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# What Changes in American Constitutional Law and What Does Not

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# What Changes in American Constitutional Law and What Does Not?

*Edward A. Purcell, Jr.\**

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Following closely on the publication of major and quite different studies of American constitutional history, Professors Herbert Hovenkamp and

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\* Joseph Solomon Distinguished Professor, New York Law School. The author wishes to thank Alfred S. Konefsky, Jethro K. Lieberman, and Frank Munger for their incisive comments on an early draft, Michael McCarthy for his exceptional help in gathering material, and New York Law School students Daniela Abadi and Stephanie Torres for their excellent research assistance.

Richard Epstein published Articles in the *Iowa Law Review* exchanging views about some of their conflicting contentions.<sup>1</sup> The editors of the *Iowa Law Review* have asked for an analysis of their exchange and a comparative assessment of their respective contributions, a substantial undertaking given the scope and depth of the two men's scholarly efforts. In their books and their articles, Hovenkamp and Epstein cover a multitude of areas and issues, displaying a vast knowledge of American constitutional law and an admirable ability to marshal legal materials to support their diverse claims.

Any examination of their contributions and disagreements must start by recognizing the radically different approaches they take to American constitutionalism. "Hovenkamp and I look at legal materials through a different lens," Epstein fairly notes. He "starts as a historian and rejoices in the ebbs and flows of doctrine and cases and politics,"<sup>2</sup> while "I start as a legal theorist determined to isolate the common features that organize how legal systems operate, and why they are capable of success."<sup>3</sup>

Epstein's descriptions are highly revealing. In characterizing Hovenkamp's approach, his choice of the word "rejoices" suggests a somewhat carefree and almost frivolous antiquarianism on Hovenkamp's part, while his choice of the phrase "determined to isolate" suggests a truly serious-minded and rigorous scientism on his own part. Indeed, Epstein's aquatic metaphor of "ebbs and flows" implicitly trivializes the historical changes that Hovenkamp examines. It suggests that those changes are nothing but ordinary, repetitive, and inconsequential movements within some all-encompassing equilibrium to which Hovenkamp is apparently oblivious.<sup>4</sup> In contrast, Epstein's description of his own approach abjures metaphor and identifies it with the straight-forward quest for universal truths. It suggests that his conclusions will illuminate the nature of basic and systemic realities.

This comment suggests that Epstein's statements are accurate in highlighting a great difference between the two writers but not in identifying what each actually does and ultimately accomplishes. To support that conclusion and to fairly evaluate the recent exchange between the two requires, as a preliminary step a review of their two earlier books that inspired the exchange. That review, in turn, sets the stage for a discussion of their recent Articles in the *Iowa Law Review* and then for a more extensive appraisal

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1. Professor Hovenkamp launched the exchange, and Professor Epstein responded. See generally Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1 (2015); Richard A. Epstein, *Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp*, 101 IOWA L. REV. 55 (2015).

2. Epstein, *supra* note 1, at 90.

3. *Id.*

4. Epstein uses the same or similar dismissive imagery at several points in his reply. Hovenkamp "adds greatly to our understanding of the doctrinal ebbs and flows during the 19th century." *Id.* at 56. In contrast, Epstein explains, continuing the aquatic metaphor, "I largely ignore the 19th-century crosscurrents" on which Hovenkamp relies, *id.* at 56, and focus instead on "the 1937 watershed," that "represents a sea change." *Id.* at 80.

of their respective contributions to American constitutional history.

### I. CONTRASTING APPROACHES AND DIVERGENT BASELINES: THE BOOKS

The points that Epstein and Hovenkamp debate are rooted in their deep and longstanding differences in scholarly interests, legal and economic assumptions, and political and social values. Most immediately, they stem from the weighty books that each published within the past two years, Epstein's *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* in 2014,<sup>5</sup> and Hovenkamp's *The Opening of American Law: Neoclassical Legal Thought, 1870-1970* the following year. In varying ways, the books constitute the culmination of their authors' long, productive, and highly distinguished scholarly careers.<sup>6</sup>

Epstein's *The Classical Liberal Constitution* is a remarkable achievement, a nearly 700-page analysis of American constitutionalism from the seventeenth century to the present, the bulk of which is devoted to examining Supreme Court cases addressing issues of constitutional structure and individual rights. The book is, as Epstein notes, "both a summation and an expansion" of his scholarly efforts that have, since his 1985 book *Takings: Private Property and the Power of Eminent Domain*, increasingly concentrated on constitutional issues.<sup>7</sup>

Carefully reasoned and deeply informed, this "culmination and expansion" advances four sweeping "originalist" theses. First, the founders drafted and ratified the Constitution under the dominant influence of what Epstein calls "classical liberal theory" and the "classical liberal tradition."<sup>8</sup>

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5. See generally RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

6. See generally HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970* (2015).

7. EPSTEIN, *supra* note 5, at xiii; see also generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter EPSTEIN, *TAKINGS*]. Epstein's output has been prodigious. In addition to innumerable law review articles, shorter and sometimes more popular pieces, and talks at conferences and other public occasions, he has written several major works on the Constitution, four of which he highlights in his introduction to *The Classical Liberal Constitution* at xiii. See generally RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993); RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* (2011); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) [hereinafter EPSTEIN, *PROGRESSIVES*]; RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). For a closely related work that Epstein does not mention, see generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

8. "In its enduring provisions, our Constitution is most emphatically a classical liberal document. Its successful interpretation on all points dealing with text and its surrounding norms should be read in sync with the tradition of strong property rights, voluntary association, and limited government." EPSTEIN, *supra* note 5, at 53-54. Epstein advanced a similar claim in an earlier book *How Progressives Rewrote the Constitution*. EPSTEIN, *PROGRESSIVES*, *supra* note 7, at viii-ix. However, he then seemed to water his claim down. *Id.* at 22.

Resting on “the twin pillars of private property and limited government,”<sup>9</sup> his “classical liberalism” prized individual “liberty”—especially “economic liberty” and “liberty of contract”—and constituted the historical fountainhead of modern libertarian values and anti-regulatory, free-market economic principles. Second, the Constitution is best understood and properly construed today in light of those “classical liberal” principles that provide the foundation for a “classical liberal” constitutionalism.<sup>10</sup> Third, the Supreme Court and American constitutional law remained for the most part faithful to those “classical liberal” principles for a century and a half after the Founding.<sup>11</sup> Fourth, around 1900 “progressive” constitutional ideas began to challenge those founding principles, qualifying or rejecting the “strong protection of economic liberties” and the “twin verities of private rights and limited government.”<sup>12</sup> Then, in the October 1936 Term, the Court and the political system betrayed their original “classical liberal” principles by adopting those new “progressive” ideas and accepting the New Deal.<sup>13</sup> The results of that betrayal, Epstein contends, have severely damaged American constitutionalism and the nation’s overall welfare.<sup>14</sup>

In his preface Epstein announces proudly that his book “defends with a passionate intensity the classical liberal vision of the Constitution against its rival, and ascendant, progressive alternative.”<sup>15</sup> The former constitutes the “correct” way to interpret the Constitution, while the latter arises not from mere hapless straying but from purposeful rejection of the truth.<sup>16</sup> “The greatest challenge to the original constitutional plan,” he declares, “comes not from these inevitable and salutary historical adaptations, but from a conscious reversal of philosophical outlook on the proper role of government.”<sup>17</sup> The gulf between “classical liberalism” and modern “progressivism” is rooted in “basic disagreements about human nature, language, knowledge, and institutions,” and those disagreements involve “all

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9. EPSTEIN, *supra* note 5, at ix.

10. See *e.g.*, *id.* at 6, 9, 11, 16, 18, 29. “[T]he Constitution was intended to embody the theory of classical liberal thought.” *Id.* at 582. “Improvements” in the Court’s confused and inconsistent Establishment Clause jurisprudence “are only likely to come from courts that explicitly embrace classical liberal theory.” *Id.* at 517.

11. *Id.* at 34.

12. *Id.* at 6; *see id.* at 583.

13. *Id.* at 6.

14. *E.g.*, *id.* at 6 (“The book is offered in the spirit of explaining how matters should have evolved and why the original classical liberal constitutional order would have served this nation better than the progressive order that remains ascendant today.”).

15. *Id.* at xi.

16. “The central thesis of this book is that the older [classical liberal] view of the Constitution was correct, not only for the condition of 1787 but also, most emphatically, for vastly more complex conditions today.” *Id.* at 6.

