

# Ohio Northern University Law Review

## Gordon S. Wood Debate

### The Supreme Court and the Uses of History

Transcript of Remarks by

GORDON S. WOOD\* & SCOTT D. GERBER\*\*

March 14, 2013<sup>+</sup>

#### INTRODUCTION

ZACHARY L. BERKSTRESSER: Ladies and gentlemen, I am Zachary L. Berkstresser and I am the President of the Federalist Society here at Ohio Northern. I am so pleased to be with you this afternoon and to have the chance to introduce our guest speaker, Dr. Gordon S. Wood. Dr. Wood is joined today by Professor Scott Douglas Gerber of our own College of Law.

Dr. Wood is the Alva O. Way University Professor Emeritus at Brown University. He is without question one of the Nation's leading historians. He is the author of many works, including *The Creation of the American Republic, 1776-1787*,<sup>1</sup> which won the Bancroft Prize and the John H. Dunning Prize in 1970, and *The Radicalism of the American Revolution*,<sup>2</sup> which won the Pulitzer Prize for History and the Ralph Waldo Emerson Prize in 1993. *The Americanization of Benjamin Franklin*<sup>3</sup> was awarded the

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+ The transcript has been edited slightly, but has retained the spontaneous and spoken character of the remarks.

1. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) [hereinafter WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*].

2. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

3. GORDON S. WOOD, *THE AMERICANIZATION OF BENJAMIN FRANKLIN* (2004).

Julia Ward Howe Prize by the Boston Authors Club in 2005. His book *Revolutionary Characters: What Made the Founders Different*<sup>4</sup> was published in 2006, and *The Purpose of the Past: Reflections on the Uses of History*<sup>5</sup> was published in 2008. His volume in the Oxford History of the United States, entitled *Empire of Liberty: A History of the Early Republic, 1789-1815*,<sup>6</sup> was given the Association of American Publishers' Award for History and Biography in 2009, the American History Book Prize by the New York Historical Society for 2010, and the Society of Cincinnati History Prize in 2010. In 2011 he was awarded the National Humanities Medal by President Obama. He has received many other awards as well and he will be receiving an honorary degree tonight from Ohio Northern at the Freed Center for the Performing Arts at 7:00 p.m. Dr. Wood will be exploring "The Revolutionary Origins of the Civil War" tonight. Today, he and Professor Gerber will be discussing "The Supreme Court and the Uses of History."

Finally, he is also a fascinating person and we are all in for a treat today. We will begin with Professor Gerber, followed by Dr. Wood, and end with a period for questions. Thank you.

SCOTT D. GERBER

Thanks, Zac. First of all I'd like to thank Professor Wood for kindly agreeing to this extra session. The main event, if you will—according to President DiBiasio anyway—is tonight at 7:00 at the Freed Center and, as Zac mentioned, Professor Wood is going to be speaking about "The Revolutionary Origins of the Civil War." But he was kind enough to agree to do this additional event because I wanted the law students to have a chance to interact with him in our building on a legal topic. He also was nice enough this morning to meet with John Lomax's Historiography class. I am really grateful that he is doing all of this for us and I do strongly encourage everyone to come to tonight's event because it will be very good. After the event, at 8:00, there will be a book signing. His books all win major prizes and they make nice gifts. My family has asked me to buy some and ask him to sign them.

I'd also like to thank Zac for putting this together, because the turnout is great and it was a lot of work, as we both know, to do this. I want to thank

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4. GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006).

5. GORDON S. WOOD, *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* (2008).

6. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* (2009).

Hope Smalls and the SBA for being uncommonly generous with the money to feed everybody. The National Office of the Federalist Society likewise kicked in more than it usually does. Finally, the front office here in the law school was kind enough to give us some money and I appreciate it.

A few years ago, I debated Larry Kramer, who was Dean of Stanford Law School at the time, which is a big job to have and he is a famous person. A year or two ago, I debated Sandy Levinson here in the College of Law about the constitutionality of Obamacare. As folks might remember from that, Sandy had won the Lifetime Achievement Award from the Law and Courts section of the American Political Science Association. Now I have to debate Gordon Wood, who as Zac has mentioned, has won every major prize you can win, including the Pulitzer Prize, which is not easy to win, believe me. The President of the United States also gave him the National Humanities Medal, which, again, is not a regular occurrence. I am not sure what happens next year, or the year after that, because Gordon Wood is as big as you can get in academia. I did note that yesterday we got a new Pope. Maybe next year Pope Francis will be here and I'll have to get my tail whipped by him.

As Zac pointed out, what Gordon and I are going to talk about is whether Supreme Court justices, or judges in general, should consult history when deciding cases. The reason that Gordon and I decided that I should go first is because I wrote a book about the subject. It did not win the Pulitzer Prize, but still, I thought it was OK. I can frame the debate and, not unimportantly, I talk directly about Professor Wood's work on the American Revolution in my book. It's really an honor for me to have him here because—I'll say this tonight at the Freed Center—no one—and I'm not engaging in hyperbole here—no one has had more influence on my own writing than him. I'm not alone in saying that, as you'll see later.

