1994

Book Review of The Constitution Besieged, by Howard Gillman

Edward A. Purcell Jr.
New York Law School, edward.purcell@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs
Part of the Jurisprudence Commons, and the Supreme Court of the United States Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.
and ultra-light flying. But the NAA's relationship to the main developments in the air—
involved military, commercial, and general aviation—has long been quite minimal and
nonconsequential. Robie appears to recognize the marginal historical importance of his or-
organizations after the 1920s and in the second half of his book focuses not on the Aero Club
or NAA but rather on the flights or other efforts for which individuals were awarded the Collier
Trophy. These, Robie explains, make up "the armature that gives shape and structure" to his
narrative.

The book's shape also owes something to
the NAA itself, which through a subsidy "made
possible" its publication, and to the author's
self-confessed "addiction" to flight. These fac-
tors propel Robie, especially in the second half
of the volume, toward an uncritical, even hagiographic emphasis on "great racing pilots
and airplanes," aviation "milestones," and the
NAA in general. An "afterword" on "the future
of the NAA," taken from a 1989 speech by the
organization's president, represents a curious
injection of aviation politics into historical
scholarship, while the dozen separate append-
dices, running over a hundred pages, further
applaud the NAA.

The antiquarian and booster thrust of this
book is unfortunate, for a study of the Aero
Club of America and the early NAA could well
have enriched our understanding of twentieth-
century social and cultural history. But the
author's hermetic, insider's perspective ap-
pears to have prevented him from contextual-
izing his story very broadly. Americanists
lacking a passion for aviation history will
therefore find little of interest in his study.

Joseph J. Corn
Stanford University
Stanford, California

The Constitution Besieged: The Rise and De-
mise of Lochner Era Police Powers Jurispru-
dence. By Howard Gillman. (Durham: Duke
University Press, 1993. x, 317 pp. $34.95, ISBN
0-8223-1283-2.)

Howard Gillman's book The Constitution Be-
sieged incorporates much of the historical
scholarship of the past quarter century, espe-
cially work on the founding period and on
laissez-faire constitutionalism, into a broad,
clearly written, and lucidly argued reinterpre-
tation of American constitutional history. The
Founders shaped the Constitution, Gillman
writes, "to nurture and protect the social rela-
tions produced by capitalism by preventing the
state from taking sides in the disputes arising
among or between competing classes." Their
goal was to ensure that government would act
only for the public good and not in the interest of "factions." As a result, rejection of "class
legislation"—attempts either to assist one set of
competitors against another or to impose on
particular groups special burdens that did not
directly protect public health or safety—
became the "master principle" of American
constitutionalism.

State courts initially elaborated the master
principle, and the Supreme Court subse-
quently made it the foundation of its due pro-
cess jurisprudence. However, the "rise of indus-
trial capitalism made it more and more
difficult for people to conceive of a general wel-
fare that somehow transcended the predica-
ment of particular groups and classes." The
courts, nevertheless, continued to use the mas-
ter principle to void statutes, and "sociological
jurisprudence"—by stressing the need for
"facts" to show the connection between reform
legislation and public health or safety—only
reinforced the legitimacy of the constitutional
tradition. Decisions such as Lochner v. New
York (1905) were "defending the framers' vi-
sion." Eventually, however, fundamental social
change and new intellectual critiques under-
mined faith in the master principle, and in
1937 the Court "jettisoned" a constitutional
tradition that was a century and a half old.

The most significant feature of Gillman's
book is its dual purpose: to embrace the claim
that the original American constitutional tra-
dition was one of market-oriented liberalism
and, at the same time, to drive three fracturing
wedges between that premise and contem-
porary judicial "conservatism." First, the book
argues that the massive changes wrought by in-
dustrial capitalism destroyed the utility, coher-
ce, and fairness of the master principle.
Thus, the original tradition is "no longer avail-
able as a basis for determining the proper role
of the judiciary in American politics." Second,
the book maintains that, since “Lochner era” jurisprudence was faithful to the original master principle, it was constitutionally sound. An activist judiciary, therefore, is both traditional and legitimate, and contemporary conservatives consequently have no basis on which to invoke Lochner’s alleged wrong-headedness “as a weapon in their struggle against the modern Court’s use of fundamental rights as a trump on governmental power.” Finally, the book argues that the original tradition, in spite of its market orientation, was neither committed to laissez-faire in theory nor hostile to government regulation in practice. Its overriding purpose was not to prevent governments from acting, but rather to ensure that they acted only for the common welfare. Thus, to the extent that the original tradition can still provide contemporary inspiration or guidance, the book suggests, it does not undermine, but rather supports governmental activism in the public interest.

Professor Gillman has written an important and provocative reinterpretation of American constitutional history that deserves the attention of all students in the field.

Edward A. Purcell, Jr.
New York Law School
New York, New York


A worker from the Terni steelworks boasted to me once that he could “make a flea eye,” that is, that no job was too difficult or delicate for his skill. In Archie Green’s Wobblies, Pile Butts, and Other Heroes, a chapter discusses the United States equivalent of this attitude: the “Tiffany Touch.” “Flea eye” and “Tiffany Touch” are metaphors arising from a rich verbal lore, metaphors of manual skill and cultural pride. Green’s book stands at this intersection of workers’ material and verbal lore, “navigating between shoals of mechanical secret, union custom, and verbal art” where “job literacy consisted of reading blueprints or handling print-derived templates.”

The book’s uniqueness derives from this blend of the written, the oral, and the material, of tradition, ritual, and modernity. The subtitle, “Laborlore Explorations,” suggests a forward-looking heuristic approach unbound by academic shackles. The subject, “laborlore,” suggests a theoretical construct that is neither the archaic folklore of premodern communities nor a mere variation of mass culture, but rather the crossroads of a myriad heterogeneous sources and processes. Though steeped in it, Green does not romanticize laborlore—a “bubbling cauldron” in which “Macbeth’s witches” sometimes stir a “malevolent brew.” Yet, it is the vitality, the creativity that prevail. “We name this national cauldron our melting pot,” says Green, renaming a nationalistic metaphor in terms of the workplace experience, as well as of literary witchery.

Three introductory chapters outline the approach developed in ten case studies, painstaking investigations into what may appear as minor curiosities until Green reveals them to be keys to major political and cultural questions. Through the study of images, words, songs, and stories, Green covers a wide stretch of labor history and investigates how politics, race, gender, and class went into the making of the American working class.

Green’s treatment of laborlore as autonomous cultural expression verges occasionally toward essentialism (defining class in internal rather than relational terms, as in E. P. Thompson’s approach), and sometimes historical animosities simplify the analysis. There may have been a great deal of opportunism in the Communist appropriation of the Wobbly hero Joe Hill; yet, my experience is that rank-and-file Communists (at least in Italy) often sincerely saw themselves as continuing (rightly or not) the libertarian tradition of anarchist syndicalism. Nicola Sacco and Bartolomeo Vanzetti became Communist heroes, too.

In Tony Hillerman’s Sacred Clowns (1993), a character recalls how Navajo audiences, who could understand what the Indian extras actually said, laughed at and “talked back” to Western movies. Green, in turn, describes how Santa Barbara dockworkers laughed at Clark Gable’s “errors in simulating [the] work” of a roustabout. Both are engaged in the “counterhegemonic practice” of “talking back”: not enough to reverse hegemony, maybe, but