

Reviews

Taking Justice Thomas Seriously

SCOTT DOUGLAS GERBER

FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS

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PERHAPS MORE than for any Supreme Court Justice since the great Chief Justice John Marshall himself, Justice Clarence Thomas's nomination to and tenure on the high Court has spawned a cottage industry of scholarly (and not-so-scholarly) commentary, most of it about the incendiary allegations raised during the Justice's confirmation hearing. Scott Gerber's book, *First*

Principles: The Jurisprudence of Clarence Thomas, is a refreshing new entry into the field, in which Gerber attempts to move beyond the vitriol that has characterized much of the "scholarly" commentary and at least begin to take the Justice's jurisprudence seriously.¹ Although Gerber's own legal realist streak often prevents him from seeing the full depth of Justice Thomas's jurisprudence, the very

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¹ Gerber himself begins his book with a rehash of the Anita Hill phase of the confirmation hearing and the subsequent, politically-charged commentary, despite his concluding remark that "it is time to move beyond Anita Hill." (p. 199) Gerber adds nothing new to the Thomas-Hill debate. He does not even take a position on the subject, something which partisans on either side of the lingering controversy will undoubtedly find frustrating. To be fair, though, adding to the debate or resolving the controversy is not Gerber's purpose. Rather, he uses the politically-polarized nature of the commentary surrounding that debate to introduce the principal thesis of his book – that all law, including that which manifests itself by way of Supreme Court opinions, is merely politics (excepting Gerber's own legal interpretations, of course). Justice Thomas's opinions, as well as the critiques of them by commentators from opposite sides of the political spectrum, are no exception, according to Gerber. Readers who have had enough of the Thomas-Hill controversy or of the legal realist thesis

fact that Gerber has made the attempt elevates the debate and thereby does a great service to Justice Thomas, the Court, and the country.

Before turning to the jurisprudence Justice Thomas has begun to develop since his elevation to the high Court, though, Gerber recounts the origins of that jurisprudence. And it is here that Gerber makes one of the most astute observations of the entire book – that Thomas’s “classical liberal” originalism differs in significant respects from the “Borkean conservative” originalism often attributed to Chief Justice William Rehnquist and Justice Antonin Scalia (not to mention Robert Bork himself). It is a jurisprudence, notes Gerber, that seeks to uncover (and recover) the original principles rather than merely the original practice of the Founders. And it is a jurisprudence rooted in the self-evident truths of human nature and the inalienable rights derived from that nature, as articulated in the Declaration of Independence. (pp. 103-04) Justice Thomas’s unmistakable devotion to this “liberal originalist” project is perhaps best evidenced in the following passage from his short but powerful concurring opinion in *Adarand Constructors, Inc. v. Peña*, which Gerber describes as “an opinion rich in meaning” (p. 101):

There can be no doubt that the paternalism that appears to lie at the heart of this [racial set-aside] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”).

With the stark citation to the Declaration of

Independence, Justice Thomas left no doubt where he stood in the ongoing debate about the role the Declaration should play in constitutional interpretation, and thus left no doubt that his “originalism” (unlike that which Gerber and others attribute to Chief Justice Rehnquist and Justice Scalia) was not limited to the precepts of positive law.

For Gerber, this alone is enough to rebut the critics’ view of Thomas as merely a shadow vote for Justice Scalia. But there is much more. In significant case after significant case, in widely varying bodies of law, Justice Thomas has written separately and often alone, either in concurrence or in dissent, to articulate his “liberal originalist” view of constitutional interpretation. While Thomas’s *vote* was nearly always aligned with that of Justice Scalia and Chief Justice Rehnquist, his *reasoning* was often quite different, according to Gerber. Where Court commentators – liberal critics and conservative defenders alike – have seen only votes aligned with the conservative block on the Court, Gerber sees, rightly, the articulation of a profound and far-reaching jurisprudence.