My first book was called *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation*.<sup>7</sup> My answer to the question whether Supreme Court justices should use history to decide cases is a qualified yes. This is what I mean by that: they should use history to identify the political philosophy of the American Founding and then decide cases in light of that political philosophy. I call my theory "liberal originalism" and, as Zac knows, there is no idea that the Federalist Society is more committed to than originalism. My theory is "liberal" in the Lockean liberal sense that the principal purpose of government is to protect

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7. SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995) [hereinafter GERBER, *TO SECURE THESE RIGHTS*].

individual rights. It's "originalism" in the sense that I argue that the Framers wrote the Constitution with that principal purpose of government in mind. "To secure these rights," the Declaration of Independence proclaims, "Governments are instituted among Men."

My "liberal originalism" label is kind of a play on words, and because this was my first book my Ph.D. director wrote a Foreword to it. I'm sure Gordon has written a lot of those. This is what Henry Abraham said about *To Secure These Rights*: "In short, Gerber advances a theory of constitutional interpretation that will likely displease both modern liberals and modern conservatives: a sure sign that he is onto something."<sup>8</sup>

One of the courses I teach is a seminar on constitutional interpretation. In that course I have come to the not-too-surprising conclusion—I suspect that every person who has taken Constitutional Law comes to this conclusion as well—that all of these theories of interpretation depend at their essential level on political philosophy. Justice Felix Frankfurter said it best: constitutional interpretation "is not at all a science, but applied politics."<sup>9</sup> My choice for applied politics is the Lockean liberal political philosophy of the Declaration of Independence. Why? Because it was in the Declaration of Independence that the Founders articulated the political philosophy upon which our Nation is based. To quote a paragraph we all learned in grade school:

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—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>10</sup>

For your information, Clarence Thomas agrees with that proposition, at least in civil rights cases—I promised my students I wouldn't say anything more about Clarence Thomas than that—and so did Thomas Jefferson, who wrote the Declaration of Independence; and so did President Lincoln, the

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8. *Id.* at x (Foreword by Henry J. Abraham).

9. As quoted in *id.* at 2.

10. As quoted in *id.*

great poet-president; and so did the Reverend Martin Luther King Jr. in his “I Have a Dream” speech, which is the most famous speech of the twentieth century.

Here’s an important point for us this afternoon: Professor Wood’s first book, the one that won the Bancroft Prize, *The Creation of the American Republic*,<sup>11</sup> agreed with the proposition that the Nation was founded on the basis of political principle, but denied that the principles upon which the Founders reached consensus were the liberal principles of Locke. Instead, Professor Wood, and Professors Bernard Bailyn at Harvard and J.G.A. Pocock at Johns Hopkins, articulated a “republican” interpretation of the Founding: “republican,” not in the political party sense of the word, but in the political philosophy sense of the word. For scholars such as Professor Wood, the basis of the American Revolution was not a philosophical concern for protecting private rights, it was a widely shared commitment to sacrificing private interest for the public good. That was such an important argument that I’ll read you what a leading political theorist said about it: The fall of Lockean liberalism and the rise of classical republicanism in the historiography of the American Revolution was “arguably the most stunning reversal in the history of political thought.”<sup>12</sup> Professor Wood is the person in large part responsible for that.

The first part of my book tries to make the case that the republican revisionists, such as Professor Wood, neglected the Declaration of Independence, the document that articulates the official political philosophy of the American regime. In fact, one of the first articles I ever published, an article I included in Chapter One of the book, was called: “Whatever Happened to the Declaration of Independence? A Commentary on the Republican Revisionism in the Political Thought of the American Revolution.”<sup>13</sup>

In the second part of the book I try to demonstrate that the Framers wrote the Constitution to help effectuate the principles of the Declaration of Independence. For example, James Wilson, who was second to James Madison in terms of contributions to the Constitutional Convention of 1787, quoted the Declaration at length in the Pennsylvania ratifying convention and then said, “This is the broad basis on which our independence was placed; [and] on the same certain and solid foundation this system [the

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11. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 1.

12. As quoted in GERBER, *TO SECURE THESE RIGHTS*, *supra* note 7, at 24.

13. Scott D. Gerber, *Whatever Happened to the Declaration of Independence? A Commentary on the Republican Revisionism in the Political Thought of the American Revolution*, 26 *POLITY* 207 (1993).

