

February 11, 2015

Dear Editor-in-Chief:

In Professor Scott Douglas Gerber's article, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation* [63 CLEV. ST. L. REV. 1 (2015)], Gerber accuses me of failing to properly credit him for devising the term "liberal originalism," and implies that, more generally, I have failed to acknowledge him for originating the general idea that the Declaration of Independence should guide one's interpretation of the Constitution. He writes that my "citations to authority are sometimes misleading as to who coined the phrase 'liberal originalism' (I did). I brought my concern to [Sandefur's] attention, he sort of apologized for it, and he has since apparently stopped citing my work altogether when discussing the Declaration of Independence in constitutional interpretation." He then cites my book, *The Conscience of The Constitution*, and complains that it "fail[s] to cite" his books *To Secure These Rights* or *First Principles*. He then concludes that "[f]ortunately for me, at least some other scholars realize that Sandefur's work borrows heavily from mine."

In fact, my work does not borrow heavily—or, really, much of anything—from Professor Gerber. I have believed since I was in high school that the Declaration of Independence should guide constitutional interpretation. I reached that belief first from my own reading on the Founders, and, later, in reading the work of Harry V. Jaffa and his students. I have always been thorough in acknowledging my intellectual debts, by the way: I have actually dedicated law review articles to Jaffa, John Eastman, Clint Bolick, and to others whose influence on my thinking has been strong.

As for citations, I discovered Gerber's *First Principles* in law school, and borrowed the term "liberal originalism" from it, particularly in my 2004 article in the *Harvard Journal of Law & Public Policy*. That article, one of my first, was actually a review of a book edited by Gerber, and I cited him quite generously. In fact, in the very first paragraph, I wrote, "in recent years, some writers, led particularly by Scott Douglas Gerber, have begun to devote serious consideration to the Declaration's constitutional role. These scholars are developing a theory of interpretation that Gerber calls 'liberal originalism.'" At the time I wrote this article, however, I had already believed in this interpretive approach for a long time, and I employed the term solely for convenience.

Since then, I cited Gerber in four other articles, including a 2009 article where—again in the first paragraph—I said that Justice Thomas's "jurisprudence is probably best described in Scott Douglas Gerber's term, as 'liberal originalism.'" I fail to see how such a direct attribution could be—as Professor Gerber claims—"misleading as to who coined the phrase 'liberal originalism.'" "

It was in response to this 2009 article that Gerber first wrote in the *University of Detroit Mercy Law Review* that I had been "misleading about who coined the phrase[] 'liberal originalism.'" Yes, you read that correctly: Gerber claimed that I had been "misleading" in an article in which I referred to "*Scott Douglas Gerber's* term . . . 'liberal originalism.'" "

This first accusation came after Gerber emailed me to complain that I had somehow misappropriated “his” term. I do not recall my exact words at that time (I have since deleted those emails, and I believe it wrong for Gerber to characterize the content of this private correspondence without directly quoting it; thus, if it is indeed “on file” with Gerber, I would ask that he print its contents); however, my recollection is that I did not “apologize,” as I had no obligation to. Instead, I accurately replied that I had probably cited his work more than any other single author, and that I had given him all the “credit” to which he was entitled. This did not satisfy him, but I dropped the matter, and ignored his innuendo in the *Detroit Mercy Law Review* article. I do admire Professor Gerber's work, but I cannot truthfully say that it persuaded me of any views that I did not already hold.

Now—for the second time—Gerber has all but accused me of plagiarism, an accusation which is not only wholly contradicted by facts that any person could casually confirm, but which runs contrary to what I had thought was generosity on my part in helping to publicize his work. I think it is obviously a charge without foundation in fact or reason.

More remarkable still is the fact that Professor Gerber complains that, in my book *Conscience of The Constitution*, I “fail[] to cite” two of his books, while in reality *Conscience* actually does cite one of his books, *Declaration of Independence: Origins and Impact*, which I reviewed in my *Harvard Journal of Law & Public Policy* article ten years ago. How much credit does Professor Gerber want? Furthermore, I never use the term “liberal originalism” in *Conscience* at all. In fact, I have largely dropped my use of that term, since I am no longer sure that I qualify as an “originalist” of any sort.

I am sorry to be driven to commenting on such a petty matter, but Professor Gerber’s innuendo has now become an outright accusation of some form of impropriety (however vaguely described). Professor Gerber is a fine writer, and I have enjoyed his books. That is why I have cited him so extensively. Whatever the cause may be, Professor Gerber’s accusations are baseless.

Sincerely,

Timothy Sandefur
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Sacramento, California