

1997

Book Review: to Secure These Rights: The Declaration of Independence and Constitutional Interpretation. by Scott Douglas Gerber.

Stephen B. Presser

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Presser, Stephen B., "Book Review: to Secure These Rights: The Declaration of Independence and Constitutional Interpretation. by Scott Douglas Gerber." (1997). *Constitutional Commentary*. 1022.
<https://scholarship.law.umn.edu/concomm/1022>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

CONCLUSION

Ronald Thiemann's *Religion in Public Life* is truly a welcome addition to the ever-expanding literature on religion, law, and politics. His work presents a well-reasoned, even-handed, and intellectually defensible attempt to bring some measure of balance to its subject. Though perhaps slightly too abstract in its formulation and possibly a bit too wide-ranging in its breadth, these arguably are signs not of commonplace deficiency, but of its potentiality as a work of genuine cultural significance. Especially noteworthy is Thiemann's attempt to render the philosophical and legal dimensions of the debate over religion in public life accessible to a relatively broad readership. Frequently confined to certain elite or professional quarters, this debate plainly has relevance that extends well beyond the academic halls and judicial chambers. The periodic manifestation of elite discourse through legal doctrines and other expressions of public policy, and the frequent assertion by proponents that many of its constituent arguments are simply expressions of our deep constitutional commitments, demand that it not, in fact, stray too far from the public domain. *Religion in Public Life* laudably attempts to rein in both the esotericism and the ideological excess of this debate, and in so doing makes a genuine contribution to the present and future understanding of religion as an indelible feature of the American political landscape.

TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION. By Scott Douglas Gerber.¹ New York and London: New York University Press. 1995. Pp. 315 Cloth \$45.00.

*Stephen B. Presser*²

For some time, Constitutional interpretation in the American courts and academy has been borrowing from other disciplines. At the height of the Warren Court's adventures in Constitutional law-making, for example, sociology and social

1. Scott Douglas Gerber, Ph.D., J.D., is Visiting Assistant Professor of Government at the College of William and Mary.

2. Raoul Berger Professor of Legal History at Northwestern University School of Law, and currently a Fulbright Senior Scholar and an Adams Fellow at the Institute of United States Studies at the University of London.

psychology were useful adjuncts to Constitutional law, most famously in *Brown's* Footnote 11. As academics sought to understand, or perhaps to justify, what the Warren Court had done, other bodies of knowledge were turned to, most prominently moral philosophy, as in the work of Ronald Dworkin, Michael Perry, and others. John Hart Ely, and those influenced by him, tried to recast Constitutional Law as applied pluralistic political science. In the meantime other scholars, most notably Richard Posner, had been experimenting with borrowing from classical economics, and, in just the recent past, Constitutional theorists have raided the domain of American historians.

While the lawyers were up to all that, among historians, something called "republicanism" was all the rage, as Americanists sought to argue that it wasn't Lockean liberalism (with its purportedly attendant possessive individualism) that was at the bottom of the struggle for the Federal Constitution, but rather an altruistic and disinterested attempt to promote communitarian values in general and civic virtue in particular. I can't speak for the fate of most of the other disciplines, but I can say with some confidence that it wasn't long before historians decided that "republicanism" was a much more complex matter than simply a desire to promote civic virtue, and the historical fraternity appears to be on the way to concluding that the early history of our republic can best be understood by considering Republicanism as only one of at least three important civic ideologies—the other two being the formerly discredited Lockean Liberalism and the once popular-but more recently neglected—Protestant Christianity.³ These developments in historiography have not yet adequately been reflected in Constitutional jurisprudence, which tends superficially to borrow from the other social sciences, as other disciplines lose their degrees of nuance when employed by lawyers.

In any event, at the same time these attempts to raid social science for guidance on the Constitution were under way there was always a feeling that perhaps law could be regarded as at least a semi-autonomous scientific discipline. This feeling was manifested, surely, by Herbert Wechsler's famous effort to discern neutral principles for constitutional interpretation, and perhaps in the work of several of his disciples, most notably Alexander Bickel. Most recently the jurisprudence of neutral

3. The seminal piece in this regard is James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 *J. Am. Hist.* 9 (1987).

principles, now in the guise of original intention or original understanding, was carried out—primarily by critics of Warren Court expansionism—by Messrs. Meese, Bork, and Berger.