Constitution] is erected.”<sup>14</sup> I explore in the book how other intellectual leaders of the American Founding felt about the connection between the Declaration and the Constitution, and how the principles of the Declaration were reaffirmed in the Constitution’s preamble, the Bill of Rights, the *Federalist Papers*, and the early state constitutions. Obviously, I don’t have time to run through that in detail. I’ll just give you one example: nearly all of the state constitutions framed and ratified during the Founding period made express reference to the basic purpose of government being to protect the people’s natural rights. The reference was usually in the form of a separate bill of rights, or in those state constitutions not containing a bill of rights, in a section, typically the preamble, reaffirming an allegiance to the natural rights principles of the Declaration. In fact, New York simply quoted the Declaration at the very beginning of its Constitution.

Now a word about “conservative originalism,” because conservative originalism is a central tenet of the Federalist Society. To oversimplify it a little bit, conservative originalism is the idea that Supreme Court cases should be decided the way James Madison felt about a specific issue. Conservative originalists appeal to the specific intentions of the Framers, not to the general principles to which they committed the Nation. Conservatives such as the late Robert Bork, Justice Scalia, and Steve Calabresi at Northwestern—who co-founded the Federalist Society—regard a jurisprudence of original intention as the only legitimate approach to constitutional interpretation, because only that can give us law that is something other than and superior to a judge’s will, and only that will eliminate the anomaly of judicial supremacy in a democratic society.

Despite the methodological appeal of the conservatives’ argument, in my judgment their campaign for a jurisprudence of original intention should be seen for what it is: a quest for political results. Analyzing the conclusions to which the conservatives are led by originalism reveals that they are simply espousing politically conservative interpretations of the Constitution and labeling them “original intent.” In effect, the conservatives are substituting conservative result-oriented jurisprudence for liberal result-oriented jurisprudence. For example—and I only have time to give you one—for conservatives to argue, as then-Justice Rehnquist famously did in one of his dissenting opinions, that the Establishment Clause of the First Amendment does not prohibit the majority, acting through the political process, from authorizing prayer in public schools is to rewrite history and the Founders’ political philosophy. After all, it is

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14. As quoted in GERBER, TO SECURE THESE RIGHTS, *supra* note 7, at 59, 83.

difficult to imagine a principle to which the Founders were more philosophically committed than the separation of church and state.

Of course my criticism of conservative originalism did not win me many friends at the Federalist Society—I was a man without a home for a while—but eventually folks accepted Randy Barnett’s point that there’s a polite divide in the Federalist Society between Libertarians, such as myself, Randy Barnett and Richard Epstein, and Reagan Republicans. I’m the former; the vast majority of the Federalist Society is the latter, including, as I mentioned, one of the founders, Steve Calabresi, who clerked for both Judge Bork and Justice Scalia.

I’ll end with this: because I advocate a version of originalism—again, originalism, as you remember from Con Law 1, is reading the Constitution through history, and that’s why it’s nice that Professor Wood is here, because he is an historian—but because I advocate a version of originalism, it’s necessary for me attempt to answer, albeit briefly, the chief criticisms leveled against that interpretative method. There are four primary criticisms, and I’ll walk you through very quickly what they are and my response to them.

The first criticism is that the Framers could not, and did not, anticipate many modern needs and problems. Champions of the “living Constitution” emphasize this point. Justice Brennan was the leading figure in this regard, and in the ‘80s and ‘90s when originalism was all the rage because of what the Reagan generation was doing, Justice Brennan was criticizing it. The way that a liberal originalist avoids that criticism, however, is to adopt Ronald Dworkin’s famous distinction between “concepts” and “conceptions.” What a liberal originalist is interested in is the concept, not the conception. In other words, we want to know what the principle is that the Court should be applying. We don’t care about the conceptions that Madison, or Wilson, or any of those people had about that concept. We don’t care what their specific views were on race and gender, for example, because they were not good. But if you apply the concept of equality, you can reach different results.

The second major criticism is this: that it’s impossible to determine what the Framers intended. This criticism has two iterations. The first is that modern Americans cannot understand what the Framers meant because our language is different from theirs. To be blunt about this iteration, that’s nonsense. It’s quite feasible to understand what the Framers intended at the level of philosophical principle: that embodied in the Declaration of Independence. The second iteration of this criticism is that there’s no single entity that can be called “the Framers.” It wasn’t simply Madison, in other words. The response to that from a liberal originalist would be that the general convention that framed the document and the state conventions that

ratified it shared the same intent on the fundamental question being addressed; namely, what is the principal purpose of government in the American regime? The problem faced by conservative originalists is not shared by liberal originalists because we are concerned with discerning the Framers' intent at a relatively general level of social consensus, that of natural rights philosophical principle.

The third criticism of the four is the integrity of the documentary record. James Hutson, who at the time was the chief manuscript officer at the Library of Congress, was the leading proponent of this criticism. This is what Mr. Hutson said: that the records that conservative originalists need to identify what the Framers wanted us to do have been "compromised—perhaps fatally—by the editorial interventions of hirelings and partisans."<sup>15</sup> In other words, that Madison made himself look better than he should have, or that he left out stuff that other people said, that kind of thing. What a liberal originalist would say is that the documentary record is sufficiently reliable to reveal that the Framers intended the Constitution to be interpreted so as to secure the hard won fruits of the American Revolution.