Gerber’s signal insight is short-lived, however, as he quickly returns to the principal thesis of the book, canvassing the commentary about Justice Thomas’s opinions to demonstrate that one’s view of Thomas’s opinions is a function of one’s politics – liberal commentators find that Thomas’s opinions are “despicable” or “bizarre,” while conservative commentators of course find them “admirable.” Gerber is so absorbed with this legal realist thesis that in most cases he does not even bother to address whether one or the other side has the better of the argument. On the *Adarand* opinion, for example, the most Gerber can muster is that one liberal com-

Gerber introduces by it might be tempted to quit the book before the close of the first chapter. It is a temptation that should be strongly resisted, however, for Gerber does indeed “get beyond” Anita Hill, and the book’s legal realist shortcomings are easily outweighed by Gerber’s sincere (if often misguided) effort to take seriously the constitutional jurisprudence of Justice Thomas.

mentator failed to recognize that Justice Thomas's originalism was not the "specific originalism" of Chief Justice Rehnquist and Justice Scalia. But his conclusion is merely that, "[i]n short, [Terry] Eastland on the right, like [Angela] Davis on the left, assessed Justice Thomas's *Adarand* performance in purely partisan terms." (p. 104)

In the few cases when Gerber does acknowledge that Justice Thomas has the better argument, Gerber is quick to reassert his own neutrality by pointing out that the opposing view is equally correct, if on a different level. After his canvass of views on colorblind constitutionalism, for example, Gerber concedes that "At the level of regime principle – the *ought* part – Justice Thomas has the better argument" on the issue of a colorblind constitution. But Gerber also praises the critical race theorists for being correct in pointing out that racism still exists and that colorblindness won't work. (p. 111) In other words, Gerber contends that there is a difference between what *is* and what *ought* to be, and Justice Thomas only has the better argument on the latter.

Gerber's discussion in Chapter 4 of Justice Thomas's controversial opinion in *Hudson v. McMillian* follows a similar path. *Hudson* is the case in which Justice Thomas argued in dissent that prisoners beaten by prison guards do not have a cause of action under the Eighth Amendment because beatings by prison guards, while tortious, were not part of the "punishment" governed by the Eighth Amendment's proscription against "cruel and unusual *punishments*." After summarizing the hateful commentary about the opinion, Gerber concedes that Justice Thomas's opinion was a "correct" reading of the constitutional text and history, but he then contends that Justice Thomas's strict interpretation of the Eighth Amendment was not the best way to interpret the amendment. Gerber goes so far as to characterize Justice Thomas's opinion as "formalistic," by which he apparently means

that it is an example of Justice Thomas's lapse into the conservative originalist camp rather than the classical liberal originalism Gerber had earlier ascribed to the Justice. (p. 128)

Gerber does not explain why he thinks the *Hudson* opinion was formalistic other than that he personally finds a more expansive, and concededly unhistorical, reading of the amendment to be more appealing. By this, Gerber demonstrates that his own definition of "classical liberal originalism" is something more akin to the distinctly modern, what-seems-fair-to-me view of "natural rights" jurisprudence espoused by the late Justice William Brennan than the Enlightenment view of natural rights espoused by the Framers, which Justice Thomas is seeking to recover. Indeed, one gets the distinct impression here and elsewhere that Gerber's classification of the Justice's opinions into one or the other of the two originalist camps is more a reflection of whether or not Gerber agrees with the opinion than any inconsistency in Justice Thomas's own thought.

Gerber's discussion of the *Hudson* opinion and his companion discussions of Justice Thomas's other criminal rights opinions is nevertheless useful, even praiseworthy. He at least begins to take Justice Thomas's opinions seriously, successfully rebutting the claim that Justice Thomas is little more than Justice Scalia's loyal apprentice. Gerber points out that the *Hudson* opinion, for example, reflects a theory about the Eighth Amendment that simply cannot be legitimately dismissed by *ad hominem* attacks upon Justice Thomas's character. He describes as "particularly offensive" those attacks that mischaracterized the Justice's opinion, and he does a fine job describing just what it was that Justice Thomas wrote in the opinion, and what he did not write. In this, he gets beyond the *ad hominem* attacks and opens the door for an even deeper consideration of the Justice's views. It is a consideration that I

believe will in time yield the assessment that Justice Thomas's opinion is more than just formalistically correct.