17. *Id.* at 5.

fundamental legal questions.”<sup>18</sup>

Although Epstein’s basic theses are sweeping and blunt, he qualifies them in ways that lend his analysis great subtlety and sophistication. First, he seriously moderates his version of “originalism,” terming it “guarded”<sup>19</sup> and distinguishing it sharply from contemporary “conservative originalism.”<sup>20</sup> Specifically, Epstein argues that “conservative originalism” leads too easily to practices of “judicial restraint” and thereby allows “key political actors” in the government “too much discretion for the system to operate at maximum efficiency.”<sup>21</sup> It fails to provide adequate guidance as to when and under what conditions the Court should actively intervene to limit government action.<sup>22</sup> In addition, it fails to provide a basis for either inferring necessary “classical liberal” doctrines from constitutional principles or judging the legitimacy of precedents that have altered the Constitution’s “original” meaning through long usage.<sup>23</sup> Perhaps most fatally, “conservative originalism” fails to allow courts to deal effectively with the challenge of clever legislative efforts designed to circumvent “classical liberal” principles.<sup>24</sup>

Second, Epstein readily admits that “there is no perfect correspondence between the classical liberal theory and the constitutional text,” and he notes specifically that the Constitution’s “backhanded acceptance of slavery alone is a devastating refutation of that position.”<sup>25</sup> He thereby dismisses the Constitution’s acceptance of slavery as wholly irrelevant to a proper

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18. *Id.*

19. *Id.* at 45. “In all too many cases, the art of interpretation must go beyond the originalist program to deal with these issues.” *Id.* at 70. Thus, the book “is not a full-throated endorsement of the strong modern defenses of constitutional originalism.” *Id.* at ix.

20. Epstein flatly rejects any form of strict textual originalism: “It is a dangerous mistake to conflate any form of originalism, which asks how texts were understood when written, with strict textualism, which ignores those necessary but implied exceptions.” *Id.* at 54.

21. *Id.* at 571.

22. *Id.* at 570–73 (“[C]onservative originalists cannot remain faithful to the twin commitments of fidelity to text on the one hand and judicial restraint on the other.”); *see also id.* at 107 (commenting that modern standing doctrine is “another instance of misguided originalism”).

23. *Id.* at 573–76.

24. *Id.* at 573–74. Because of such qualifications, one admiring reviewer, who explains that he agrees with Epstein ninety percent of the time on “policy issues,” concludes that *The Classical Liberal Constitution* “cannot be considered an originalist book.” Michael B. Rappaport, *The Classical Liberal Constitution: An Originalist Assessment*, 8 N.Y.U. J.L. & LIBERTY 800, 801 (2014).

25. EPSTEIN, *supra* note 5, at 8. “[I]t would be a mistake to posit any perfect correspondence between what the original Constitution prescribes and what a classical liberal theory demands” *Id.* at xi. That lack of correspondence is due “in part” to the fact that “the [f]ounders, in sailing uncharted waters, made many serious errors both of omission and commission, in designing the Electoral College, the structure of federal courts, the institution of judicial review, and the relations between dual state and federal sovereigns.” *Id.* at xi. The founders “self-imposed task of nation-building, moreover, did not align itself neatly with the major classical political theory teachings of Thomas Hobbes, John Locke, Montesquieu, or David Hume.” *Id.* at 3.

understanding of its “classical liberal” roots.<sup>26</sup> Accordingly, he sometimes seems to limit his thesis that the “classical liberal tradition” underwrote the Founding to a looser claim that it underwrote the Constitution only for the most part: “[T]he constitutional provisions with the longest staying power,” he declares in more qualified and somewhat more ambiguous terms, “have consistently drawn their strength from classical liberal theory.”<sup>27</sup>

Third, Epstein acknowledges that neither “classical liberal theory” nor the constitutional text provides automatic answers to all questions and that carefully reasoned interpretation is often necessary. “The Constitution contains many cases of studied ambiguity that necessarily give rise to interpretive tangles[,]”<sup>28</sup> and “classical liberal theory” may not always “yield a univocal answer.”<sup>29</sup> Nonetheless, questions of “first principle” can be properly resolved “only if they are seen through the lens of the same classical liberal theory that animated the drafting of the original text.”<sup>30</sup>

Fourth, Epstein acknowledges that over time constitutional law changes and, to some extent, must change. “The Constitution has also been transformed by judicial reasoning through sensible analogies . . . .”<sup>31</sup> Thus, the First Amendment, “reasonably enough, covers the broadcast media that were unknown in 1791,” and “[t]he commerce power covers all modern modes of transportation, not just horses and buggies.”<sup>32</sup> Similarly, the so-called “dormant” commerce clause goes well beyond the text of the Constitution, but it is nonetheless an entirely legitimate constitutional addition because it serves “the original classical liberal synthesis by knocking down anticompetitive state barriers.”<sup>33</sup> Those broadened applications are proper, Epstein explains, because they “preserved and extended the original

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26. See *infra* Part V.C.2.

27. EPSTEIN, *supra* note 5, at 8–9.

28. *Id.* at 52. For Epstein’s discussion of the need for and proper methods of interpretation, see *id.* at 45–71.

29. *Id.* at 46. Epstein, for example, recognizes what historians have shown to be the vague, unsettled, and contested nature of ideas of separation of powers, and he acknowledges that the doctrine “calls for the division of power between two or more branches, but does not specify exactly what that division should be or why.” *Id.* at 86.

30. *Id.* at 45.

31. *Id.* at 5.

32. *Id.*; see also *id.* at 55–56 (“[I]t is important to be aware of how changed circumstances fit into the question. It is one thing to ask how the traditional visions of limited government and strong property rights can survive in changed circumstances. Thus one could ask whether—and, if so, how—commerce among the several state covers transportation by rail or communication on the web. It is quite another thing to argue that the progressive vision of the world requires jettisoning the older worldview in favor of one that expands the power of the federal government at the expense of the states. . . . The correct approach is to preserve the balance between national and local regulation as applied to these technological changes.” (footnote omitted)).

33. *Id.* at 13. Epstein praises and defends the “dormant” Commerce Clause at great length. See *id.* at 243 (“To sum up, the dormant Commerce Clause represents a welcome departure from the rules of strict constitutional construction.”).

classical liberal position.”<sup>34</sup> Thus, changing interpretations may be wholly legitimate, and precedents should sometimes prevail over original meanings if they meet the ultimate test of serving “classical liberal” values.<sup>35</sup> The key lies in answering one “simple question: does the original version of the Constitution or its subsequent interpretation do a better job in advancing the ideals of a classical liberal constitution?”<sup>36</sup>

Finally, Epstein declares that his “classical liberal” theory is not the kind of “modern hard line” libertarianism advanced by such theorists as Robert Nozick.<sup>37</sup> Rather, it accepts the need for governments that “rightly gain the legitimacy and the resources needed to prevent violence, enforce contractual promises, and supply needed social infrastructure.”<sup>38</sup> His “classical liberalism” is “a social theory, not the magic paean of radical individualism.”<sup>39</sup> Based on “the twin pillars of private property and limited government,” its goal is “to make sure that each and every government action improves the overall welfare of the individuals in the society it governs.”<sup>40</sup>

*The Classical Liberal Constitution* is an exceptionally impressive intellectual achievement. It offers a sophisticated consideration of many of the most difficult problems in constitutional interpretation, and it provides a wealth of incisive analyses of constitutional doctrines and individual Supreme Court cases. Above all, it stands as a paramount example of the use of free-market libertarianism and public choice theory to develop a comprehensive

34. *Id.* at 5. There are “countless . . . issues of constitutional law” for which “it is impossible to escape the weight of the past.” *Id.* at 70–71; *accord id.* at 94 (speaking of cases upholding the right of the courts to enforce the Fourteenth Amendment: “With the passage of time, who would ever want to undo their outcome?”).

35. *Id.* at 68–71, 97–100, 575. In an earlier book, Epstein recognized the importance of retaining some constitutional “errors” if they had been long-established and generated substantial and warranted reliance interests. EPSTEIN, *TAKINGS*, *supra* note 7, at 324.

36. EPSTEIN, *supra* note 5, at 71; *see id.* at 53 (“[T]he constitutional text must be interpreted in light of supplemental norms that arise from within that classical liberal tradition.”).

37. *See generally* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Epstein cites Nozick’s book at this point in his text. *See* EPSTEIN, *supra* note 5, at 20; *see also* EPSTEIN, *PROGRESSIVES*, *supra* note 7, at 14. Epstein has repeatedly insisted that his own libertarianism, which he identifies with “classical liberalism,” is distinct from what he terms “the pure libertarian theory.” EPSTEIN, *PROGRESSIVES*, *supra* note 7, at 14; *see infra* note 39 and accompanying text. For an insightful critique of Nozick’s more extreme form of libertarianism, *see* JETHRO K. LIEBERMAN, *LIBERALISM UNDRRESSED* 103–13 (2012).