The last criticism, and the one I'll end with, is this: that the Framers did not intend the Constitution to be interpreted in accordance with their intent. In other words, they did not want us to do what they wanted to do. On that theory—or that criticism—conservative originalism is a "sham and illusion," someone once said, because it lacks historical foundation and the very notion of original intent depends on history. But critics of this type, in my judgment, overlook the importance of discerning the philosophical principles motivating the Framers and the obligations to which those principles gave rise. English writer G.K. Chesterton made the point nicely when reflecting on his voyage across America in the early part of the twentieth century. This is what Chesterton said: "The American Constitution . . . is founded on a creed. America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence; perhaps the only piece of practical politics that is also theoretical politics and also great literature."<sup>16</sup> The Constitution, in other words, is a political document in the noblest sense. It establishes a framework of government through which certain underlying philosophical principles are to be advanced. And those philosophical principles are the natural rights principles of the Declaration of Independence. To ignore this fact is to ignore the reason we are a Nation.

With that, I will stop and turn it over to Professor Wood.

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15. As quoted in *id.* at 14.

16. As quoted in *id.* at 15.

GORDON S. WOOD

Thank you. I'm pleased to be here at the law school talking about the Supreme Court and the uses of history. I have no doubt that the Supreme Court should use history and will use history, but there is no doubt in my mind also that it's not really history that the justices are using. It's not the history that historians write, and I would go beyond that and say it's impossible for jurists, law professors, and Supreme Court justices—or judges anywhere—to really use history. It simply would not work. Judges have to invent another kind of history: we call it “law office history,” or “history lite.” It's a necessary fiction, and I don't consider that to be a bad thing. It's a necessary fiction for judges and other jurists to get along with their work—they need some kind of history to work with. History is much too complicated to be used effectively by judges and the courts.

Let me give you an example: a distinguished historian—I won't name him because apparently this is going to be recorded—called me last week because he had been asked by the *New York Times* to write an op-ed piece on gun control. (And you thought the op-ed pieces in the *New York Times* came from below, but they come from above.) He called me because he doesn't know much about the Constitution and he wanted to know what I thought about this request. I said, “You're out of your mind to write it.” I said, “the history is too complicated and if you make it simple”—he's a good liberal and wanted to take the good liberal position that the *Times* wanted—“you'll hurt your professional standing.” It hasn't bothered a lot of other historians to do that, but he was a little taken aback. But he said, “I'm a citizen too.” I said, “That's fine, you are a citizen, but when you write and they list your credentials, you're writing and using those credentials to assert your point.” I said, “the people back then had no idea—could not have imagined in their wildest dreams the debate we're having over gun control”—whether it was over the Second Amendment, whether it was the militia or the individual, those issues, which have filled law reviews—and many historians have participated in it, I think wrongly—because they couldn't conceive of that debate. They simply didn't draw that distinction. They could not even begin to imagine that we would have a debate about gun control. So how can you go back to the history except to cherry pick and select phrases or words that seem to fit your agenda? I don't know what he is going to do, the op-ed has not appeared, so it may never appear. When I told him it might hurt his historical reputation, he got second thoughts. The history that historians write is much too complicated, too unwieldy to be used. As I say, judges have created what has been called “history lite.” I think it's an essential part of what you do, or what jurists

do, and I don't disparage it. But let's not get it confused with real critical history because that can't be used very effectively.

Now those who call themselves originalists, as Scott does, do need history and it's they who have probably created the "history lite." Although I think all judges go back to history—to the Constitution in one form or another—they all use history in different ways. There are, of course, many different kinds of originalists. Justice Scalia calls himself an originalist and he has been called an originalist, but he is better understood as a textualist, which is a different thing—it's kind of a subcategory of originalists. Thus, he disclaims any effort to recover the intentions or the historical circumstances under which the Constitution was created, which absolves him of a lot of the problems that other jurists get into. All he wants to do is recover what the words meant to the people back then. He does not want to know what went on in the Convention, he doesn't care what went on in the ratifying conventions, he just says, "what did the words mean?" It absolves him from a lot of—he escapes a lot of—the problems that we have. Of course, I think all judges and justices of the Supreme Court begin as textualists. They all look at the text. They don't get up in the morning and say, "What should the Constitution mean today?" They're circumscribed to some extent by the text, and then other elements play into it, previous decisions and so on. Whether it's the philosophy of the Declaration, or some other philosophy that they've concocted out of the period, they have some kind of reigning theory of one sort or another.