Gerber next turns to Justice Thomas's concurring opinion in *Rosenberger v. University of Virginia*, a landmark case in which the Court, by a 5-4 majority, held that the provision of funds by a state university to a student-run religious publication on terms available to other student publications would not violate the First Amendment's prohibition against the establishment of religion. As with the *Hudson* opinion, Gerber disagrees with Justice Thomas's opinion and therefore characterizes it as one that is conservative originalist rather than classical liberal originalist. And, after giving his usual thematic summary – "conservative commentators applauded [Justice Thomas's] originalist concurring opinion in the case, while liberal commentators castigated it" – Gerber weakly concedes that the Justice's position may actually have been the more consistent with actual practice at the time of the Founding. (pp. 144, 147)

But Gerber then boldly asserts that even if Justice Thomas's position was correct as a matter of *practice*, the opinion is simply wrong as a matter of *first principles*: "A liberal originalist would have decided the case the other way," writes Gerber, because "the principle at the heart of the Establishment Clause is the natural right to freedom of conscience." (p. 147) Perhaps nowhere else in the book is Gerber's decidedly anachronistic view of original "principle" more mistaken than it is in this assertion, and nowhere is the problem with his facile classification of Justice Thomas's opinions into one or the other of Gerber's two originalist camps more evident.

The text of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." (emphasis added). As Gerber rightly acknowledges, the prohibition against established religions was not applied to

the States until 1947, and then by way of Court decision rather than constitutional amendment. Moreover, as the legislative history of the Establishment Clause makes clear, the phrase, "respecting an establishment of religion" was adopted in place of the phrase originally proposed, "establishing religion," to prohibit the national government not only from establishing a national religion but from otherwise interfering with existing state established religions as well. Thus, the principle at the heart of the clause, as least as the Framers understood it, is, if anything, a federalism principle rather than a freedom of conscience principle, a principle that Gerber himself later in the book claims was "made central to the American system of government" by the Founders. (p. 184)

To be sure, many of the Founders subscribed to Locke's views on toleration, as Gerber asserts, (p. 147), and freedom of religion is one of the most significant accomplishments of the Founding. But many, if not most, of the Founders did not consider toleration to be incompatible with state established religions, and no state, not even Virginia (where Locke's views found their fullest expression) had such a strict view of Jefferson's "wall of separation between church and state" as to preclude state support of religion generally. Jefferson himself proposed that religious seminaries be established on the grounds of the University of Virginia (albeit on the periphery, and run by the various sects independent of the University). And although almost every state had language in its own constitution acknowledging the "freedom of conscience" principle described by Gerber, several of those states also had established religions. Massachusetts, for example, had an established religion until 1836, despite language in its 1780 Constitution providing that "no Subject shall be hurt, molested, or restrained, in his person, Liberty, or Estate, for worshiping God in the manner and season most agreeable to the

Dictates of his own conscience, or for his religious profession or sentiments.” Part I, Art. II.² Gerber’s anachronistic reading of the Establishment Clause therefore not only ignores the federalism principle, it fails to see how utterly radical the notion that the Establishment Clause applied to the States via incorporation really was, for such a reading actually mandated the very thing the First Amendment was designed to forbid, namely, interference with state established religions.

Which brings me to my point about the problems with Gerber’s 2-camp classification of Justice Thomas’s opinions. The true “principle” of the Establishment Clause can be gleaned from its text, and from the legislative history and contemporaneous practice that places the text in context. That is not to say that practice was never at odds with principle, of course. Slavery, protected in the Constitution yet fundamentally at odds with the equality principle articulated in the Declaration of Independence, is the most notorious example. But it is simplistic to contend, as Gerber does, that Justice Thomas’s resort to history and practice makes the Justice a Borkean originalist or a legal positivist. (pp. 146-47, 193) Gerber will have to look deeper if he wants to fully understand the jurisprudence of Clarence Thomas, but then, he will not find in that

