medieval period" (p. 15). Gerber begins with Aristotle's famous discussion of the theory of a mixed constitution, followed by Polybius, Marsilius of Padua, and Casparo Contarini. John Fortesque and Charles I provide the English legal "origins." Next come Montesquieu and John Adams's modification of Montesquieu's separation of powers, the Articles of Confederation, and finally the Constitutional Convention debates on the creation of an independent judiciary. Part II, to my mind the most valuable and original part of the book, offers a chronicle of each of the thirteen colonies' development of its judiciary, starting with the Virginia Charter of 1606 and ending with the Constitution in 1787 or, in the case of some states, a slightly later date. The third and final part brings together the theory from the first section and the experiences of the various

colonies in the second in order to assess how that experience worked to mold Article III and the federal court system.

All of this is well and good. However, there are two basic issues that I find troubling in this otherwise admirable book. The first involves the reliance on a handful of sometimes idiosyncratic texts selected by the author as *the* intellectual origins of an independent judiciary. As an historian I find free-floating texts, however interesting and important they may otherwise be, problematic if unlinked to any evidence that they actually were influential in the American case. Moreover, taken out of context they can easily be misunderstood. My second problem is the author's narrow interpretation of an "independent judiciary" as meaning the existence of a separate judicial branch rather than judges who behave independently and impartially.

Let's begin with the particular texts selected as origins. I do not disagree with Gerber's reliance upon texts. What else do we historians have but written records of various sorts? Essays in intellectual, constitutional, and legal history from an earlier era are crucial. If Gerber merely were searching for the origins of the idea of a separate or independent judiciary, Aristotle and Polybius would be fine. His aim, however, is to understand the origins of the American colonial and constitutional idea of the role of the judiciary. There, Aristotle's work and some of the other early texts that feature in *Distinct Judicial Power* played little if any part, nor does Gerber provide any evidence that they did.¹ Fortesque, on the other hand, *is* a fundamental source of English constitutional law and an important one. So too is a text Gerber selects from Charles I: the king's "Answer to the Nineteen Propositions." Unlike his father James I, Charles I was not given to committing to writing his thoughts on the English Constitution or any other subjects. The "Answer" was part of an escalating dispute between Charles I and the Long Parliament that eventually led to the English Civil War, a war the king lost along with his head. Parliament had issued a list of propositions that would severely have limited the discretion and power of the monarch and enhanced its own. Charles's famous response is useful for its endorsement of England's mixed and balanced constitution, although that was a commonplace among writers of the time. Charles's reference to the judicial role of the House of Lords, noted by Gerber as part of the king's allusion to the Lords as a buffer between the common people and the Crown, was a widely accepted conceit. Gerber concedes this, although he still lays great stress on the influence of the king's "Answer" (p. 20). The Lords were a distinctive branch, of course, but not a judicial branch *per se*, although they had a judicial function. Appeals could

¹ Gerber does mention that historian Scott Gordon, in his *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, MA: Harvard University Press, 1999), denies that Aristotle or any other ancient Greek philosopher contributed anything significant to the modern system of the separation of powers epitomized in the American Constitution. Gordon, however, thinks that Polybius, a Greco-Roman, did serve as a genesis; see Gerber, *Distinct Judicial Power*, p. 8.

be taken there, but the Commons also heard cases and the Crown appointed the judges to the common law courts of Common Pleas and King's Bench. Indeed, Parliament is customarily referred to as "the High Court of Parliament," the highest court in the realm, but definitely not the distinct branch that relates to Gerber's quest.

The real breakthrough in the "Answer" is that for the first time the monarch, or to be more accurate his aides who wrote the "Answer," concede that the king is one of three co-ordinate estates in Parliament—the triumvirate of king, lords, and commons—and not separate from and above that body.² Gerber does refer to two other writers of that era. Sidestepping genuinely influential seventeenth-century political authors such as Sir Edward Coke, John Pym, or Henry Parker, or William Blackstone in the eighteenth century, however, he plucks Charles Dallison and John Sadler from obscurity, arguing that they "merit brief mention for what they had to say about the judiciary's role in this [seventeenth-century English] constitutional schema" (p. 20).³ To my mind, the most serious omission in the list are texts that illustrate the common law tradition of judicial independence stemming not from Charles I or the Glorious Revolution, but from Magna Carta and subsequent acts meant to bolster it. (But I will have more on that below.)