The newest game in constitutional interpretation town, I suspect, is the effort by several scholars of late eighteenth century history (among whose numbers I modestly include myself)⁴ to move beyond what might have been perceived as a negative approach to original intention or original understanding, and to appreciate the early Constitution on its own terms, informed not by current philosophical fads in the legal or arts and sciences faculties, but (adopting the latest work by American historians) rather by an understanding of the complex of philosophical, political, and economic conceptions that were prevalent at the time of the Constitution's drafting and adoption. This is a tricky business, because to do it properly requires not only legal training, but probably professional training in history (or at least enough years to get grandfathered in), and/or perhaps even an advanced degree in political science or government.

As if this were not enough, an attempt must be made to appreciate the social sciences in the manner of our Framers, when law, politics, economics, history, moral philosophy, and religion were all integrated pieces of one holistic approach to life and law. Not for nothing was what we now know as economics called "political economy," and common it was for many of the founding generation to believe that it was impossible to implement law without morality and morality without religion.

The results of a new kind of interdisciplinary approach to and appreciation of the late eighteenth century founding years have begun to accumulate, and they seem promising and exciting. Two notable efforts in this regard are William Casto's recent book on the early federal courts,⁵ and David Mayer's interdisciplinary study of Thomas Jefferson's constitutional theory (such as it was).⁶ Now, in this vein, comes Scott Gerber's new book on constitutional interpretation, *To Secure These Rights*.

Like Casto and Mayer, Gerber deploys interdisciplinary tools, most prominently those acquired as a Ph.D. studying under Henry Abraham at Virginia. The result is an extraordinarily am-

4. Stephen B. Presser, *Recapturing the Constitution: Race, Religion, and Abortion Reconsidered* (Regnery Pub., 1994) and Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History* (West, 3d ed. 1995).

5. William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (U. of South Carolina Press, 1995).

6. David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (U. Press of Virginia, 1994).

bitious and, given the possible pitfalls, a remarkably successful first book, an essay in constitutional exegesis which should now be required reading for anyone seeking to understand the animating spirit of the 1787 document and the Bill of Rights which followed. Gerber's work is not free from problems (whose is?), and it is probably fair to say that he raises almost as many questions as he answers, but in his volume, as was true for earlier efforts by Bernard Bailyn, Gordon Wood, and J.G.A. Pocock,⁷ to provoke disagreement and discussion is likely to be the mark of a vital and seminal work. .

Indeed, it is Bailyn, Wood, and Pocock who furnish the starting-off point for Gerber. *To Secure These Rights* is an attempt to shift focus from "Republican" or "Civic virtue" explanations of the origin of our constitutional law, and to return to an appreciation of the Lockean influence on the framers. (pp. 23-32) Not even the most zealous advocates of the Republican reading of the Constitution (with exception of the strange attempt by Garry Wills⁸) argued that Locke was not influential in the writing of the Declaration of Independence, but virtually all American historians have recently argued that America, in the years following the Declaration, moved away from Locke, as it was demonstrated that Lockean notions, when put into practice, seemed to lead to legislative irresponsibility and nearly total breakdowns in American provincial government. Indeed, as the Constitution itself was in the process of being drafted, rebels in Western Massachusetts who had declared themselves in a Lockean state of nature and had rendered nugatory the power of state authorities had just been subdued.

In the course of his reexamination of the notions of Locke, the Declaration of Independence, and the Constitution, Gerber concludes that it is wrong to think that the influence of the Declaration suddenly evaporated. Instead, after a review of the writings of such framers as Hamilton, Madison, Jay, and Wilson, as well as Jefferson, he makes out a powerful case that the Declaration was still very much in the minds of both the Constitution's proponents and its foes, and that the Constitution is best under-

7. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press, 1967); Gordon S. Wood, *The Creation of the American Republic 1776-1787* (U. of North Carolina Press, 1969); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton U. Press, 1975).

8. Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (Doubleday & Co., 1978). Says Gerber, "Most scholars no longer take Wills's Scottish [Enlightenment] reading of the Declaration of Independence seriously, believing that his thesis was demolished in a superb review essay by Ronald Hamoway." (27n.)

stood, as his title suggests, as a means of implementing the rights outlined in the Declaration.