38. EPSTEIN, *supra* note 5, at 20. “Government works best when it *forces* each individual to surrender some of his or her own liberty and property to government in exchange for greater security for those rights that are retained.” *Id.* (emphasis in original).

39. *Id.* at ix; *see id.* at 484 (contrasting “a libertarian theory that treats individual autonomy as the ultimate good and a classical liberal theory that also starts with a baseline of individual autonomy, but allows deviations from that baseline to the extent that they work to the universal advantage of all players subject to a common legal regime”); *see also id.* at 487–90 (discussing differences between “strong” and “softer” versions of “libertarian” theory and his idea of the more “cost-benefit”-oriented nature of “classical liberalism”).

40. *Id.* at ix.



normative approach to American constitutional law.

The book's rhetorical power resides in its easy integration of two ultimately conflicting characteristics. One is its seeming reasonableness. It repeatedly relies on assertions of such generality that most people would readily agree with them, while its recognition of complexities and difficulties makes its arguments seem both well-considered and balanced. The other characteristic is its ideological imperative. At every key point the book declares that its pivotal conclusions and inferences about "classical liberalism" are "correct" and that opposing views are biased, dangerous, and "wrong."<sup>41</sup> Ultimately, then, its generalities, qualifications, and subtleties are tangential, while its "passionate" affirmation of the specific conclusions it attributes to the "classical liberal tradition" stand imperiously as its core. "In its enduring provisions," Epstein insists, "our Constitution is most emphatically a classical liberal document."<sup>42</sup>

Hovenkamp's *The Opening of American Law* is a far different work, though an equally impressive scholarly effort.<sup>43</sup> An expert in economic theory and antitrust policy, Hovenkamp writes as an intellectual historian,<sup>44</sup> and the surface differences between Epstein's book and his are apparent. While Epstein ranges over some four centuries, Hovenkamp concentrates on a much shorter period, the century from 1870 to 1970. Epstein limits his focus for the most part to the writings of major political theorists and Supreme Court cases, while Hovenkamp reaches more broadly into the intellectual history of the

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41. Epstein often refers to "correct" and "incorrect" answers and interpretations. "Different constitutional terms require different approaches for their correct explication." *Id.* at 46; *see, e.g., id.* at x ("[M]any of our most entrenched constitutional doctrines, including that of judicial supremacy, are incorrect under normal interpretive principles."); *id.* at 167 (noting that *Hammer v. Dagenhart*, 247 U.S. 251 (1918), invalidating the first federal child-labor law, "was . . . correct"). In an earlier book, he repeated his claim that most governmental "interferences with employment contracts, such as minimum wage laws, antidiscrimination laws (in competitive markets only), collective bargaining laws, and Social Security requirements were unconstitutional," and he defended his claim because it rested on "the correct *social* ground." EPSTEIN, *PROGRESSIVES*, *supra* note 7, at x–xi (emphasis in original).

42. EPSTEIN, *supra* note 5, at 53.

43. *See generally* HOVENKAMP, *supra* note 6. Hovenkamp has also published numerous law review articles and books addressing legal and economic issues. *See generally* HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*]; HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937* (1991) [hereinafter *ENTERPRISE AND AMERICAN LAW*]; HERBERT HOVENKAMP & CHRISTINA BOHANNAN, *CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION* (2012); *see also generally* PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES & THEIR APPLICATION* (3d ed. 2006–2016). His innumerable scholarly articles include Herbert Hovenkamp, *Progressive Legal Thought*, 72 *WASH. & LEE L. REV.* 653 (2015); Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 *IND. L.J.* 499 (2011); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 *STAN. L. REV.* 379 (1988).

44. "[I]ntellectual history is an essential part of legal history, which in modern legal traditions is unavoidably a study of written words." HOVENKAMP, *supra* note 6, at 4.

social sciences and the evolution of professional economic thinking.<sup>45</sup> Further, while Epstein focuses more abstractly on ideas and doctrines, Hovenkamp examines the ways in which those ideas and doctrines relate to practical political and economic interests.<sup>46</sup> Though both see economic theories as critical social forces, Hovenkamp stresses the fact that their practical importance depends largely on their fit with changing social, political, and cultural conditions.<sup>47</sup>

Most obvious, Epstein and Hovenkamp define the term “classical” in radically different ways. For Epstein, “classical” is necessarily linked to the label “liberal,” and his arguments are addressed only to what he defines as “classical liberalism.” He uses the phrase to refer to an extended “tradition” of libertarian and free-market thinking that he sees beginning in the seventeenth century, reigning in the United States from the Founding to the arrival of “progressivism” and the New Deal, and remaining for all time both vital and “correct” in its principles and values.<sup>48</sup> For Hovenkamp, “classical” refers to a narrower set of economic ideas anchored in the anti-monopoly, free-market, and laissez-faire thinking that began to coalesce with the Jacksonian movement in the mid-nineteenth century, reigned for the following half century, and then began disintegrating in the early twentieth century under the assault not of “progressivism” but of “marginalist” economics.<sup>49</sup>

Unlike Epstein’s book, which elaborates one overriding thesis, Hovenkamp’s offers a series of narrower-gaged but more carefully detailed

45. See *id.* at 9–10 (describing the methodology and sources used in writing *The Opening of American Law*).

46. See *id.* at 29 (“The rise of railroads and large-scale industrial production called for a theory of value that incorporated long-run planning and entrepreneurial risk more realistically than the classicists did. Marginalism greatly facilitated the development of distinctions between investment (fixed) costs and operating (variable) costs, and of the effects of decisions over time.”).

47. See *id.* at 30 (“[M]arginalism was in some ways ideally suited for American intellectual soil. It was forward-looking, emphasizing motion (both scientific and social), and symbolizing growth and change.”); see also *id.* at 5.

48. EPSTEIN, *supra* note 5, at 6.

49. Although Hovenkamp does not provide a comprehensive explanation of marginalism, he characterizes it as an approach based on the theory that market prices were determined not by past costs of production, but by “a person’s willingness to pay for or produce the next unit.” HOVENKAMP, *supra* note 6, at 28. “[It] forced a shift in economics’ methodology from the measure of *things* or the labor that went into making them, to the measure of human behavior based on presumed rationality.” *Id.* at 29 (emphasis in original).

Classical political economy generally concluded that the ‘value’ of anything is a function of its cost. But that did not explain why different people place widely different values on one unit of a good, even though its cost is everywhere the same.

The marginalist answer appeared instantly to solve every problem about individual and social value.

*Id.* at 29–30. For some of the principal “corollaries” produced by marginalist ideas, see *id.* at 32. For a recent history of marginalism, see HEINZ D. KURZ, *ECONOMIC THOUGHT: A BRIEF HISTORY* (Jeremiah Riemer trans., Columbia Univ. Press 2016) and see *infra* notes 162, 167.

historical arguments. First, he explores what he calls the “[t]wo intellectual revolutions” that “disrupted American thought in the late nineteenth century[,]” one caused by Darwinian biology and the other by marginalist economics.<sup>50</sup> Ultimately, in areas involving “economic regulation and welfare policy,” he argues, “Darwinian analogies gave way to marginalist economics.”<sup>51</sup> Marginalist thinking triumphed primarily because of its widespread practical utility for policymakers dealing with a wide range of economic and social issues.<sup>52</sup> It was a path-breaking intellectual development that gathered steam within the profession in the United States after 1890 and then largely swept the field in the 1920s and 1930s.<sup>53</sup>

Second, Hovenkamp argues that marginalist ideas and their many practical uses undermined and ultimately discredited much of “classical” economic thinking. “Classical economic thought was unified by a historical theory of value and a deep hostility toward State interference in private arrangements.”<sup>54</sup> In contrast, marginalist thinking inspired “a forward-looking theory of value based on rational expectations”<sup>55</sup> and harbored no rigid opposition to government economic regulation. Marginalist thinking proved “much less stable” in its theoretical implications and capable of generating “radically different views about the State, the market, and other social institutions.”<sup>56</sup> In particular, marginalism helped destroy one of the principle doctrines of “classical legal thought,” the anti-regulatory, free-market doctrine of substantive due process.<sup>57</sup>

Third, Hovenkamp argues that marginalist thinking superseded, but did not depart entirely from, “classical” ideas. It “completely rejected” the “theory of value and decision-making” that marked “classical” thought, but it incorporated its “faith in markets.”<sup>58</sup> The result was a new theoretical synthesis that, following common usage, Hovenkamp terms “neoclassical,”<sup>59</sup> a forward-looking, behavior-oriented utilitarianism with a general, but significantly qualified, commitment to free-market values.<sup>60</sup> Most important for its legal

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50. HOVENKAMP, *supra* note 6, at 1.