We know from what Professor Gerber has just told us that he is an originalist, but if he's an originalist, he's a very—how should I put it—a soft or broad-minded originalist. In fact, his notion of Liberal Lockean philosophy is so broad and so abstract—it operates at such a high level—that I think almost anything could be justified under that kind of originalism. What exactly did the signers of the Declaration mean by "inalienable rights, among which are life, liberty, and the pursuit of happiness"? And they implied that there were other rights. What are those rights? Could they be the rights to privacy? It seems to me that Professor Gerber's category is so broad that there is not a Supreme Court justice on the present Court who couldn't use it. I'm sure that Justice Ginsburg and Justice Sotomayor might find this theory of constitutional interpretation helpful. It's very wide ranging, it's very abstract and very permissive, just as the second paragraph of the Declaration is wide ranging and abstract and permissive. That Declaration was conventional wisdom at the time. There's nothing new about it. Jefferson said as much later. He says, "Look, I wasn't making up things, I was just speaking common sense of the American people." In fact, the notion that all men are created equal was voiced by a number of people, including British aristocrats and Americans,

like William Byrd, who was a slaveholder and a very conservative member of the previous generation. But he believed that all men are created equal. That's not new for people at the time. There's nothing dramatically new about it. And if we look at the history of the Declaration, we can see that the so-called natural rights, which is now used by, I think, Scott and others who appeal to them, are very similar to good old-fashioned English rights.

The English made a fetish of rights and liberties well before we Americans did. In fact, until 1774 the colonists, in their discussions in the Continental Congress, were using English rights—they kept appealing to English rights, until at one point somebody said, “Look, it's getting embarrassing that we keep referring to English rights when we're on the verge of breaking from England; we better start calling these”—and they were explicit about this—“we better start calling these natural rights.” They just decided it would be more pragmatic and more effective to change the word. But for the most part, they're talking about good old English rights—rights to life, liberty, and the pursuit of happiness, the right to no taxation without representation, and the common law rights of habeas corpus, trial by jury and so on. These rights were not really antithetical to anything an Englishman—a liberal Englishman, or a good Whig—would have believed.

Professor Gerber mentions my book *The Creation of the American Republic*,<sup>17</sup> and the way it was used by law professors, in particular in the 1980s, to justify some sort “republican synthesis,” which was made a big deal by lots of people—even historians too picked up the republican synthesis because they need categories to work with, just like law professors—but it really flourished in the law schools. It offered, especially to Lefties in the law schools, a collective and communal alternative to Marxism that was native grown. Marxism was already being discredited well before the wall went down, and people were looking around and thinking “how can we find something that can justify communal action?” They grab hold of this notion of republicanism, which, with its emphasis on the *res publica*—the public good, if you will—and ran with it and created a monster, as far as I'm concerned. I was totally taken aback, as was Bailyn. We had no idea that that's what we were saying—it never occurred to me when I was writing the book and emphasizing the public good, because that's what the literature of the time emphasized. The Americans in the Revolution don't talk about rights to the same extent that Gerber might like because they took those for granted; they were a given. What they needed to emphasize was why they were becoming republicans—throwing off monarchy with its manipulation of private interests—and were now going to

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17. See WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 1.

be emphasizing the *res publica*, the public good. And that term lingers on in our own thinking—the communal good, the common good, or the public good. It's leftover from early modern English history. But in focusing on republicanism I was not in any way denying the importance of the Declaration of Independence or the emphasis on rights, which were taken for granted and a basic part of Anglo-American thinking. No one at the time ever thought of republicanism as a coherent body of thought, set in opposition to a body of thought emphasizing rights—natural rights or English rights. But republicanism became important in the 1980s to scholars, especially law professors, who were eager to find a communal alternative to our obsession with rights.

At the same time, my book, and others, appealed to the Right—to the Straussians, who also were fascinated by the Founders for very different reasons. So we had the blessing of having both ends of the political spectrum enjoying what we were saying. But in no way were we intending that. I was as shocked as anybody to discover that I had created this republican synthesis. It fit the needs of people looking for ammunition in their causes, which is what law office history is. It's a legitimate endeavor, but let's not ever get it mixed up with what historians do or should be doing.

So, the emphasis on rights and the Declaration and republicanism complement one another; they're not in opposition. What many scholars did—what the law professors and others did—was distort past reality to fit their agendas. It was just another example of the use and abuse of history that goes on by scholars everywhere who have political or judicial agendas.

Let's take an issue that was raised by Scott that I think illustrates the complexity of history. He says, and I'm quoting him here, "It's difficult to imagine a principle to which the Founders were more philosophically committed than the separation of church and state." I just think that's not true. The Founders were confused about separation of church and state; in fact, most didn't believe in it, at least at the outset. We quote Jefferson's letter to the Danbury Baptists of 1802 where he uses the term "wall of separation." But Jefferson's an outlier; he's way over to the Left on this issue. Very few agreed with him. And he ran into real trouble over the things he had said earlier in his Notes on Virginia and in the preamble to his Bill for Religious Freedom. From this trouble, especially during the election of 1800 when he was accused of atheism, he learned enough to clam up for the most part on religious matters.

