

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.<sup>13</sup> 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.<sup>1</sup> New York: Alfred A. Knopf. 1994. Pp. ix, 818. Cloth, \$39.00; Paper, \$19.95.

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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

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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)

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the unending parade of precedent-setting Supreme Court opinions (they appear in my memory, furiously underlined and maddeningly dense), the book included a First Amendment decision that, besides coming from a lowly federal *district* court, appeared to set no precedent whatsoever, for superior tribunals immediately rejected its speech-protective reasoning. The decision in question was *Masses Publishing Co. v. Patten*;<sup>3</sup> its author was a federal judge memorably named Learned Hand.

Today, Professor Gunther's decision to include *Masses* in his casebook seems less mysterious. For one thing, Hand's elegant First Amendment reasoning blazed a trail that, though not followed at the time, was picked up decades later by the Warren Court. For another thing, it happens that Gunther, in 1953-54, served as Learned Hand's law clerk. By including *Masses* in his casebook, thus, Gunther was at once mourning a legal path not soon enough taken and celebrating the memory of his mentor, Learned Hand, one of the greatest judges in American history. In *Learned Hand: The Man and the Judge*, Gunther's masterful biography, this celebration continues.

Gunther's weighty book follows its subject from cradle to grave, leaving few stones unturned along the way. It begins in 1872, the year of Billings Learned Hand's birth to a respectable Albany family. At fourteen, young Learned experienced the death of his father, a successful appellate lawyer; for the rest of his life, Hand would despair of ever approaching his father's professional stature—even after he had far surpassed it. Gunther traces both Hand's admirable humility and his sometimes paralyzing self-doubt to this source.

Learned Hand attended Harvard College, which affected him both personally and intellectually. His exclusion from Harvard's elite social clubs reinforced feelings of insecurity. (One productive byproduct of this exclusion, Gunther suggests, may have been Hand's lifelong opposition to discrimination, including that practiced by his alma mater against Jews.) Meanwhile, Harvard's brilliant philosophy faculty, above all George Santayana, William James, and Josiah Royce, validated Learned's emerging intellectual skepticism and inspired in him a spirit of inquiry and open-mindedness that would stay with him for the rest of his life.

So inspired was Learned by his philosophy professors that he seriously considered graduate study and a career in that field.

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3. 244 F. 535 (S.D.N.Y. 1917)

His continued lack of confidence, however, left him vulnerable to family pressures to abandon his dream and, like his father, grandfather, and two uncles before him, study law. In his twenty-first fall, therefore, Hand turned his back on philosophy and, somewhat grudgingly, entered the Harvard Law School.

To his surprise, Hand took readily to legal study. As always, he excelled in his classes. Less expectedly, he found actual inspiration in the teachings of his best instructors, especially Professor James Bradley Thayer, an impressive thinker whose staunch opposition to judicial activism became a torch that Hand himself would carry long after Thayer's death in 1902.

Graduation from law school in 1896 sent Learned out into the world for the first time. He did not fare well. Hand's reflective nature, so well matched to legal study, was utterly unsuited to legal practice. He tried hard to establish himself as a lawyer, first in Albany and then in New York City, but so modest was his success that it registered in his own mind as failure. Happily, Hand found two interests outside his profession to lift his spirits during those cheerless years: a growing involvement in the world of social reform, and Frances Fincke, a bright, charming, Bryn Mawr graduate whom Hand courted and wed. Gunther's sensitive discussion of Learned and Frances's imperfect relationship illuminates both the day's conventions and the Hands themselves; it adds richly to the book. (Indeed, I felt a real sense of loss when Frances slipped almost entirely from view after Learned's judicial career took off; Learned, Gunther shows, felt this loss more deeply still.) Having thus filled in the background, Gunther then sketches Hand as most famously remembered: robed in black, imposing brow knit, gavel in hand. Learned first struck this pose in 1909, when President William Howard Taft appointed him to the federal bench; and in that pose he would remain—serving first as a federal district judge and then, after 1924, as a member of the Court of Appeals for the Second Circuit—for an impressive fifty unbroken years. Hand's exceptional performance won for him every conceivable mark of judicial distinction save one: elevation to the United States Supreme Court. Despite frequent rumors that he was next in line, Hand, for reasons painstakingly detailed by Gunther, never made it to the nation's highest bench.

In Gunther's extensive discussion of Hand's judicial career, four principal themes emerge. First, throughout his time on the bench, Hand wrestled with a dilemma faced by all politically engaged judges: how to balance the imperative of judicial impartial-

ity against the urge to participate actively in public affairs. Although never drawn to partisan politics, Hand avidly followed public controversies. At times, his passion overcame him and swept him into action. This was especially true early in his judicial career, as in 1912, when he became an important adviser to Theodore Roosevelt's "Bull Moose" presidential campaign, even while occupying a place on the federal bench. Although Hand disciplined himself more effectively as he matured, he never fully reconciled his native impulse to engage in public controversies with his judicial obligation to stay above them.