51. *Id.* at 3.

52. Compared to Darwinism, “[m]arginalism had the distinct advantage of practicality: it offered policymakers from many legal disciplines a useful set of predictive and normative tools. This triumph of marginalism was most explicit in criminal law and business law, but it also reached to the common law, regulation, and even constitutional law.” *Id.* For Hovenkamp’s treatment of the impact of Darwinism and marginalism and their relationship, see *id.* at 13–72.

53. *Id.* at 29–35, 82–84, 101–02, 108–09.

54. *Id.* at 6.

55. *Id.* at 7.

56. *Id.*

57. *Id.* at 9.

58. *Id.* at 2.

59. *Id.*

60. “Classical political economists generally opposed most regulation. . . . By contrast, emergent marginalism doubted the superiority of the market and seriously qualified the classical

and political salience, “neoclassical” thinking brought a degree of instability and unpredictability to policy analysis because it “proved quite vulnerable to critique and change from within the neoclassical system.”<sup>61</sup> Consequently, “neoclassical” marginalist ideas “gyrated among political ideologies” and produced “a right wing and a left wing that are both completely driven by marginalist assumptions.”<sup>62</sup>

*The Opening of American Law* implicitly challenges *The Classical Liberal Constitution* on two central points.<sup>63</sup> First and foremost, it denies Epstein’s claim about the thinking of the founders and consequently about the meaning and interpretation of the Constitution. Epstein argues that the “classical liberal tradition” began in the seventeenth century and dominated American constitutional thought until 1936, thus establishing that “classical liberal” ideas shaped the Constitution and provide the correct set of “originalist” principles with which to construe it. Hovenkamp argues that “classical” legal thought arrived only with the Jacksonian movement in the 1830s and that it constituted a sharp break with the thinking of the founders. Holding aside differences in terminology, then, Hovenkamp’s decisive claim is that the founders did not share the kind of self-seeking, libertarian, and free-market ideas that Epstein attributes to them through his “classical liberal tradition.” Because those ideas came along much later, they had no particular influence on the founders and should have no special significance in interpreting the Constitution.

Second, Hovenkamp’s book implicitly challenges Epstein’s argument

aversion to government interference.” *Id.* at 251.

61. *Id.* at 7.

62. *Id.* For some “left wing” implications of marginalism, see *id.* at 98–100 (stating that early marginalists supported methods of wealth redistribution); *id.* at 251 (“[E]mergent marginalism doubted the superiority of the market and seriously qualified the classical aversion to government interference.”); *id.* at 274 (“Marginalist economics completely upended the classical wage-fund doctrine . . . .”); and *id.* at 276 (“For the Progressives the developing economics of marginal utility revealed nothing but oppression for the working class.”).

63. Hovenkamp also seems to imply other more specific criticisms as well. While mentioning Epstein in his text only once, and then favorably, see *id.* at 313, Hovenkamp seems to suggest other criticisms of Epstein at several points. See *id.* at 3 n.10 (citing EPSTEIN, *supra* note 5 for using the term “progressive,” and thereby “creating an easy target for critics”); *id.* at 245 n.14, 260 (citing EPSTEIN, *supra* note 5) (pointing out that “classical liberal constitutionalism today” differs from the views of Thomas M. Cooley who best “symbolizes classical legal thought” in the late nineteenth century); and *id.* at 266, 266 n.10 (citing EPSTEIN, *supra* note 5 in noting that “[c]onservatives and libertarians have decried [the New Deal] as being damaging in fundamental ways to both the American economy and the American spirit,” while criticizing “public choice theory” as socially biased). At several points, in addition, Hovenkamp makes statements that could be seen as implicit criticisms of Epstein’s libertarian views. See, e.g., *id.* at 2 (“Public policy in the United States has always avoided the extremes of libertarian laissez-faire and socialism . . . .”); *id.* at 254 (“American law was increasingly preoccupied with ‘liberty of contract’ in economic matters, while readily approving serious interferences with contract when morals were at stake.”); *id.* at 278 (“The United States had a strong tradition of regulation at every governmental level that stretched back to the commonwealth ideal of Revolutionary times and maintained a growing presence throughout the nineteenth century.”).

about the impact of “progressivism” and the changes that came with the New Deal. It argues that it is highly misleading to see “progressive” economic ideas as surpassing earlier “classical” ones. Indeed, using the term progressive “unnecessarily biases our characterization.”<sup>64</sup> “‘Neoclassicism’ is much broader” than “progressivism” and includes “ideologies and movements that Progressives rejected.”<sup>65</sup> Similarly the “progressive” label “suggests that social and economic conservatives clung to an obsolete ‘classical’ ideology, when in fact many were just as revisionist as the progressive legal thinkers whom they critiqued.”<sup>66</sup> Thus, to see either “classical” or “classical liberal” thought falling to “progressive” legal thought simplifies events and misses the underlying intellectual and political dynamics that marked the twentieth century. “Neoclassicism” and its marginalist method not only took a variety of forms but also changed in their political and social significance over the century. “Marginalist thinking drove both the pro-legislative anti-common law reform missions of the Progressive Era and New Deal[,]” Hovenkamp explains; “and the pro-market, pro-common law, anti-legislative, and deregulatory counterrevolution that occurred later.”<sup>67</sup>

Thus, Epstein and Hovenkamp see different ends for the different “classical” theories they address. Epstein sees “classical liberal” ideas trumped by “progressive” ones after 1936, while Hovenkamp sees “classical” ideas trumped by newly dominant marginalist theories that conquered partisans on both political wings and inspired policy arguments capable of supporting contradictory free-market and pro-regulatory conclusions. While Epstein sees a cataclysmic break in American constitutionalism with the development of “progressive” ideas that culminated in the New Deal’s oppressive “statist” constitutionalism, Hovenkamp sees a decisive, but far from total, break in professional economic thinking that led to the development of more intellectually sophisticated—and politically ambivalent—economic thinking and legal reasoning. For Hovenkamp the New Deal marked a substantial change in American constitutional law, but change that was less total and abrupt and far more complex and economically justified than Epstein allows.

## II. SHARPENING THE DISPUTE: THE ARTICLES

The two authors obviously disagree on many issues,<sup>68</sup> and the contrasting

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64. *Id.* at 3.

65. *Id.* at 3–4.

66. *Id.* at 4.

67. *Id.* at 5.

68. Epstein, for example, draws on ideas of a “social contract” for part of his theoretical argument about the “classical liberal tradition.” EPSTEIN, *supra* note 5, at xi (noting that there is a “standard social contract theory that undergirds the classical liberal approach”); *see id.* at 18–20. Hovenkamp dismisses the “social contract” idea. Hovenkamp, *supra* note 1, at 6 (noting that the idea “never played much of a role in American constitutional development prior to the mid-20th century”). When judges and constitutional commentators referred to a “social contract,”

titles of their Articles spotlight one that is fundamental. Hovenkamp claims that recent scholarship—primarily Epstein—has “invented” a so-called “classical Constitution,” while Epstein counters that he has “rediscovered” the true and authentic “classical liberal” Constitution. Although their dispute involves different uses of the word “classical,” it is about far more than terminology. Indeed, it involves stakes of the highest order, for at bottom they are debating the ultimate source, meaning, and nature of American constitutionalism.

Hovenkamp’s Article sharpens his disagreement with Epstein by challenging him on four specific points.<sup>69</sup> First, and most basic, he explicitly rejects the claim that “classical” ideas shaped the Constitution. “Classical constitutionalism was not the doctrine of the founders,” he declares,<sup>70</sup> and “the Constitution was not classical in its inception.”<sup>71</sup> Rather, it was mercantilist. “To the extent the Constitution reflects a theory of economics and government intervention, it came mainly from the predecessors of classical economic thought.”<sup>72</sup> Accordingly, the founders believed that government sponsorship of monopolies and corporations was the best method of spurring economic development and increasing national wealth.<sup>73</sup> At the Founding, Hovenkamp argues, Adam Smith’s ideas about free markets and minimal government were of little consequence, and insofar as Smith exerted any influence it was not on issues of economic policy but on debates about standing armies, the separation of church and state, “the profligacy of monarchs,” and the superiority of agriculture over manufacturing.<sup>74</sup>

Second, Hovenkamp charges explicitly that what Epstein calls “classical

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Hovenkamp argues, they were almost invariably referring not to unwritten philosophical principles but simply to the provisions of federal or state constitutions or other similar authoritative legal texts. *Id.* “They rarely advocated for a social contract doctrine that would enable them to move beyond the ratified text to some unstated fundamental principle.” *Id.*

69. Hovenkamp made his disagreements even more sharply in another recent article. There he said:

[T]he extent to which some conservatives and libertarians have attempted to rewrite constitutional history in order to make antigovernment *laissez faire* a significant part of our constitutional past is nothing short of embarrassing. The original United States Constitution and contemporaneous state constitutions all contemplated governments that were heavily involved in economic development.