jurisprudence the reflection of Justice Brennan he would like to see.³

Although Gerber simply misses the federalism principle evident in the Establishment Clause, he demonstrates a deep misunderstanding of “our federalism” in his discussion – mischaracterization, really – of Justice Thomas’s dissent in the Term Limits case. Gerber accuses Justice Thomas (and Ronald Reagan, for good measure) of following a Calhounian “compact theory” of federalism (although he doesn’t actually mention Calhoun). (pp. 165, 168-69) As a result, Gerber places the Justice’s opinion in the conservative originalist camp, which, in the now-familiar methodology of Gerber’s book, means for Gerber that Justice Thomas’s opinion was necessarily wrong as a matter of liberal originalist principle. Indeed, after making the *de rigueur* bow to his legal realist theme (noting that the *Term Limits* “commentary – like the opinions themselves – was tainted by the political preferences of the commentators themselves”), Gerber cites Kathleen Sullivan’s contention that Justices Thomas and John Paul Stevens “battled to a draw” on the historical evidence as further proof that “conservative originalism is a deeply flawed methodology.” Either everyone “is simply paying lip service to history, or history is indeterminate on many significant

2 The fact that many of the Founders did not see toleration and state support for religion as incompatible also gives the lie to Gerber’s gratuitous and false accusation that Michael McConnell essentially repudiated his own views on the subject by defending the position of his client, the student publication *Wide Awake*. (p. 137 n*). Gerber obviously does not understand Professor McConnell’s views very well. McConnell was undoubtedly asked to represent *Wide Awake* because of his views on the Establishment Clause (which are fully in accord with the position he took in the case on behalf of *Wide Awake*), not in spite of them. Compare Petitioner’s Brief, *Rosenberger v. University of Virginia*, with Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992), and Michael McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

3 One particularly germane example of Gerber’s failure to appreciate the depth and nuances of Justice Thomas’s opinions is Gerber’s claim that, in a concurring opinion in *McIntyre v. Ohio Elections Commission*, the Justice “missed” the irony of referring to Justice Brennan as an originalist. (p. 150) The much more likely scenario is that Gerber missed the point, and that Justice Thomas deliberately cited Brennan to demonstrate that even the most unoriginalist of jurists was willing to recognize the methodological validity of originalism, at least when doing so furthered the jurist’s immediate purpose.

questions of constitutional law (such as term limits),” writes Gerber. In his view, the Justices and commentators were simply “picking and choosing from the historical record ... to find support for a preconceived policy preference,” for “[i]t strains credibility to believe that it was merely a coincidence that history *always* led to the policy result the particular justice or commentator favored.” (pp. 172, 175)⁴

Of course, Gerber does not consider that use of originalist history is more likely to be mere lip service when utilized by critics of originalism (including Justice Stevens, whom Gerber acknowledges as one of the staunchest critics of originalism), nor does he seem to appreciate that jurisprudential consistency does not necessarily mean that one is merely using originalism selectively to reach a preferred policy result. It should come as no surprise, for example, that Justice Thomas’s originalism generally, though not always, coincides with what Gerber believes are the Justice’s policy preferences, because those policy preferences were molded by a deep study of the natural rights political philosophy of the Founders, as Gerber had earlier in the book recognized. (p. 44) Perhaps Gerber’s next book will rethink this accusation, at least as it applies to the consistently originalist Justice Thomas, in light of the Justice’s opinion for the Court last year in *United States v. Bajakajian*, 524 U.S. 321 (1998), but I doubt it. In *Bajakajian*, Justice Thomas (together with the Court’s traditionally “liberal” members, Justices Stevens, Souter, Ginsburg, and Breyer) rejected the Govern-

ment’s seizure of \$357,000 in lawfully-obtained currency that was being transported out of the country without the requisite filing of a currency report, as contrary to the Excessive Fines Clause of the Eighth Amendment. That holding cannot be reconciled with what Gerber apparently believes Justice Thomas’s personal policy preferences to be, but Gerber is simply too wedded to his legal realist thesis to see that Justice Thomas, at least, takes originalism very seriously, no matter where it leads.

