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Gerald Gunther

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2 of 2 people found the following review helpful. *The Tenth Justice* By T. Graczewski
Author Gerald Gunther was one of the country's most prominent twentieth century legal scholars. He authored the authoritative constitutional law textbook and was widely regarded as most deserving of a Supreme Court justiceship, if the criteria were purely based on merit and intellectual gravitas. Gunther clerked for Learned Hand on the Second Court of Appeals from 1953 to 1954 and played a supporting role in the McCarthy era Remington case. He went on to clerk for Chief Justice Warren the following year when *Brown vs. Board of Education* was decided. Thus, it is difficult to imagine a more qualified scholar to write the definitive biography on one of the twentieth century's most influential justices, a man considered by many to be in an elite fraternity with such legal giants as Marshall, Holmes and Cardozo, despite the fact he never sat on the nation's highest bench. Gunther delivers a layered and textured narrative of Hand's life. Perhaps the most important theme is Hand's lifelong aversion to judicial activism. I learned a lot in reading this book, especially about how the due process clauses (5th and 14th amendments) have been used by both conservatives and liberals to override legislative reforms. At first, it was conservatives that leaned on the ambiguous language of the due process clauses to overturn legislation that sought to provide labor protection against overwork and unsafe conditions. Hand was firmly against judicial activism beginning in the so-called *Lochner* era (after the *Lochner* case in 1905 striking down a New York law calling for a maximum 60-hour work week in bakeries) and retained that position in the New Deal era as the conservative court sought to leverage due process arguments to negate FDR's sweeping economic reforms. "The risk, in short, was that the *Lochner* philosophy allowed unelected, politically unaccountable judges to decide whether a particular legislative purpose was or was not legitimate." For Hand, it was unconscionable that "five men [Supreme Court majority], without any reasonable probability that they are qualified for the task, determine the course of social policy for the states and the nation." Hand consistently resisted judicial activism via due process arguments even when liberals took that approach to successfully overturn segregation in the South, most notably with *Brown vs. Board of Education*. Gunther writes that "[Hand] insisted that courts were not justified in upsetting honestly reached legislative accommodations of clashing interests and values; and in the course of so doing, he even questioned *Brown vs. Board of Education*...that *Brown* constituted second-guessing of legislative choices," although the author seeks to defend his former boss and idol as being old, tired and badgered by Felix