Gunther's second theme involves Hand's unswerving commitment to free speech. Having learned from his undergraduate philosophy studies to distrust absolutist dogma and to value open inquiry, Judge Hand sought throughout his career to expand the range of permissible expression as much as possible within the confines of existing law. From the aforementioned *Masses* opinion of 1917, wherein Hand bravely defended the right of leftist dissenters during World War I, to his opposition to McCarthyism some three-and-a-half decades later, Learned Hand, Gunther shows, compiled an impressive record as one of the century's true champions of free expression.

Third, Gunther details Hand's firm commitment to judicial restraint. From the Gilded Age through the Great Depression, American courts were notorious for striking down popular reform statutes on vague Constitutional grounds. Hand utterly opposed such interference with the legislative will. Indeed, in five decades on the federal bench, he voted only twice to void statutes for constitutional reasons. And it mattered not whose ox was being gored. Up through the New Deal, Hand's opposition to judicial activism made him a liberal, for the laws most often struck down in those years were progressive social reforms such as maximum-hour laws for workers.<sup>4</sup> Subsequently, however, when courts turned their activist powers away from conservative goals and toward liberal ones (as happened, most famously, in *Brown v. Board of Education*<sup>5</sup>), Hand's continued advocacy of judicial restraint left him at odds with one of the main currents of post-war legal culture and damaged his standing among liberals.

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4. See, most infamously, *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a New York law banning the employment of bakers for more than 10 hours per day or 60 hours per week was unconstitutional for violating the due process clause of the 14th Amendment). Hand wrote a stinging response to the *Lochner* decision: *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495 (1908).

5. 347 U.S. 483 (1954). For Hand's doubts regarding *Brown*, see Learned Hand, *The Bill of Rights* (Harvard U. Press, 1958).

Gunther's first three themes, thus, concern Judge Hand's approach to big issues: the balance between law and politics, the limits of free expression, and the legitimacy of judicial review in the American constitutional system. Theme number four, in contrast, concerns Hand's approach to the sorts of little issues that came before his bench daily. Nowhere, Gunther shows, did the judge loom larger. Like Mozart and music, Learned Hand, by intellect and temperament, was perfectly suited to the art of judging. His flexible mind sought out all perspectives on an issue before settling on a decision. Possessed of an extraordinary capacity for mastering technical detail, Hand repeatedly untangled even the most complex fact situations to lay bare the essential legal issues below. In the same manner, his tireless labors enabled him to locate hidden complexities in cases that others wrongly saw as open-and-shut. To top it all, Hand was a literary craftsman who wrote with clarity and elegance.

The passages in which Gunther brings Hand's judicial labors to life are some of the best in the book. They show Judge Hand rolling up his sleeves, spitting on his palms, and wrestling one legal conundrum after another to the mat. In one typical passage, Gunther sketches Hand bent over past tide tables and weather reports, drawing diagram after diagram, determined to get to the bottom of a disputed ship collision. (p. 307) In another passage, we see Hand sitting alone through a specially scheduled theatrical performance, testing with his own eyes allegations of copyright infringement. (p. 319) Little wonder, then, that Hand's decisions impressed the U.S. Supreme Court as "the best Federal Court opinions that come before us for review." (p. 272)

*Learned Hand* is an impressive book. To prepare it, Gunther cast a research net both broad of reach and fine of weave. In this net, he hauled in literally thousands of court opinions; tens of thousands of letters, manuscripts, and speeches; and several illuminating interviews. One example of Gunther's research mastery will suffice: while discussing the college days of Frances Fincke, the woman who would later marry Learned Hand, Gunther quotes revealingly from the diary of Mildred Minturn, one of Frances's Bryn Mawr housemates. Where did Gunther unearth this research gem? Simple: he found it in Fordingbridge, Hampshire, England, in the possession of his biographical subject's wife's college housemate's daughter! (p. 90)

The extensiveness of Gunther's research enables him to reward his readers steadily with fascinating tidbits. For instance,

although most readers will be aware that Theodore Roosevelt's 1912 presidential campaign bore the intellectual markings of Herbert Croly's *The Promise of American Life*,<sup>6</sup> how many know that it was Learned Hand who first commended Croly's book to TR? How many will know that Hand was a pioneer in the development of judicial clerkships? That Felix Frankfurter was married (by Benjamin Cardozo, no less) in Hand's chambers? That Hand, late in life, developed a warm friendship with the famously reclusive J.D. Salinger? Well, it's all true, and Gunther has the footnotes to prove it.