The Declaration's Lockean inalienable rights to life, liberty, and the pursuit of happiness (or perhaps the accumulation of property) furnish Gerber with a dynamic constitutional philosophy which allows the possibility of adopting the Constitution to meet the exigencies of a people struggling to establish a just society in a manner not yet seen in history. Gerber concludes that the proper posture of constitutional interpreters, then and now, is what he calls "liberal originalism." (pp. 1-4, 6-8) He believes that he is being faithful to the original understandings of the document's drafters and ratifiers, but he eschews what he regards as the modern "conservative" approach to constitutional interpretation, which he says demands that the constitution be read simply as the establishment of a majority-rule democracy. (pp. 4-6)

Gerber shares with many current conservatives the belief that the Warren and Berger courts improperly made constitutional law according to their particular political preferences rather than following any valid constitutional philosophy (and he singles out Justices Brennan and Marshall for special excoriation). (See, e.g., pp. 9-11, 177) But he believes that conservatives such as Meese and Bork and some of their positivist fellow travelers have failed to appreciate that the Constitution was about more than popular sovereignty, and that instead it was to incorporate a jurisprudence of natural rights.

One could certainly quibble with Gerber's definition of "conservative" here—he probably too easily links Meese and Bork with Blackstone and Burke, and fails to realize that a Burkean approach to law might well include some of the jurisprudential approaches he favors⁹—but he does succeed in fatally undermining the historical arguments that some conservatives have been making against a jurisprudence informed by supra-constitutional principles. He demolishes this positivistic approach, for example, by demonstrating quite nicely that the only Justice to argue against a natural-rights based jurisprudence of the constitution (to argue, in other words, against "great principles of republican government" which circumscribed any American legislature—state or federal), Justice Iredell in *Calder v. Bull*, was not only quite out of step with his contemporaries, but inexplicably had abandoned his own clear views to the contrary voiced a scant few years before. (pp. 111-112, 118-119)

9. On this point see generally Presser, *Recapturing the Constitution* (cited in note 4).

Somewhat more troubling difficulties are presented, however, by what often seems to be Gerber's notion that the "natural rights" philosophy of the Declaration ought to be regarded as the be-all and end-all for Constitutional interpretation. He is certainly to be commended for elegantly laying out what the past, present, and future content of such a jurisprudence would look like. His book is a particular delight, as well, because he actually takes a stand on the most difficult constitutional questions now facing us, for example those involving race, religion, abortion, sexual preference, and the right to die. (pp. 164-195) Still, in order to pull this off, Gerber is forced to move his "natural rights" notions from the Declaration and Locke to a higher level of generality than that employed by the framers or by Locke himself, (see, e.g., pp. 189-190) and once he moves to this higher level of generality it is difficult not to conclude that his theory would suffer from the same open-ended character of that, say, manifested by Justice Brennan.¹⁰

Thus, when Gerber finds in the purported Lockean natural rights philosophy of the Declaration support for the notion that the Supreme Court should find that state or federal governments may not punish consensual sodomy or discriminate on the basis of sexual orientation, (pp. 189-190) or that prayer in the schools should not be permitted, (p.5) or that there ought to be a constitutionally-recognizable right to die for persons in unbearable distress, (p. 180) one is excused if one raises an eyebrow. Less problematic, and dead-on, I think, are his claims that the Constitution ought to be interpreted in a manner which results, in racial cases, in equality of opportunity but not equality of outcome, (p. 174) and that a woman's "right" to have an abortion could not exist in the constitution if the fetus is recognized as a human life. (p. 182)

But even if Gerber, in his admirable zeal to apply his basic theory, gets it a bit wrong, that doesn't necessarily mean that his theory itself is flawed. Indeed his basic premise, or what he calls his "underlying theme," that "the Constitution cannot be properly understood without recourse to history, political philosophy, and law—all three" ought to be inscribed on the fly-leaves of all texts in first-year Constitutional law. So how might one avoid the open-ended problems of Constitutional interpretation to

10. Indeed, it is just this sort of moving to higher levels of generality that recently allowed Michael Perry to make the curious claim that it is proper to view William Brennan as an originalist. Michael Perry, *The Constitution in the Courts: Law or Politics?* 213 n.15 (Oxford U. Press, 1994). To his credit, Gerber appears implicitly, at least, to acknowledge this problem. (p. 9n.)