Instead, Gerber uses the claim that history is indeterminate to argue again that his liberal originalism is a better theory than the conservative originalism he claims Justice Thomas espouses in the *Term Limits* dissent. Although Gerber asks the right question – What is the principle of federalism? – he gives the wrong answer, and as a result fails to see that Justice Thomas’s opinion is itself the more consistent with the original principles espoused by the Founders. Gerber’s understanding of American federalism is essentially a supremacy clause understanding, or what Gerber describes, oxymorically, as a “national theory of federalism.” (p. 164) It is a flawed understanding, although it is not without its adherents on the Supreme Court (see, for example, Justice Anthony Kennedy’s concurring opinion in *Term Limits*).⁵ For starters, Gerber misunderstands, or mischaracterizes, the Founding-era controversy over the national bank as pitting “two competing conceptions of federalism against each other: The compact theory of federalism advanced by

4 Gerber’s canvass of the commentary on the *Term Limits* case apparently did not include my own article on the subject. See John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution’s Qualifications Clauses*, 73 DENVER U. L. REV. 89 (1995). Gerber would undoubtedly discount my conclusion that the Constitution does not prohibit the States from imposing term limits on their own representatives to Congress, as just another conservative’s policy preference. But he would be hard pressed to accuse me of picking and choosing among the historical evidence to support my position, because roughly half the article is devoted to addressing the historical evidence relied upon by the *opponents* of term limits.

5 Gerber retreats from this position in his discussion of the *Lopez* decision, however. See p. 185.

Jefferson, which posits that the national government was brought into existence by a compact among sovereign states; and the national theory of federalism advanced by Hamilton, which identifies the people of the United States, collectively, as the source of the legitimate powers of any and all governments.” (p. 164) The national bank controversy was not about the *source* of power at all, but about the *nature* of limited government and delegated powers, whether those powers were delegated from a national people or the people of the several states. This fundamental misunderstanding carries through the remainder of Gerber’s discussion of the *Term Limits* case.

Gerber relies upon a passage in *Federalist* 39, for example, in which James Madison contended that the House of Representatives was an example of the national, not federal principle of the Constitution. But Gerber ignores the numerous ways in which the Constitution itself ties Representatives to the particular states from which they are elected. Article I, section 2, clause 1, for example, provides that members of the House are to be chosen by the People of the several States, not by the undifferentiated people of the whole nation. The third clause of the same section apportions representatives “among the several States” based on the population in each state, and guarantees that each State will have at least one Representative no matter what its population. Instead, Gerber concludes from *Federalist* 39 that “Justice Thomas was *incorrect* to maintain, as he did in *Term Limits*, that what the Framers meant in the Constitution by ‘We the People’ was really ‘We the States.’” Gerber is so certain of his position that “We the People” means an undifferentiated national people that he does not even believe there can be any debate on the subject: “If we can be certain of anything about the Constitution,” he writes, “we can be certain of that.” (p. 187)

Apparently Gerber is engaging in a little historical picking and choosing of his own to

arrive at his position. He ignores, for example, a passage earlier in *Federalist* 39 that is a direct rebuttal to his position, and a direct confirmation of Justice Thomas’s position (correctly understood, that is). In that passage, Madison described the ratification process as follows:

[A]ssent and ratification [of the Constitution] is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, – the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act.

Justice Thomas’s opinion begins with a restatement of this very view: “The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.” 514 U.S. at 846. Although Justice Thomas’s position, like Madison’s, is not nationalist, neither is it a Calhounian compact position, as Gerber claims. Indeed, Justice Thomas expressly rejects the state compact theory. See 514 U.S. at 849 n.2 (noting, with approval, that Chief Justice John Marshall had in *McCulloch v. Maryland* rejected the contention that the Constitution was “a compact between the States” by virtue of its ratification by the people of the States). Justice Thomas’s position in *Term Limits* is different in kind from the state compact theory, yet Gerber fails even to acknowledge the possibility of another, principled position on the subject of federalism.

Perhaps the best description of the true, principled nature of American federalism is found in a speech by James Wilson during the Pennsylvania ratifying convention, in which Wilson argued that the ultimate sovereign was the people themselves, not the governments, and that the people have a right to delegate

such powers to a single government or to several governments as to them shall seem most likely to effect their safety and happiness:

I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.

Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people, and as an illustration of it, I beg to read a few words from the Declaration of Independence⁶

Wilson, like Justice Thomas, is articulating the very kind of principled position for which Gerber claims to be contending, and even relies on the same source for that principle upon which Gerber himself claims to rely – the Declaration of Independence. Gerber’s dispute with Justice Thomas is therefore about the proper understanding of the principle at issue. Gerber does a disservice to his own attempt to elevate principle over mere conventionalism by failing to take Justice Thomas’s articulation of the principle at issue seriously.