Herbert Hovenkamp, *Defending a Mixed Economy*, NEW RAMBLER (May 9, 2016), <http://newramblerreview.com/book-reviews/political-science/defending-a-mixed-economy> (reviewing JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016)).

70. Hovenkamp, *supra* note 1, at 52.

71. *Id.* at 4. Hovenkamp approvingly quotes Clinton Rossiter’s conclusion “that ‘[t]he *laissez-faire* principles of Adam Smith were no part of the American consensus in 1787.’” *Id.* at 7 (quoting CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 69 (1966)).

72. Hovenkamp, *supra* note 1, at 9.

73. *See id.* at 8–9, 23–24.

74. *Id.* at 9.

constitutionalism” was “invented” based on developments that occurred some “40 or more years after the Constitution was ratified.”<sup>75</sup> Its supposed principles actually “grew largely out of the Jacksonian movement” that condemned monopolies, opposed government regulation, praised private markets, and urged “a strong view of liberty of contract.”<sup>76</sup> With the triumph of those Jacksonian ideas, he continues, “constitutional doctrine began to depart more significantly from constitutional texts and collateral historical sources.”<sup>77</sup> Jacksonian “classical” constitutional thinking, that is, broke away from the founders’ thinking.<sup>78</sup>

Third, Hovenkamp underscores the differences between “classical” Jacksonian constitutionalism and Epstein’s libertarian version of “classical liberalism” by emphasizing a profound dichotomy that marked “classical” ideas about governmental regulation. Classical “writers preached a strong version of *laissez faire* in areas of business and equally strong interventionism in matters of morals,” he points out.<sup>79</sup> They “support[ed] harsh regulation of lotteries, alcohol consumption, and even offenses that had few identifiable victims, such as Sabbath breaking and blasphemy.”<sup>80</sup> Thus, Hovenkamp declares, “classical” constitutionalism “cannot be described as libertarian” for the simple reason that, despite their free-market economics, the “Jacksonians were interventionist on questions of morals.”<sup>81</sup>

Fourth, Hovenkamp elaborates his argument about the demise of both “classical” and “classical liberal” constitutionalism. Epstein’s claim that “classical liberal” constitutionalism gave way to “progressive constitutionalism,” he declares, is “wrong, or at least wildly exaggerated.”<sup>82</sup> “The constitutional revolution that occurred during the first four decades of the 20th century was . . . broader and much more centrist” than what passed as “progressivism.”<sup>83</sup> That new “neoclassical” constitutionalism drew on older “classical” ideas but revised them, often “in ways that the classicists themselves would have rejected.”<sup>84</sup> Principally, “neoclassicism” incorporated a general faith in markets but “rejected classicism’s tendency to determine value from

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75. *Id.* at 4.

76. *Id.* at 4–5. Hovenkamp made the same point in an earlier book on American economic and legal policy that foreshadowed many of the arguments in *The Opening of American Law*. “Classical political economy in the United States,” he declared there, “is a Jacksonian phenomenon.” HOVENKAMP, ENTERPRISE AND AMERICAN LAW, *supra* note 43, at 2.

77. Hovenkamp, *supra* note 1, at 5.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Even in economic matters, substantial regulation by state and local governments continued in effect throughout the nineteenth century. See generally WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

82. Hovenkamp, *supra* note 1, at 6–7.

83. *Id.* at 7.

84. *Id.*

past averages, substituting a forward-looking theory of value based on rational expectations.”<sup>85</sup> Further, it developed a “greater sophistication about risk and its management, and a broader conception of market failure.”<sup>86</sup> In short, the “revolution” that changed both economic and constitutional thinking in the late nineteenth and early twentieth centuries was not “progressivism” but “marginalism.”<sup>87</sup>

Hovenkamp concludes his Article with a direct rejection of Epstein’s ultimate constitutional goal. Legal and economic ideas change over time, he argues, and “the classical Constitution” of the nineteenth century was itself a product of changes that overtook the United States over the course of the century. Thus, Epstein’s “classical liberalism” has no authoritative constitutional status. “That is why,” Hovenkamp concludes, “we can never go back.”<sup>88</sup>

In response, Epstein begins by shifting the focus of debate.<sup>89</sup> First, he denigrates Hovenkamp’s historical arguments, declaring that they seek merely “to decompose historical evolution prior to the New Deal revolution.”<sup>90</sup> In contrast, he explains: “I largely ignore the 19th-century crosscurrents on these critical topics in order to concentrate on the epochal differences that mark the transition between two contrasting eras.”<sup>91</sup> Thus, with another dismissive aquatic metaphor, Epstein asserts the ultimately inconsequential nature of Hovenkamp’s history and the contrastingly fundamental nature of his own.<sup>92</sup> “My basic thesis holds true,” he declares,<sup>93</sup> and “Hovenkamp is profoundly wrong both on the history and theory of legal systems.”<sup>94</sup>

Second, and more fundamental, Epstein claims that Hovenkamp misses the entire point because his critique “omits the word ‘liberal’ and unavoidably

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85. *Id.*

86. *Id.*

87. “In fact, however, most of the changes in economic policy and the constitutional doctrine that displaced constitutional classicism are not ‘progressive’ at all. They are better described as ‘neoclassical’ or ‘marginalist,’ reflecting centrist changes in theories of economics and value embraced by a wide population, including many who would never describe themselves as progressive.” *Id.* at 53.

88. *Id.*

89. Epstein avoids Hovenkamp’s stress on the importance of history by implying, once again, that their disagreements about “history” are relatively unimportant because Hovenkamp examines only recurring and relatively minor “ups and downs” that occur “before and after the 1937 watershed.” Epstein, *supra* note 1, at 80. “It would be foolish for me to battle with Professor Hovenkamp on the fine points of historiography.” *Id.* at 55.

90. *Id.* at 56

91. *Id.*

92. Epstein states that Hovenkamp “adds greatly to our understanding of the doctrinal ebbs and flows during the 19th century,” thus complimenting Hovenkamp’s work while diminishing it. *Id.* at 56.

93. *Id.* at 57.

94. *Id.* at 65.



works at cross-purposes with my book.”<sup>95</sup> Hovenkamp’s analysis has little or no bearing on the theses of *The Classical Liberal Constitution*, Epstein contends, because his critique ignores the underlying concept of the “classical liberal” tradition itself. “There is a powerful difference between a ‘classical Constitution’ that has no clear linkage to political theory and a classical liberal Constitution, which speaks not only of the time of its adoption but also to the structure of its argument.”<sup>96</sup> Thus, Epstein makes clear that his “classical liberal” constitutionalism is rooted in the reasoning and values of a broad theoretical tradition and that its authority rests on that compelling philosophical foundation.

To justify that claim, Epstein clarifies his most basic theoretical assumptions. “Historically, a tradition does not rise and fall in a day,”<sup>97</sup> he declares, and on that premise he stretches his concept of the “classical liberal tradition” to embrace almost everything in the past that supports the general ideas that he values. It embraces, for example, all “those who thought that sound state craft required a limited government that devoted itself to the protection of individual rights of property, of contract, and, of course, of conscience and association.”<sup>98</sup>

On the basis of that vague and broadly encompassing definition, he traces the roots of his “classical liberal tradition” back to Roman times. Thus, it includes not only the ideas of such disparate “modern” figures as Coke, Hobbes, Locke, Hume, Blackstone, Montesquieu, Smith, Hamilton, and Madison,<sup>99</sup> but also fundamental legal concepts that “derive straight from Roman law.”<sup>100</sup> Indeed, Epstein asserts, the founders understood the Constitution’s meaning in line with “very complex theories of textual interpretation that trace their origins in Roman law.”<sup>101</sup> Thus, the principle values of his “classical liberal tradition”—which he describes at one point as “survival and the protection of liberty and property”<sup>102</sup>—are of the most

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95. *Id.* at 55.

96. *Id.* at 55–56.

97. *Id.* at 65. Revealingly, Epstein reiterates that idea, declaring that “no tradition is defined as a single point in time,” while at the same time ignoring the empirically demonstrable fact that “traditions” not only extend over time but also change over time *Id.* at 57; *see also generally* Stephen Skowronek, *The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition*, 100 AM. POL. SCI. REV. 385 (2006). Epstein makes his “classical liberal” tradition extend over millennia, but remain essentially unchanged.