which Gerber is also dedicated to avoiding? An answer, I think, is implicit in an observation that he has himself made, but has not yet fully developed. That is that while "Modern students of political philosophy and jurisprudence often draw distinctions between terms like 'natural equity,' 'natural justice,' 'natural law,' and 'natural rights,' . . . An examination of the early cases reveals that early American judges and lawyers typically did not make such distinctions." (p. 106 n.*)

What this means, I think, is that if one wants truly to be an originalist, one cannot simply rely, as Gerber too often does, exclusively on an individualistic "natural rights" Lockean philosophy. One must also take into account (as the Framers most assuredly did) Ciceronian or Thomistic ideas of universal natural law, Aristotelian conceptions of justice, and the English common law's concepts of inherent powers of government and duties of the subject. Moreover, while Republicanism and Christianity ought not to be regarded (as Gerber quite properly claims they ought not to be) as the exclusive guides to Constitutional interpretation, they are surely of some importance in understanding the way the framers approached constitutional problems.¹¹ Also of more importance than Gerber accords to it, I think, was the movement both in the Constitution and certainly in the Bill of Rights to safeguard rights and liberties by preserving the dual sovereignty of state and federal governments. If Gerber assimilated all of this, I think he'd have a tougher time, for example, supporting the Supreme Court's current jurisprudence regarding essentially domestic matters such as sexual orientation or school prayer. Surely one who took seriously Federalism would find it difficult to justify many of the "incorporation" decisions which have transmogrified wise restrictions on the Federal government (to protect state sovereignty) into shackles to be attached to the states.¹²

Thus, for my money at least, while securing the natural rights spoken of in the Declaration was one important goal of Constitutional government, it was not the only goal, and a theory of interpretation which is dedicated to supra-constitutional principles and eschews simple positivism cannot begin and end with the Declaration. Indeed, a theory which tried to come to grips with the late eighteenth-century conceptions of natural law, revealed religion, civic republican philosophy, dual state and fed-

11. See generally Kloppenberg, 74 J. Am. Hist. (cited in note 3); Presser, *Recapturing the Constitution* (cited in note 4).

12. See Presser, *Recapturing the Constitution* at 160-66 (cited in note 4).

eral sovereignty, and Lockean natural rights might even end up precise enough to avoid the need to pursue higher levels of generality, and thus the problem of arbitrariness could be contained. When we needed Constitutional change, then, we would not rely on the judges' senses of how higher levels of Lockean theory would resolve the problem, we could—as Gerber quite wisely recommends as a check on the Justices (pp. 139-144)—simply use the Article V process, and amend the document.

But this last is the familiar rant of the reviewer that if he were writing the book he would have written a different one.¹³ On Gerber's own terms his book ought to be regarded as a successful and quite comprehensive proposal for rethinking Constitutional law in general and the selection and operation of Supreme Court Justices in particular. It is written with sparkle and passion and with a lucidity rare in works about Constitutional hermeneutics. It deserves to be widely read, debated, and improved upon by other scholars and by Gerber himself. Indeed, *To Secure These Rights* ought to attract the attention not only of scholars of constitutional law, but of those of history, politics, and moral philosophy. Perhaps it will even do its part in bringing us back the kind of synthesis of those fields that the framers enjoyed, and without which interpretation faithful to the original understanding cannot take place.

LEARNED HAND: THE MAN AND THE JUDGE. By Gerald Gunther.¹ New York: Alfred A. Knopf. 1994. Pp. ix, 818. Cloth, \$39.00; Paper, \$19.95.

*John Wertheimer*²

Like countless other students, I got my first serious exposure to the intricacies of American constitutionalism through the pages of Gerald Gunther's *Constitutional Law*, the leading casebook in the field. At the time, I thought it strange that, amid

13. Made more ironic here because I did, and attempted to derive supra-constitutional principles, and apply them to present problems in much the same way that Gerber did. See Presser, *Recapturing the Constitution* (cited in note 4). He does a much better job than I did, however, at clearly laying out a coherent and widespread understanding of his particular brand of extra-constitutional interpretive guides, tackles a wider field of contemporary problems, and offers a more expansive set of remedies for containing judicial arbitrariness. (pp. 134-61)

1. Professor of Constitutional Law, Stanford University.
2. Assistant Professor of History, Davidson College.