Prodigious research, however, is but one of several strengths that Gunther brings to his task. Gunther's own legal expertise is another; it makes him a sure-footed guide to the sometimes tricky legal and constitutional terrain that Judge Hand himself traversed. Furthermore, Gunther's experience as Hand's law clerk enables him to escort his readers directly into Hand's chambers. "In writing his memos and opinions," Gunther reports, "Hand worked with a legal-size pad of yellow paper, which he propped on a board resting on his knees or set on his desk." Occasionally, Hand would lay down his pen and break into song, filling his chambers with "old Calvinist hymns, sea chanteys, and G[ilbert] & S[ullivan] numbers." (pp. 290, 415) Who but a former law clerk would know these wonderful details? (Of course, intimacy presents dangers as well as advantages to the biographer. The possibility of bias is always present when people write about revered mentors. To Gunther's credit, however, only occasionally—as when he seeks, persuasively though still defensively, to blame Hand's opposition to *Brown v. Board of Education* on the unfortunate influence of Felix Frankfurter—does the author seem to cover up for his former boss.)

Finally, *Learned Hand* excels precisely where one might expect a book by a law professor about a judge to fail: when dealing with non-legal matters. Gunther moves confidently beyond Hand's legal career in two directions. First, he zooms outward to consider broader issues of twentieth-century history. Because Hand was an active correspondent and a close follower of world events, Gunther is able to illuminate both the judge and the march of twentieth-century history by showing how the former wrote about the latter. In this manner, Gunther provides interesting perspectives on issues ranging from the Sacco-Vanzetti case and Franklin D. Roosevelt's court-packing scheme (Hand

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6. Herbert David Croly, *The Promise of American Life* (Macmillan Co., 1909).

was not particularly outraged by either) to birth control and American diplomatic internationalism (Hand favored both).

Besides moving outward beyond Hand's legal career, Gunther moves inward to reveal Learned Hand, the man. He does this with a compassionate understanding of what it means to be human, enabling him to paint a nuanced, humane portrait of his subject. He describes Hand's imposing strengths without making him appear invincible, and reveals Hand's less abundant but still striking weaknesses without making him seem pitiful.

The result is the most fully realized biography of this impressive man yet written. Indeed, the fullness and authoritativeness of Gerald Gunther's account of the life of Learned Hand might never be surpassed.

No reader will deny that *Learned Hand* is an admirably thorough biography; ungenerous readers, however, might come to have mixed feelings about this attribute. All facets of Hand's life seem to receive the same meticulous attention. Hand's temporary falling out with his friend Walter Lippmann becomes in Gunther's book half a chapter; Hand's failure to be nominated to the Supreme Court becomes two chapters. But perhaps a narrative that occasionally runs low on steam is inevitable when a biographer as conscientious as Gunther writes an 800-page account of a subject whose wide paper trail covered nine decades and whose professional greatness was as undramatic as was Hand's. Perhaps, too, lengthy detail is the unavoidable price of authoritativeness.

Ungenerous readers might also conclude that the historical implications of the book are limited. Some other judicial biographies—Leonard Levy on Chief Justice Shaw comes to mind<sup>7</sup>—make strong arguments regarding eras in legal history, arguments that easily can inform both classroom teaching and scholarly debate. In contrast, although Gunther's book does contribute effectively to some historiographical controversies—why Justice Oliver Wendell Holmes, Jr., for instance, converted from opposition to celebration of free speech, or why Hand and Lippmann

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7. Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Harvard U. Press, 1957). It should be noted that Levy's biography of Shaw is much less comprehensive than Gunther's biography of Hand. Unlike Gunther, for instance, Levy focuses almost exclusively on his subject's judicial output, paying but scant attention to his life off the bench. Furthermore, even in analyzing Shaw's legal output, Levy makes no claims of comprehensiveness, opting, by his own admission, for "depth on a few matters rather than breadth of coverage." (5) Nonetheless, or perhaps consequently, Levy's historical arguments have much more bite and are much more broadly resonant than Gunther's.

experienced their discord—these controversies are not major ones. Consequently, Gunther's book works better as a human study than as a way of helping us to rethink legal history.

But if this is a shortcoming—as I am not entirely sure that it need be—it is one that suggests the continuing influence of Learned Hand on his former clerk. After all, just as Judge Hand, in deciding court cases, deferred to precedent, declined to impose his political preferences, and practiced judicial restraint, so Professor Gunther, in writing about Hand's life, defers to the historical record, declines to impose his subjective interpretations, and practices what might be called biographical restraint.

Indeed, interpretive temperance is but one among several attributes shared by Judge Hand and his biographer. Undogmatic liberalism, attention to detail, even-handedness, supreme professionalism, intellectual integrity: it is a tribute to Gerald Gunther that these characteristics of Learned Hand, the man, also characterize *Learned Hand*, the book. The judge's life, and this fine book, suggest two findings: first, that if our system is to work well, it demands the contributions of people who, like Learned Hand, work hard, are fair minded, and excel at what they do; and second, that the rest of us owe a debt of appreciation to such people for their contributions, no matter how unglamorous. We, the beneficiaries both of Learned Hand's legal craftsmanship and of Gerald Gunther's meticulous scholarship, owe double.