

BOOK REVIEWS

Opting Out: Selected Writings of Gerrit H. Wormhoudt

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Fifteen years ago, when the United States was helping the Iraqis draft their new constitution, one wag asked, “Why don’t we just give ‘em ours? It was written by geniuses, it worked well for more than two centuries, and we’re not using it anymore.” To be sure, constitutional law has evolved during the past decade and a half, but only to reinforce the notion that the legislative and executive branches of the federal government, with the acquiescence of our federal courts, have essentially rewritten key provisions of our founding documents. The effect has been to expand government power and curb individual liberties in a manner never intended by the Framers. That’s the core message of *Opting Out*, a brilliant collection of essays by Gerrit Wormhoudt, with whom I had the privilege of serving on the board of directors of the Institute for Justice, the nation’s premier libertarian public interest law firm.

Wormhoudt documents numerous abuses and misinterpretations of the Constitution but tempers his critique with an optimistic assessment: by acknowledging the extent of our constitutional apostasy and resuscitating core principles—limited government, separation of powers, federalism, protection of individual rights, and the rule of law—we can rebuild a coherent legal framework for a free society. Wormhoudt’s subtitle—“It All Begins and Ends with Education”—tells us where he would focus primary attention. Opting out of our

government-dominated schools would indeed be a critical first step. Along the way, however, Wormhoudt touches on our common-law tradition, the legal profession, tort reform, and even our monetary system. He warns us that “our very minds, like our money and law, have become government-issue.” And he advises us to “opt out of the morally and constitutionally dubious programs and regulations supposedly imposed [for our] benefit.” Here are just a few of the ailments that Wormhoudt highlights.

On the Living Constitution. At college, writes Wormhoudt, “we learned that the Constitution had always been a living thing.” Yet many, if not most, jurists, including those now sitting on the U.S. Supreme Court, embrace originalism—the polar opposite of the so-called living constitution. The Constitution was not intended to be a malleable guide to modernity. Instead, the words actually in the document are our enduring guidepost—interpreted in accordance with their meaning at the time they were ratified. Yes, college professors may preach that our constitutional system must adapt to rapidly evolving social, economic, and technological conditions. But Wormhoudt understands that the Framers provided an amendment process for that purpose. We can update the Constitution—indeed, we have done so 27 times—without pretending that the written document doesn’t exist or doesn’t mean what it says. Meanwhile, originalism does not foreclose examining the trajectory of the constitutional text and applying it to changing circumstances. What is not permissible, however, is to interpret the words as if they mean something quite different than they meant at the time of ratification.

On “Fundamental” Rights. Wormhoudt points to “differing standards of constitutional review according to the court’s view of the importance of the rights being asserted.” And he observes that “some of the rights guaranteed by the original Constitution and its subsequent amendments are fundamental while others are not.” In other words, our rights have been bifurcated. The Court rigorously protects some—such as a free press, free speech, and protection against unreasonable searches—but minimally protects others—such as the right to contract, own and use property, and form your own business without unwarranted government restrictions. To qualify for greater protection—that is, to be considered “fundamental”—a right has to be “implicit in the concept of ordered liberty” or “deeply rooted in the Nation’s history and traditions.” But all rights—enumerated and

unenumerated, fundamental and nonfundamental—should be scrupulously protected by the courts. That's especially true for economic liberties, where regulations designed to protect politically connected persons from competition are routinely rubber-stamped by the courts.

On the Commerce Clause. With considerable understatement, Wormhoudt criticizes the courts' "expansive reading of the Interstate Commerce Clause." Put more bluntly, the power to regulate interstate commerce has become the means by which the federal government insinuates itself into virtually all manner of human conduct, regulating anything and everything. Initially, the idea was to prevent the states from establishing barriers—like tariffs or quotas—to interstate trade. But that quickly morphed into a broader regulatory power. Initially, the regulatory umbrella covered buying and selling ("commerce") across state lines. Then it was expanded to encompass other economic acts—mining, manufacturing, farming, distributing, and consuming—including wholly intrastate acts. During the New Deal, the federal commerce power grew still further, sweeping in all economic acts that, in the aggregate, could have a substantial effect on interstate commerce. Restoring constitutional government is long overdue.