Finally, Gerber turns to the other major federalism case decided during Justice Thomas’s first five years on the Court, *United States v.*

Lopez, and although he believes Justice Thomas’s concurring opinion in this case is equally an example of conservative originalism, in this instance Gerber believes it nevertheless is in accord with his own, liberal originalist views.

Gerber disparages Justice Thomas’s (and the pre-New Deal Court’s) distinction between “commerce” and “manufacturing,” for example, as a “formalistic” distinction and therefore another example of Justice Thomas’s conservative originalism. Gerber and the New Dealers instead read the Commerce Clause as not just a power to regulate “commerce” among the States, but to regulate the economy generally or, to use Gerber’s words, to regulate anything that is “commercial.” (p. 179) (Justice Breyer, in his dissenting opinion in *Lopez*, even goes so far as to call the distinction between commercial and non-commercial activity itself “formalistic.” (p. 180)).

As with his discussion of the Establishment Clause, Gerber’s reading of the Commerce Clause is anachronistic. It improperly reads into the Constitution’s words a distinctly 20th century gloss, and the 20th century meaning of the word “commercial” is much broader than the 18th century meaning of the word “commerce.” That may be “conservative originalism,” but it is also the path for discovering the original principle at issue. For a careful focus on the meaning of the words chosen by the Founders reveals a clause in furtherance of the federalism principle, by which matters such as interstate trade that required national regulation were within the powers delegated to the national government, but that everything else, such as the internal police powers of the States, were not within the national government’s province.

Fundamentally, the difference between Gerber and the New Dealers, on the one

⁶ James Wilson, Speech to the Pennsylvania Ratifying Convention, Dec. 4, 1787 (reprinted in Philip B. Kurland & Ralph Lerner, 1 *The Founders’ Constitution* 61, 62 (Chicago 1987)).

hand, and Justice Thomas, on the other, is no mere formalism, but rather a dispute which goes to the heart of whether Congress is exercising powers not granted to it, in violation of one of the most fundamental principles articulated in the Declaration (to which Gerber himself claims to be so devoted), namely, that the only legitimate government is one that derives its just powers from the consent of the governed. A government that ignores the limitations on the powers that have been delegated to it by the sovereign people operates outside that consent, and is therefore illegitimate.

In the end, Gerber's failure to see a reaffirmation of original principle at work in Justice Thomas's jurisprudence demonstrates that Gerber's classification scheme does not work. Justice Thomas's use of strict textual interpretation, of legislative history, and of founding-era practice is not proof of the Justice's supposed positivist bent; it is rather a means to discover the original principle at issue in order to give effect to that principle. In fact, Gerber himself employs just such a methodology in support of his claim that the decision in *Lopez* is correct as a matter of his "liberal originalism." If Gerber spent more time trying really to understand the jurisprudence of Justice Thomas, which is the purported purpose of the book, and less time trying to advance his own legal realist agenda of debunking original-

ism, he might find that his own understanding of the principles advanced by the Founders could be greatly enhanced.



Given the harshness of my treatment of Gerber's book, one might question my opening assertion that the temptation to quit this book after its first chapter foray into the Anita Hill controversy should be resisted. But I stand by that assertion. Although I think Gerber is wrong in many respects, from his overall legal realist theme to his overly simplistic classification of Justice Thomas's opinions as either classical liberal originalism or Borkean conservative originalism, Gerber's is by far the most serious treatment of Justice Thomas's jurisprudence yet written. Merely taking issue with Justice Thomas's jurisprudence on substantive grounds significantly elevates the level of discourse. Thus, Gerber's book accomplishes its stated goal of getting beyond Anita Hill, and it also gets beyond the *ad hominem* attacks that have been commonplace in most of the prior commentary about Justice Thomas's work on the Court, even if Gerber fails to see the full depth and coherence of Justice Thomas's thought. The book is therefore a must read for serious constitutional scholars, but it is a read that must be undertaken with a skeptical eye. 