98. Epstein, *supra* note 1, at 57. Epstein acknowledges that in “a literal sense” his “term ‘classical liberal’ cannot apply to the Founding Period or any of its intellectual antecedents” because it “was invented by later thinkers to describe an earlier movement that at one time traveled under the banner of liberal, as opposed to Tory.” *Id.* His statement acknowledges that the “classical liberal” label came from thinkers who lived long after the Founding, wrote from the perspective of a different national political system, and addressed later-day concerns and challenges.

99. *Id.* at 57–58.

100. *Id.* at 64.

101. *Id.* at 61.

102. *Id.* at 62.

general sort. Indeed, Epstein signals the historical sweep of “classical liberal” ideas by declaring that those values have constituted the “essentials in every classical liberal theory, whether of Roman or common-law origins.”<sup>103</sup>

Epstein confirms the long historical reach and generality of his “classical liberal tradition” by invoking the *Institutes* of Gaius on civil and natural law. Announcing that he has “come to the conclusion that Gaius is right,”<sup>104</sup> Epstein affirms the prescriptive power of natural law and identifies its principles as the philosophical foundation of his “classical liberal tradition.” There are certain relationships that are fundamental,<sup>105</sup> he argues, and those relationships—involving marriage, care for the young, and concern for the welfare of others—are essential to all societies. From that premise, Epstein reasons that “[t]he two most important features of any society are that individuals not kill each other and that they cooperate to ensure gains from trade.”<sup>106</sup> He then declares that “these so called minimum conditions shape all the essential social relations that any legal system must respect.”<sup>107</sup> On the basis of that natural law premise and those “philosophical” principles, he proclaims the intellectual authority of his “classical liberal tradition” and, by implication, the authority of the more specific tenets of his own contemporary free-market libertarianism.<sup>108</sup>

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103. *Id.*

104. *Id.* at 63. The “correct” view, Epstein contends, quoting Gaius, is that “the law that natural reason establishes among all mankind is followed by all peoples alike.” *Id.* (quoting 1 THE INSTITUTES OF GAIUS 3 (Francis De Zulueta trans., 1946)). The “issue of individual liberty,” when “rightly understood,” properly “rests on a view of individual entitlements that precedes the creation of the state.” EPSTEIN, *supra* note 5, at 461.

105. “It is one of the great blunders of modern lawyers to pooh-pooh the notions of natural law, as if they had no determinable contract, or were not subject to some coherent theory. The reason why constitutions work, and why people aspire to abide by them, is that common concerns about the basic structure of human relationships make it possible to reconstitute with more sophisticated justifications the general principles of natural law.” Epstein, *supra* note 1, at 64.

106. *Id.* at 63. The choice of highlighting those two particular but quite different “features” suggests one of the ways that Epstein projects his contemporary values and goals into natural law ideas. He gives the principle of wealth maximization a historical and natural law standing equal to the principle that people should not kill one another.

107. *Id.* Epstein has defended the idea of natural law at some length. See generally Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXFORD J. LEGAL STUD. 219 (2005) (discussing natural law as a product of multiple forces).

108. Epstein repeatedly relies on generalities involving concepts whose meanings and applications have been and continue to be contested. He relies, for example, on the premise of an underlying “social contract” that “at every point stresses the theory of strong rights of property, contract, and conscience that all individuals possess against their government.” Epstein, *supra* note 1, at 60. He elaborates the idea in his book. EPSTEIN, *supra* note 5, at 18–20. The idea of a “social contract,” however, has no single or correct form but can be used for many different purposes. Epstein, for example, draws on John Rawls’s “veil of ignorance” to help explain the founders’ success in drafting the Constitution, but he fails to address the fact that Rawls drew radically different normative and practical inferences from the idea of a “social contract” than he does. *Id.* at 30; see JOHN RAWLS, A THEORY OF JUSTICE 10–19 (rev. ed. Oxford Univ. Press 1999) (discussing the creation of laws using principles of justice by people in identical situations).

Epstein then turns to an extended discussion of early American constitutional case law. Applying his definition of the “classical liberal tradition,” he identifies “[t]he key question” as “whether the Constitution itself, and the early cases decided, fit that definition even before the Jacksonian period.”<sup>109</sup> His answer is that they do fit and that it is not even “a close call.”<sup>110</sup> Supreme Court cases, he maintains, demonstrate that the changes Hovenkamp identifies miss the fundamental continuity of nineteenth-century “classical liberal” constitutional law.<sup>111</sup> To defend that conclusion, he reviews the principal substantive doctrines that Hovenkamp’s Article discusses and argues that a careful analysis proves Hovenkamp wrong.<sup>112</sup>

To follow Epstein’s technical legal arguments, it is necessary to place them in the context of Hovenkamp’s initial treatment of the cases at issue. Their contrasting interpretations of the Commerce and Contract Clauses illustrate their divergent positions.

On the Commerce Clause, Hovenkamp challenges Epstein on two points: when “liberal” constitutionalism arrived and whether it changed over time. On the first point, he argues that the Marshall Court restricted state legislation affecting interstate commerce and “strengthened the role of the federal government in economic development.”<sup>113</sup> Relying primarily on *Gibbons v. Ogden*,<sup>114</sup> he paints the Marshall Court as nationalizing and pro-regulatory, qualities he sees as consistent with “pre-classical” and mercantilist economic thinking.<sup>115</sup> “Classical” ideas came only with Jackson, the Taney Court, and the idea of “dual federalism.”<sup>116</sup> Then, new interpretations began to limit governmental regulation, shift power from national to state levels, and expand the scope of the free market.<sup>117</sup> “[T]here is little evidence of a

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Indeed, Thomas Hobbes, who Epstein identifies as one of the thinkers whose work helped ground the Constitution, surely had his own ideas about the nature and significance of the “social contract” that are also radically different from Epstein’s. EPSTEIN, *supra* note 5, at xi.

109. Epstein, *supra* note 1, at 58.

110. *Id.* “[T]he classical legal tradition describes most of the historical arc of legal evolution between the Founding period and the 1936–1937 constitutional revolution.” *Id.* at 65.

111. “It is just this solid foundation that makes it possible to understand the specific issues” of constitutional law that show the continuities of the “classical liberal tradition” and thereby demonstrate Hovenkamp’s errors. *Id.* at 65.

112. Those doctrines involve the Commerce Clause, the Contract Clause, and constitutional provisions involving takings, condemnations, and “public use” and “public purpose” limits on governmental power over private property.

113. Hovenkamp, *supra* note 1, at 14.

114. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

115. See Hovenkamp, *supra* note 1, at 14–19.

116. See *id.*

117. As illustrative, Hovenkamp cites the *License Cases*, 46 U.S. 504 (1847), which allowed states to tax goods that entered through interstate commerce, and *United States v. E. C. Knight Company*, 156 U.S. 1 (1895), which barred Congress from reaching manufacturing intended for interstate markets. Hovenkamp, *supra* note 1, at 17–18.

‘classical liberal’ Commerce Clause jurisprudence,” Hovenkamp maintains, “prior to the rise of the Taney Court in the 1830s.”<sup>118</sup>

On the second point, Hovenkamp argues that *Gibbons* interpreted the words “commerce” and “among” broadly and, on that basis, construed the clause to mean that congressional power reached every subject that “concerns more States than one.”<sup>119</sup> The word “concerns,” he implies, foreshadowed post-New Deal interpretations because it “means about the same thing as ‘affects.’”<sup>120</sup> Thus, Hovenkamp sees the Marshall Court as substantially expanding the reach of national power under the Commerce Clause and providing some support for its further expansion during the New Deal.

Epstein disputes Hovenkamp’s first claim about the Commerce Clause by denying that *Gibbons* was a broadly nationalistic and pro-regulatory opinion. He construes Marshall’s opinion narrowly, arguing that it was intended only to counter an earlier state court opinion that restricted the Commerce Clause to an unreasonable degree.<sup>121</sup> Hovenkamp, he charges, simply misread Marshall’s narrow language and ignored the rigid limits his opinion placed on federal power.<sup>122</sup>

Epstein rejects Hovenkamp’s second claim by showing that in several important nineteenth-century cases the Supreme Court interpreted the Commerce Clause narrowly to reach only interstate carriers serving as instruments of interstate commerce.<sup>123</sup> Although he concedes that there was “some expansion of the Commerce Clause” during the nineteenth century, he insists that the New Deal “extended Congress’s powers miles beyond the earlier cases.”<sup>124</sup> Therefore, Hovenkamp was wrong to argue “that it is proper to read *Gibbons* in harmony with the New Deal cases that talk of ‘affecting commerce’”<sup>125</sup> and equally wrong to minimize “the gap between the earlier

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118. *Id.* at 19.