Every one of the Founders, of course, believed in liberty of conscience—nobody was being hanged on Boston Common anymore for their religious beliefs, as they had been a century or so earlier. So everyone believed in the freedom of religious conscience, but separation of church and state was a totally different matter. Jefferson believed in it and

Madison believed in it, but they're unusual if not unique. To be sure, the official establishment of the Church of England that existed in half a dozen colonies was immediately disestablished—eliminated—by 1776/1777 in these state constitutions, which, by the way, are far more important than the Federal Constitution because they created all of the basic elements that form the later Federal Constitution. The revolutionary state constitutions of Maryland, South Carolina, and Georgia authorized their state legislatures to create, in place of the Anglican Church, a kind of multiple establishment of a variety of religious groups using tax money to support what was called the Christian religion. That's not separation of church and state; it's just the destruction of the Anglican Church's monopoly; instead we had tax supported Christian churches—Protestant Christian churches, not Catholic. Many of the other state constitutions provided for religious tests for office holders. Six states—New Hampshire, Connecticut, New Jersey, the two Carolinas, and Georgia—required office holders to be Protestant. Maryland and Delaware said Christians—only Christians—could be office holders. Pennsylvania and South Carolina, their officials had to believe in one God and in heaven and hell—they had to take an oath to that effect. Delaware required a belief in the Trinity. This was not separation of church and state. And, of course, Connecticut and Massachusetts maintained their religious establishments—that is, tax money going to the Congregational Church—well into the second and third decades of the nineteenth century. Religion was everywhere in the documents of the period. The peace treaty with Great Britain in 1783, for example, opened with language familiar to British statesmen and to the devout Anglican, John Jay, who was instrumental in writing the peace treaty. It began in this way: "In the name of the holy and indivisible trinity."

Even Jefferson as President did not implement his belief in the wall of separation. He went to church, as President, every Sunday, which was held in the House of Representatives—talk about separation of church and state—even though there were church buildings available. He knew that if he tried to avoid going to church it would have created a storm of controversy and his presidency would have been affected.

We also have to remember—and this we often ignore—that the Bill of Rights applied then only to the federal government. The states could continue to do whatever they wanted to do as far as religion was concerned; of course many of them had bills of rights that spelled out their beliefs in religious liberty. And as I said, many of them had all kinds of provisions for religious tests and maintained the religious establishments—Connecticut and Massachusetts into the nineteenth century. Only in 1925—less than a century ago—did the Court decide to begin incorporating some of the Bill of Rights into the Fourteenth Amendment and incorporate some of these

rights and apply them to the states. And that's only in 1925. That's called the—and you all know about this, you're law students—the doctrine of incorporation.

I asked Scott whether Justice Thomas believes in the doctrine of incorporation, and he has his doubts that he does. He's the only member of the Court who apparently doubts the doctrine of incorporation. I heard a speech by Justice Scalia two years ago at George Washington University and one of the law students there asked Justice Scalia, "Do you believe in the doctrine of incorporation?" Scalia paused with a big grin on his face, and said, "Look, I'm an originalist, I'm a textualist, but I'm not stupid." Because nobody—he says, "It's seventy years of precedent—who's going to overthrow that?" But it is a really extraordinary kind of interpretation of the Fourteenth Amendment. You have to realize that, throughout the nineteenth century, the Bill of Rights has no application to the states. It took a very imaginative reading of the Fourteenth Amendment to begin to apply the religious clause, and the freedom of press and so on, to the states.

The Court has labored in this particular issue of church and state in order to define what is permissible and what is impermissible in what has become, I think, an increasingly capricious relationship between church and state. As you perhaps know, and maybe I'm just speaking to the choir here, the Ten Commandments can be displayed in some public arenas, but not in others. School prayers are impermissible if sponsored by the administration, but perhaps not if they are sponsored by the students. Observing religious holidays in the public schools is impermissible, but excusing students from attending school on their religious holidays is permissible. It's this perplexing atmosphere in the public schools—which, I think, goes back to the confusion of the Founders over the issue of religion and the state—that has made teachers so confused, so scared of violating what they don't really know is the law that they've decided, best not talk about religion at all. That, of course, is the complaint of many conservatives and others: that religion has been driven from the public arena. Nobody knows now clearly what the wall of separation really means.