On the Separation of Church and State. Wormhoudt quotes Jefferson's statement that "religion is a matter which lies solely between man and his God." So, when the Declaration speaks of Americans' unalienable rights "endowed by their Creator," there is no conflict between that notion and "Jefferson's metaphor of a 'wall of separation' existing between church and state." For constitutional purposes, it does not matter whether rights come from God or from nature. In either event, they do not come from government. Individuals have rights, independent of government. In a nutshell, we start with rights—whether God-given or natural—then protect those rights by delegating limited and enumerated powers to a government that is bound by a written Constitution, which does not separate God from our lives but does separate God from government.

On Eminent Domain. Notwithstanding Wormhoudt's reverence for our Constitution, he acknowledges that "one, openly admitted departure from the stated political morality of our founding generation was the inclusion of the power of eminent domain in the

Fifth Amendment.” The seminal case, litigated by the Institute for Justice, was *Kelo v. City of New London*. The Supreme Court decided that property could be seized by the government for public benefit, even though the Fifth Amendment contained a quite different term—“public use”—which typically meant such things as roads, military bases, and government buildings. Essentially, the Court ruled that property can be taken from one private party and turned over to another private party as long as the new owner promises to pay higher taxes, create more jobs, or foster an equivalent public purpose. Suzette Kelo lost her home because a developer convinced the city that he knew how to use her property better than she did. Under that standard, nobody’s property is safe from the government bulldozer. It’s always possible to conceive of commercial development generating more taxes or jobs than private homes.

Happily, there’s an epilogue. Thanks to a media campaign by the Institute for Justice, more than 40 states have now passed legislation that has reined in the use of eminent domain for economic development under state law. And therein lie two lessons: First, there’s more than one way to win a case. If litigation fails, take your case to the court of public opinion and try for remedial legislation. Second, states can grant greater protection for individual rights than the federal government. The U.S. Constitution sets a floor not a ceiling.

On Occupational Licensing. If there’s one economic principle that liberals, conservatives, and libertarians should agree on, it’s that competition is good and government-supported private monopoly power is bad. That principle is the driving force behind an overdue effort to free selected vocations—like hair-braiders, dance studios, and interior designers—from needless government regulation. As Wormhoudt describes the problem: “[O]verreaching legislation, licensing, or regulations exist to benefit some special interest at the expense of the public and of those who are unjustifiably foreclosed from participation in the marketplace.”

Not surprisingly, some vocations resist deregulation. All too often the only real function of occupational licensing is to protect members of the regulated industry from new competition by erecting barriers to entry. That process imposes substantial costs on society, by eliminating economic opportunities for would-be entrepreneurs and driving up prices for consumers. If there are legitimate reasons for licensing—such as anti-fraud, health, or safety—even libertarians, who generally oppose government intervention, support the

restrictions. In fact, however, the claimed concerns are more often a pretext for protectionism.

On Educational Choice. This focal point of Wormhoudt's book is best captured in his own powerful words: “[T]he right to a public education’ is a euphemism for governmental power over the formation of thought and belief.” “Freedom in education exists when each person has the right to choose that educational experience which he truly desires for himself or his children and for which he is willing to voluntarily commit his resources.” “When the foundation of education is built upon compulsion instead of choice, learning easily becomes indoctrination, with the minds and lives of children vulnerable to shaping as instruments of social policy.”

Those words paint a crystalline picture of today's educational establishment. By contrast, school choice programs offer low-income children—often Hispanic and African-American—an opportunity to attend private schools that might otherwise have been limited to more affluent white families. Educational choice is effective and constitutional. Parents or students decide which schools to attend. Meanwhile, the state can assure that educational, financial, nondiscrimination, health and safety goals are met, but the state would not exercise day-to-day control over curriculum, personnel, and administration. The schools would exist to serve the students, not vice versa.

On the Right to Opt Out. Jefferson said that “Freedom is the right to choose.” And George Washington is quoted as saying, “Government is not reason, it is not eloquence; it is force.” The freedom not to participate—to opt out—is paramount. Anyone should be free to leave Wormhoudt's libertarian world, but they are not free to compel him to join. Wormhoudt's libertarianism does not foreclose collectivist arrangements as long as participation in those arrangements is voluntary. By contrast, collectivists will not condone libertarian enclaves within a collectivist system. An essential aspect of collectivism is force; an essential aspect of libertarianism is choice.

In promoting that objective, Wormhoudt has given us an invaluable compilation of his legal scholarship, coupled with moral guidance and a recipe for effective public policy. *Opting Out* should be required reading for students, educators, lawyers, judges, and politicians.

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