119. *Id.* at 15 (citing *Gibbons*, 22 U.S. at 194). Hovenkamp emphasizes that under the Commerce Clause, Congress has the power to regulate commerce “with” foreign nations and the Indian tribes and “among” the several States. *Id.* at 15 (quoting U.S. CONST. art. VIII, § 8, cl. 3).

120. *Id.* at 16. Similarly, Hovenkamp quotes Marshall’s statement in *Gibbons* that the commerce power was “complete in itself” and that it “may be exercised to its utmost extent, and acknowledges no limitation.” *Id.* (quoting *Gibbons*, 22 U.S. at 195).

121. Epstein, *supra* note 1, at 65–66. The state court opinion, *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812), was written by Chancellor James Kent. *Id.* at 65.

122. *Id.* at 66. “But it is simply historical mythmaking to think that [Marshall’s] broad conception of the Commerce Clause bears even a faint resemblance to the modern interpretation of the clause that leaves virtually no domain of exclusive jurisdiction of the states.” EPSTEIN, *supra* note 5, at 154.

123. Epstein, *supra* note 1, at 69–72.

124. *Id.* at 72. Some nineteenth century cases, Epstein argues, were “step[s] in the long erosion of Marshall’s flat injunction against the regulation of the internal commerce of a single state.” *Id.* at 70–71. However, they came nowhere near to the breadth of “the transformative decisions” that came with the New Deal Court. *Id.* at 72.

125. *Id.* at 66.

classical liberal and [later] progressive readings of the clause.”<sup>126</sup>

On the Contract Clause, Hovenkamp argues that its “public” branch—the branch limiting government power—was designed to prevent interference with vested rights, especially state grants of charters and monopolies. “In order to finance infrastructure, many states chartered private corporations to build such facilities as toll roads, bridges and later railroads,” he explains.<sup>127</sup> “The inducements provided in corporate charters included such things as grants of free land, monopoly rights, tax exemptions, bounties, eminent domain power, or other special privileges.”<sup>128</sup> His argument strikes a double blow at Epstein in that it tracks the pre- and post-classical thinking divide. First, “[a]ll of this was quite consistent with pre-classical, Hamiltonian statecraft, which believed that capital would not naturally flow into profitable enterprises” but “had to be induced by active government policy.”<sup>129</sup> Second, it was contrary to the teachings of subsequent “classical” thinking which emphasized the superiority of market exchanges and the danger of political corruption.<sup>130</sup> It was not until the 1820s that this “pre-classical” thinking came under assault and not until 1837 that its opponents finally triumphed with Taney’s anti-monopoly opinion in the *Charles River Bridge* case.<sup>131</sup>

For the next hundred years, Hovenkamp continues, constitutional law largely adapted itself to this new “classical constitutionalism,” limiting monopoly grants and gradually developing the powerful “classical” and anti-regulatory doctrine of substantive due process.<sup>132</sup> “The Contract Clause does not place any limit on state power to control contracts to be made in the future,”<sup>133</sup> he emphasizes, and hence it did not limit the power of governments to regulate future economic activities. That inherent limitation helped drive doctrinal change and led “classical constitutionalism” to turn in the century’s second half from the Contract Clause to the far more restrictive doctrine of substantive due process.<sup>134</sup>

Epstein’s response is somewhat indirect and highly legalistic. Deftly narrowing the Marshall Court’s Contract Clause cases to their facts, he argues that later cases enforcing corporate charters and upholding monopolies did

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126. *Id.* at 72. “[T]he ambiguities over the scope of the Commerce Clause [under Marshall and Taney] have nothing to do with the conspicuous expansions of the New Deal period.” EPSTEIN, *supra* note 5, at 157.

127. Hovenkamp, *supra* note 1, at 19.

128. *Id.* at 19–20.

129. *Id.* at 20.

130. *Id.*

131. *See id.* at 20–21 (citing *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837)).

132. *See id.* at 22–27.

133. *Id.* at 19.

134. *See id.* at 19. Hovenkamp’s argument on this point tracks one of the arguments of his earlier book. *See HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra* note 43, at 17–35.

not follow necessarily from the facts and reasoning of the earlier ones.<sup>135</sup> Similarly, he argues that *Charles River Bridge* did not represent a substantial break from earlier Marshall Court decisions because it actually involved a monopoly and therefore presented a different factual issue and, accordingly, was consistent in its legal principles with those earlier cases.<sup>136</sup> Finally, he argues that Hovenkamp overlooked a series of considerations—the passage of general incorporation laws, narrower judicial techniques to limit monopolies, and later cases that further limited the Contract Clause—that undermine his thesis. Contract Clause jurisprudence was for the most part consistent from Marshall’s opinions through the entire nineteenth century, Epstein reasserts, and the Jacksonian movement brought little substantial change. There was, he insists, “no huge migration in sentiment in the understanding of the Contract Clause cases over the course of the 19th century.”<sup>137</sup> Although “the particular problems faced at any given time” changed, the law itself remained essentially unchanged.<sup>138</sup>

Epstein concludes by insisting that, whatever minor doctrinal shifts occurred in Contract Clause cases, the “key point” remains the fact that “systematic change” came only with “progressive” constitutionalism and the New Deal.<sup>139</sup> The result was “a vast expansion in the level of discretion that progressive theorists give to government.”<sup>140</sup> Citing as a prime example *Home Building & Loan Association v. Blaisdell*, where the Court “sustained a debtor’s relief law with retroactive effect,”<sup>141</sup> he declares that “the contrast between the pre- and post-1937 rules could not be clearer”<sup>142</sup> and “represents a sea change that separates the classical liberal from the progressive eras.”<sup>143</sup>

On these two major issues of constitutional case law, Hovenkamp’s interpretation is the more persuasive.<sup>144</sup> Epstein’s adroit reading of the cases produces plausible legal briefs, but it mainly illustrates the extent to which a lawyer can construe the language of judicial opinions broadly or narrowly—stressing, at will, their general reasoning or their peculiar facts—to make

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135. Epstein, *supra* note 1, at 73–75.

136. *Id.* at 75–76.

137. *Id.* at 78.

138. *Id.* For an analysis stressing the way that Contract Clause jurisprudence evolved, and especially the way it changed after the 1870s, see generally JAMES T. ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* (2016).

139. Epstein, *supra* note 1, at 78.

140. *Id.*

141. *Id.* (citing *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934)).

142. Epstein, *supra* note 1, at 79.

143. *Id.* at 80. In another contribution to this symposium, Samuel R. Olken notes the extent to which *Blaisdell* was a far more moderate decision than Epstein allows. See Samuel R. Olken, *The Refracted Constitution: Classical Liberalism and the Lessons of History*, 101 IOWA L. REV. ONLINE 97, 106–07 (2016).

144. Epstein’s narrow technical reading of *Gibbons*, for example, ignores both the historical context of the case and Marshall’s likely purposes in shaping his opinion to enlarge congressional power. See generally Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398 (2004).

them serve widely varying purposes. As a matter of actual history, however, Hovenkamp has the stronger argument on both the arrival date of libertarian, free-market constitutionalism and the evolving nature of the doctrines it subsequently inspired. Commerce Clause jurisprudence may have changed slowly and expanded the reach of federal power only gradually, but in Epstein's "classical liberal" period it nonetheless did both. During the same period Contract Clause jurisprudence changed more noticeably, declining in importance and then largely giving way to substantive due process. That constituted a major doctrinal reorientation that fit snugly with the libertarian and free-market ideas that flourished in the nineteenth—but not the eighteenth—century.

### III. SOME PRELIMINARY COMPARISONS

The impressive works that Epstein and Hovenkamp have produced offer many insights and arguments that merit serious consideration. Epstein's methodical examination of constitutional doctrine is thoughtful and well argued, and his claims that some Court decisions are "correct" and others badly mistaken are provocative. Hovenkamp's exploration of the impact of marginalism enriches the historical literature, and his arguments about the relationship between theoretical changes in economics and doctrinal changes in the law are equally provocative. Both *The Classical Liberal Constitution* and *The Opening of American Law* will become standard sources and touchstones in future scholarly debates.