I don't want to single out Scott in his particular use of history. I think it's essential—he's a law professor, not a historian and his need for history is different from mine, as is the need that you may have as jurists or attorneys. But I do want to emphasize that we can't solve our current disputes over religion, for example, by looking back to the actual historical circumstances of the Founding. Those circumstances are just too complicated, too confusing, and too biased towards Protestant Christianity to be used in the courts today. Most of these circumstances work against our particular twenty-first century needs. We do not, and cannot, base our constitutional jurisprudence on the historical reality of the Founding. Our

constitutional jurisprudence has to rest on a historical fiction that is developed over time through an accumulation of decisions by the courts. And again, I emphasize it's a necessary fiction; it doesn't mean that it's wrong. It may not be historically accurate by an historian's standards; but it's necessary and it's created by you jurists, and it has its own integrity. But we should not ever get this law-history mixed up with real history that historians write.

Thank you.

#### QUESTION & ANSWER SESSION

ZACHARY L. BERKSTRESSER: Thank you Professor Gerber and Dr. Wood. That was very entertaining and very enlightening. At this time, the Federalist Society is going to entertain a round of questions and answers, as we always do. We think this course is the best way to enlightenment, and so if you have a question, go ahead and throw your hands up. I see Professor Lewis has jumped the gun on us and I'll open the floor to him first.

QUESTION: You talked about English rights being the forerunners or the assumed rights that Jefferson just took and put into the Declaration. To what extent were those rights derived from the Treaty of Westphalia—to the extent we go back that far?

ANSWER (GORDON S. WOOD): I know when the Treaty of Westphalia was drafted, but I don't remember the provisions of it. English rights go back deep into English history—it's not something that was created in 1648. I don't know whether you have a course in English constitutional history, but you should have, because that's really the foundation of our sense of rights. People often ask me, "How come our American Revolution seems so successful compared to the French Revolution?" I always tell them that it's really important that the Revolutionaries were Englishmen. Don't ever belittle that—that the colonists had a long tradition of self-government. They had been electing their legislatures for a hundred years in some colonies; they knew about habeas corpus, they knew about trial by juries, and they had that experience of self-government that other revolutionaries often have not had. You have to feel bad for the Arabs in the revolutions of the Arab Spring, or the French in 1789—what experience in self-government did they have? The French Estates-General hadn't met for over a century. So we Americans had tremendous advantages in having that English experience in leading the Revolution and in drawing up our constitutions in 1776 and 1787. These English traditions of rights and the

common law go back deep into English history. Historians debate their obscure origins. We know about Magna Charta and so on, and these are all celebrated as high points, but the complicated story of the development of the common law and the origins of legislative representation—of Parliament—is still debated. What we do know is that there was nothing like Parliament or the English tradition of rights in eighteenth century Europe. No large state had a representative legislature like Parliament. Nobody had a Bill of Rights like that of 1688/89. These are all part of our American history. As a consequence, I think we need to have a familiarity with English constitutional history if we're going to fully understand our own history. I don't think the Treaty of Westphalia—although I must say I haven't read it recently—has much to do with that long tradition.

ZACHARY L. BERKSTRESSER: Professor French.

QUESTION: Gordon, if the American Revolution had failed, which seemed likely to occur in its early days, how different would our country be today?

ANSWER (GORDON S. WOOD): I don't believe it could have failed in the sense of our not acquiring independence. I just read a book by Kevin Phillips, and I reviewed it in the *New York Review of Books*. Phillips, who started as a journalist writing about the Republican majority, has turned to history in recent years. It's actually quite an interesting book. I'm not sure he realizes the significance of his own book, but he shows the extent to which, as early as 1775—the long year of 1775 that includes some of 1774—we were already revolutionaries; in other words, we were on the verge of independence a year before the actual Declaration of Independence. And I think you can make a good case for that. What he shows is the extent of support for the American cause and that the difficulty the Brits faced in trying to put down the insurgency. Putting down an insurrection—we should know about that since we've been trying to put them down—it's very, very difficult to put down an insurgency which has the support of most of the populace several thousand miles away—and in our recent cases we're talking about eight—ten—thousand miles away. We're not going to win those put-downs any more than the British did. The colonists were doing everything to undermine British rule; for example, pilots were sabotaging British naval commanders trying to bring their ships into port. Try to bring a war ship into a harbor when you don't know much about it—it's a dangerous business. That may not have been IEDs, but that

kind of sabotage was effective. I don't believe that the Brits had a chance of winning the war.

Joe Ellis, my fellow historian, has written a book—it's coming out later this year—called *The Summer of '76*. He asked four historians to write a thousand words each on what would have happened if Washington had been killed or captured at the Battle of Long Island and the Continental Army was destroyed, which was quite plausible . . . it could have happened. We all agreed, the four historians, that this would not have changed the outcome. Another general would have risen—he may not have been as good as Washington, who did not have the celebratory status in '76 that he acquired later—and that the army would have been re-raised. There were people willing to join. The cause was not that fragile. As it turns out, the publisher didn't like this idea of this appendix with four historians, so we've been reduced to a footnote. Nevertheless, I'm more convinced than ever that it was an impossible task for the British to put down this insurgency. There simply weren't enough loyalists. They misjudged the extent of loyalism—they misjudged a whole host of things in the way that we're misjudging, or have misjudged, in Iraq or in Afghanistan or Vietnam. Putting down insurgencies is not an easy thing to do.