Gerber's analysis of Montesquieu that follows that of Charles I is excellent and avoids the mistakes frequently made in discussions of that writer. The choice to include John Adams's 1776 pamphlet, "Thoughts on Government," written to oppose the English government's decision to pay the salaries of colonial judges, is also well-taken. The argument about the impact of funding judicial salaries, and even more about judicial tenure, whether according to "good behaviour" or "at will," raged in the colonies during the reign of George III. Gerber mentions this briefly, but judicial tenure was an important constitutional issue in England even earlier, when Charles I altered the tenure of judges from "good behaviour" to "at will." The views that Adams expresses were far from novel at the time but certainly important. On the other hand, Adams's defense of separation of powers was discussed and

² While Charles gave his approval for publication of the "Answer" and presumably glanced at the lengthy document, it is unclear whether he actually read it. It does not reflect his views before or after its publication. His aides argued about who penned crucial parts and some of his moderate advisors were unhappy with the concession noted above in the text. The concession also meant that the bishops were eliminated from the House of Lords. See Joyce Lee Malcolm, *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts*, 2 vols. (Indianapolis, IN: Liberty Fund, 1999), vol. 1, pp. 146-47.

³ Political scientist Donald Lutz has made a study of the authors the Founders cited most. Next to Montesquieu came William Blackstone. See Donald Lutz, "The Relative Influence of European Writers on Late-Eighteenth Century American Political Thought," *The American Political Science Review* 78 (March 1984), table 3, p. 194.

copied by the delegates to the Constitutional Convention while their author was on diplomatic assignment abroad.

The section on the debates in the Constitutional Convention is fine as far as it goes, but Gerber postpones until a final part of his book that deals with judicial review James Madison's attempt to include a Council of Revision in the Constitution. This council would have included the president and members of the judiciary to advise the president, and would have been authorized to review legislation for its appropriateness and constitutionality. Madison introduced the subject several times during the Convention debates, but it was defeated repeatedly because it would interfere with the separation of the branches of government by mixing the judiciary with the executive.⁴ A discussion of this debate is important when treating Convention debates not only for the topic of judicial review, but also for the issue of judicial independence and creating a separate branch for the judiciary.

To return to the topic of text selection, in the book's conclusion Gerber has no doubts about his choice of *the* influential texts. Indeed, he is emphatic that the American political theory of an independent judiciary "is the culmination of the work of eight political theorists writing over the span of 22 centuries, with each building on the contributions of the others" (p. 325). Gerber's level of certainty is entirely too strong for this historian.

Part II of the book, which recounts the experience of each of the thirteen colonies, is an excellent scholarly resource. As Gerber notes, many colonies-turned-states had elected judges. Although the delegates to the federal convention did not adopt this practice, that experience surely helped inform their attitudes. It gave the delegates a variety of systems to consider and weigh for the final form of Article III.

More troubling than Gerber's decision to focus on some texts that played little, if any, role in shaping American notions of a separate judiciary, is his inclusion of two very different concepts in his title while pursuing only one in the book. Gerber's main title is *A Distinct Judicial Power*. Somewhere along the way, he equates this distinct judicial power with a separate branch of government, as his choice of texts makes clear. Yet his subtitle refers to the origins of an *independent* judiciary. A separate judicial branch and judicial independence, however, are not synonymous. The English legal system had, until very recently, no separate judicial branch. Its judges were appointed by the Crown, and the Law Lords—which was the highest appeals court—sat in the House of Lords. Despite not being separate, from the passage of Magna Carta onward, judges were expected to be independent in their rulings and English parliaments struggled with a host of expedients to ensure that result. It's worth taking a quick look at some of these expedients. First, legislation going as far back as the fourteenth-century reign of Edward III, required the king's judges to swear to "deny no man common Right by the King's

⁴ See Joyce Lee Malcolm, "Whatever the Judges Say It Is? The Founders and Judicial Review," *The Journal of Law & Politics* 26, no. 1 (Fall 2010), pp. 30-33.

Letters.”⁵ That is, they were to ignore even orders from the king that interfered with the judicial process. Furthermore, if a judge failed to uphold the host of specified rights listed in Magna Carta and subsequent statutes, the judge’s ruling was to be “undone and holden for naught.”⁶ The author of an anonymous 1643 tract writes, “the King can do no wrong, because his juridical power and authority is allwayes to controle his personall miscarriages.”⁷ The task of judges was to keep kings from becoming over-mighty. Judges who took the king’s side in cases where the rights of subjects were being clearly violated were punished by parliament at the first opportunity. Among the first to suffer when the Long Parliament met in 1640 were Charles I’s judges for their series of rulings in the king’s favor that extended royal power. Edward Hyde, an attorney and future royalist, was one of many who found Charles’s politicization of royal judges unprecedented and more alarming than any particular verdict:

[I]t is very observeable that, in the wisdom of former times, when the prerogative went highest . . . never any court of law, very seldom any judge, or lawyer of reputation, was called upon to assist in an act of power, the Crown well knowing the moment of keeping those [the judges] the objects of reverence and veneration with the people. . . .⁸

Judges were expected to act independently and to defend the law and people’s liberties. They were not to be extensions of Crown policy or to alter the law to suit themselves. In 1679, when judges upheld Charles II’s dubious actions and refused to protect individual liberties, the House of Commons initiated impeachment proceedings against Chief Justice of the Court of King’s Bench, Sir William Scroggs.⁹ In an accusation with a modern ring to it, members of the Commons declared the judges guilty of “usurping to themselves legislative power.”¹⁰ Sir Francis Winnington, the solicitor-

⁵ 18 Edward III, 3.c.7.

⁶ Ibid.

⁷ *Touching the Fundamentall Lawes* (London: Thomas Underhill, 1643), p. 11.

⁸ Edward Hyde, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England*, ed. William Dunn Macray, 6 vols. (Oxford: Oxford University Press, 1969 [1888]), vol. 1, p. 88.

⁹ For a discussion of this incident see Malcolm, “Whatever the Judges Say It Is?” p. 9.

¹⁰ Cited in Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, NC: Carolina Academic Press, 1998), pp. 149-50.

general, asked, “Shall we have law when they [the judges] please to let us, and when they do not, shall we have none?”¹¹

Many judges certainly found it difficult to remain strictly impartial and independent, as indeed some judges do today despite constituting a separate branch. But then as now, the intention was that the law was supreme and the judges were relied upon to uphold the law. The king, as Sir Edward Coke points out in *Prohibitions del Roi*, was “under no man but under God and the Law.”¹² John Pym, one of Charles I’s leading opponents, reminded members of the House of Lords, “Your Honours, your Lives, your Liberties and Estates are all in the keeping of the Law.”¹³ On this subject the future royalist Roger Twysden wholeheartedly agreed, writing that the proper execution of the laws was the “greatest (earthly) blessing of Englishmen.”¹⁴

Englishmen were jealous of judicial independence and upset when Charles I changed the usual tenure so that judges no longer served during good behavior but at the king’s pleasure, bringing them under closer royal control. After the restoration of the monarchy in 1660, royal judges once again served during good behavior. In the American colonies the judges served at the king’s pleasure, much to the dismay of many colonists. Indeed, one of the complaints against George III in the U.S. Declaration of Independence was that “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The emphasis on judicial tenure to help protect judicial independence would shape Article III.

These and other stratagems were designed to keep the judiciary independent. The subject of a separate branch of government for the judiciary did not enter into that discussion about independence. This aspect of the common law tradition informed American opinion, although Convention delegates decided to follow what they took to be Montesquieu’s approach, opting for a separate branch in order to achieve judicial independence.

All of this should be part of the story of the origin of an independent American judiciary. It was certainly part of the common law mentality that the colonists carried with them and that shaped their thinking in crafting the Constitution. It is also part of the story of the concept of a separate branch

¹¹ Ibid.

¹² Malcolm, *Struggle for Sovereignty*, vol. 1, pp. 14-18.

¹³ John Pym, *The Speech or Declaration of John Pym Esquire, After the Recapitulation or Summing Up of the Charge of High-Treason, Against Thomas, Earle of Strafford* (London: John Bartlet, 1641), cited in Malcolm, *Struggle for Sovereignty*, vol. 1, p. xliii.

¹⁴ Sir Roger Twysden, *The Commoners Liberty: or, The Englishman’s Birth Right* (London: R. Royston, 1648), p. 1, cited in Malcolm, *Struggle for Sovereignty*, vol. 1, p. xliii.

for the judiciary, for the history of royal judges and the problems of keeping them both “lions under the throne” yet faithful to the law were well known to the colonists. If Americans turned their back on the English system, it was because they were aware of its shortcomings. Nevertheless, it had given them an education in the importance of an independent judiciary and a variety of methods by which to achieve it.

It is certainly unfair to criticize an author for writing a book different from one that a reviewer would have written. There is much to praise in *Distinct Judicial Power*. Tracing the history of a separate judicial branch as it developed in America is an important task in itself. Bringing together the experience of every one of the thirteen colonies in the development of its judiciary is a boon to us all. However, some discussion of what an independent judiciary really means and whether it must be achieved through a separate branch would have added greatly to the work Gerber has done.

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