ZACHARY L. BERKSTRESSER: In the middle.

QUESTION: Thank you both for coming and talking. I appreciate hearing your thoughts. This question is for you, sir. You mentioned at the beginning of your talk that you didn't think the Founding Fathers even thought about the possibility of a debate like we are having today over gun control. But if they didn't think about us having a debate over gun control, why would they need the Second Amendment?

ANSWER (GORDON S. WOOD): Because it was part of an English tradition. The right to bear arms goes back to English history—it goes back to the seventeenth century. So that's all they were saying. It's conventional wisdom for an Englishman to include such a right to bear arms. No big deal about it, nobody questioned it, nobody thought that, oh, "is that for the militia or is it just for the individual?" They wouldn't have raised that issue. As far as I know, nobody made a big deal about the rights Madison listed in his proposed Bill of Rights, because they were essentially common law rights and a few of these traditional English rights. The only one that's really different from the English list of rights is the freedom of religion that's expressed in the First Amendment—again, not applying to the states . . . you have to realize that doesn't come until 1925. So otherwise, the rest of the Bill of Rights are traditional English rights, many of them

copied almost verbatim from the English past, the English Bill of Rights of 1688/89.

That's why Madison initially didn't think a bill of rights was necessary in 1787. In England the Bill of Rights of 1688 was a fence put up to guard against the preexisting prerogative power of the king; in England in 1688 Englishmen needed such a fence against this dangerous pre-existing encroaching power that threatened their rights. In America, look, said Madison, this is a government of limited powers—it's a government of delegated powers. Power does not preexist—there is no prerogative power that needs to be fenced off. We're creating, delegating, the power and we can pull it back if we need to. That's why we don't need a bill of rights. Madison had a very sophisticated argument, too sophisticated and too precious for the time. Of course, once the notion of a Bill of Rights gets thrown out into the public arena it had such resonance for Englishmen, going back to 1688/89, that there was no stopping it. And especially Jefferson, of all people, picks it up and writes a letter to Madison, but also to a friend in Maryland, saying "where's the Bill of Rights? My French liberal friends can't believe we don't have a Bill of Rights." You can hear Madison groaning, "Oh my God, those French intellectuals, what are they doing?" Madison writes back to Jefferson a very sophisticated argument about why there is no Bill of Rights, but it just goes right by Jefferson's head. Jefferson says, "What would my liberal French friends think?" Jefferson is the kind of knee jerk liberal who doesn't think through things the way Madison does, and as far as he's concerned, "what would my friends think" is all that's on his mind. Madison didn't publish his letter from Jefferson, but this Marylander did, and of course once it's out in the public arena—"Mr. Jefferson in Paris says we have to have a Bill of Rights"—the Anti-Federalists say, "Ah, we've got an argument." That was their best argument and they used it very effectively and put the Federalists on the defensive on behalf of the Bill of Rights.

Madison is very shrewd, though. He finally has to agree to pass a Bill of Rights to get elected to the House. You probably know that story: Patrick Henry, who controls the Virginia legislature, ices Madison out of the Senate; so poor Madison has to run for the House. Henry redistricts Madison's district and puts up this young, very attractive candidate—Revolutionary War hero, which Madison was not—to oppose him, James Monroe. Madison has to actually electioneer—give a speech—which he hated to do. He thought it was unbecoming a republican—small r—and yet he does campaign—gives a speech—and in the speech he promises that if elected, he will promote a Bill of Rights, which he does. But what he does is take the hundred and twenty—thirty, or a couple hundred, I think—of these rights suggested by the states in their ratifying conventions. He sifts

through them, throws out the serious ones, which struck at the structure of the federal government, and keeps all the innocuous ones—the common law rights that everyone takes for granted. So when the Anti-Federalists see this they say, “This is a tub for the whale, Madison’s list of rights.” A tub for the whale being a metaphor for a diversion—that’s what mariners did when the whales were bearing down . . . they throw a tub overboard hoping to divert the whale to the tub. This is exactly what Madison’s Bill of Rights was in the minds of the Anti-Federalists. In the end, they’re angry at his Bill of Rights, that’s not what they wanted. They wanted really serious rights, in other words, encroachments on the strength of the federal government—limiting the president’s power, limiting the taxing power—these are serious rights, which again, were ignored by Madison. He’s a good Federalist. He wants his national government. This is the way politics works. In this respect it wasn’t different then from now.

ZACHARY L. BERKSTRESSER: We’re at the end of our time. We have a very full schedule for Dr. Wood, as you can imagine, so we only have him blocked out until 1:00. Thank you all for attending. Dr. Wood, thank you very much.