Both authors agree on the importance of ideas, especially of rigorous economic theory, in the development of the law. Further, both agree that the law is not "formalist" in the sense of being a closed and self-contained system of rules, and both agree that issues of policy underlie legal rules. Both, moreover, see the law as contingent and changing, though in quite different ways. Hovenkamp sees legal change in empirical terms and—however caused, paced, or consequential—as an ordinary part of history; Epstein sees legal change in normative terms, acceptable if consistent with his normative framework but otherwise revolutionary, destructive, and wrong. For Hovenkamp, the arrival of "neoclassicism" makes the law "a much more open and contingent enterprise"<sup>145</sup>; for Epstein, the persistence of "classical liberalism" offers the law "correct" answers.<sup>146</sup>

Not surprisingly, the two differ significantly in their political and social views, something that Hovenkamp keeps largely implicit but Epstein trumpets loudly. Hovenkamp seems to share many of the values associated with "contemporary liberalism,"<sup>147</sup> while Epstein is an avowed libertarian, opposed to the "statist" policies of "contemporary liberalism" and leaning toward, but

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145. HOVENKAMP, *supra* note 6, at 7.

146. See EPSTEIN, *supra* note 5, at 8–9, 46.

147. See HOVENKAMP, *supra* note 6, at 269–70 (discussing sympathetic treatment of labor).

remaining distinctly removed from, “contemporary conservatism.”<sup>148</sup> Understandably, then, Hovenkamp sees value in government regulation and questions the contemporary need for more deregulation, while Epstein condemns the regulation of the post-New Deal administrative state and urges its near wholesale elimination.<sup>149</sup> Hovenkamp suggests shortcomings in a highly deferential “rational basis” standard, while Epstein’s condemns that standard vigorously and across the board.<sup>150</sup> Hovenkamp credits “legal realism” with advancing the idea that “all of law, including common law, is essentially public in character,” while Epstein insists that fundamental “private law notions” are “the essential building blocks of any constitutional order.”<sup>151</sup>

In spite of similarities and differences, the works of both authors present themselves as historical analyses advancing specifically historical claims. Accordingly, they must stand or fall on the merits of the historical arguments they make and the quality of historical evidence they adduce. As works of history, however, they are radically different, and their differences require widely different treatments.

#### IV. HOVENKAMP: “HISTORY” AS THE EFFORT TO UNDERSTAND THE PAST

Hovenkamp writes as a self-described “legal historian,”<sup>152</sup> and his book and Article are impressive examples of thoughtful historical analysis. They show knowledge of the relevant scholarly literature, balance in weighing evidence, attention to context and nuance, and awareness of the subtleties involved in intellectual and legal change.

Hovenkamp charts many doctrinal shifts in the late nineteenth and early twentieth centuries and illuminates the subtle way that legal change often occurs. He shows, for example, how anti-regulatory thinking “veered from its original Jacksonian course” in the late nineteenth century when courts began seeing the danger of class legislation coming not from the corrupting power of established and vested interests but from unnerving new social and political threats posed by “labor, small business, or economic reformers.”<sup>153</sup> His analysis illustrates how formal doctrines may remain stable while their practical significance changes. He has no problem, for example, recognizing the changes that occurred in the understandings and applications of the Constitution’s basic structural principles. “Federalism,” he notes accurately, “is a ‘term that has morphed and re-morphed many times.’<sup>154</sup>

Similarly, rather than conceiving of the New Deal as a monolith, as

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148. See *supra* text accompanying notes 19–24.

149. Compare HOVENKAMP, *supra* note 6, at 324–25, with EPSTEIN, *supra* note 5, at 40, 44, and Epstein, *supra* note 1, at 65.

150. Compare HOVENKAMP, *supra* note 6, at 305–06, with EPSTEIN, *supra* note 5, at 578–79.

151. Compare HOVENKAMP, *supra* note 6, at 306, with EPSTEIN, *supra* note 5, at 579.

152. Hovenkamp, *supra* note 1, at 4.

153. HOVENKAMP, *supra* note 6, at 245.

154. *Id.* at 290.



Epstein does, Hovenkamp recognizes its variety, contradictions, and policy shifts.<sup>155</sup> Further, he recognizes the grave real-world problems the New Deal confronted and its arguable strengths as well as its obvious weaknesses.<sup>156</sup> Accepting the common idea that there was a “first” and “second” New Deal, for example, he finds the former a failure and the latter a qualified success.<sup>157</sup>

On the positive side, Hovenkamp extends the analysis he developed in an earlier book that explored the interplay between changing political and economic ideas and the development of the modern business corporation.<sup>158</sup> *The Opening of American Law* broadens the scope of that earlier study and places its analysis in the wider and richer intellectual context of Darwinism and marginalism. In his analysis of Darwinism, he traces its shifting and increasingly diffuse impact, especially as it played out in racial and criminal law issues.<sup>159</sup> For the most part he follows the established historical literature, including its dismissal of the idea that a harsh, pro-corporate “Social Darwinism” animated American business interests.<sup>160</sup> In particular, he stresses the fact that such a harsh “Social Darwinism” was not the source of the Supreme Court’s much controverted “liberty of contract” and “substantive due process” doctrines.<sup>161</sup>

On the second “revolution,” the impact of marginalism, Hovenkamp makes his most original and insightful contribution to American intellectual history.<sup>162</sup> While the broad impact of Darwinism is well known, the influence of marginalism is much less so. Outside of specialists in the history of economic thought, marginalism has been less understood and studied for several reasons. Unlike Darwinism, it did not lend itself so readily to social

155. *Id.* at 278–98.

156. *Id.* at 286.

157. *Id.* at 290 (“A case can be made that the government-enforced cartelization policies of the First New Deal actually prolonged the Depression by limiting output expansion. The switch toward government stimulation of demand and output expansion that began in 1935 pointed the country on a truer course to recovery.”). Historians also increasingly recognized a “third” New Deal. *See generally e.g.*, ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995).

158. *See generally* HOVENKAMP, *ENTERPRISE AND AMERICAN LAW*, *supra* note 43.

159. HOVENKAMP, *supra* note 6, at 36–72.

160. *Id.* at 159 (“[H]istorians accepted that the development of business policy during this period had almost nothing to do with any theory of evolution.”); *see, e.g.*, ROBERT C. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* (1979); Edward A. Purcell, Jr., *Ideas and Interests: Businessmen and the Interstate Commerce Act*, 54 *J. AM. HIST.* 561, 574–75, 574 n.64 (1967).

161. “Liberty of contract was never a Darwinian doctrine,” and “Social Darwinism did not produce substantive due process.” HOVENKAMP, *supra* note 6, at 23. “Contractarian ideology on the Fuller Court almost certainly did not come from Social Darwinism.” *Id.* at 24.

162. Marginalism is, of course, well known and widely accepted among professional economists, though they also harbor many disagreements about its uses and conclusions. *See, e.g.*, *Marginal Revolution*, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (2d ed. 2008); *see also* MARK BLAUG, *ECONOMIC THEORY IN RETROSPECT* 277–310 (5th ed. 1996); TERENCE W. HUTCHISON, *A REVIEW OF ECONOMIC DOCTRINES, 1870–1929* (1975); HARRO MAAS, *WILLIAM STANLEY JEVONS AND THE MAKING OF MODERN ECONOMICS* (2005).

metaphors or directly implicate hot-button religious and political ideas. Moreover, its influence was more subtle and its consequences more abstract. For most historians, the mathematization of economics that marginalism inspired made it seem an overly technical and arcane subject. Hovenkamp thus adds significantly to our understanding of economic thought and more general social thought as well. For the law in particular he demonstrates that marginalism had a substantial impact in a variety of areas from traditional common law issues of tort and contract, to more modern issues of business and corporate law, and even to some issues of constitutional law.<sup>163</sup>

Among the provocative insights he offers is the observation that, despite their many differences, “Darwinism and marginalism had a common starting point, which was scarcity in relation to the population.”<sup>164</sup> Pointing out that both theories claimed Thomas Malthus as their “intellectual parent,” he notes an intriguing parallel between the new sense of limits that the Turner thesis suggested in 1893 and the definition of economics that Lionel Robbins offered in the 1930s: the scientific study of the “relationship between ends and scarce means which have alternative uses.”<sup>165</sup> Hovenkamp then proposes that “Darwinism became the science of explaining how biology and culture were determined by an inadequate environment[,]” while “marginalism became the science of ranking priorities when not every want can be satisfied.”<sup>166</sup>

On the more critical side, Hovenkamp likely overplays the sweeping success of marginalism within the economics profession and the substantive impact it had more generally in other areas.<sup>167</sup> He casts his net of marginalist thinking widely and may draw within it examples that are at most only obliquely related to marginalism. His claim that substantive due process “was a heroic but ultimately unsuccessful effort to hold off the marginalist revolution,”<sup>168</sup> for example, seems strained, if not off the central point. Further, as in his earlier work, he sometimes overemphasizes the extent to which economic ideas directly shaped legal doctrines and determined the course of the law.<sup>169</sup> Although he discusses marginalism’s use by political and social partisans, for example, he also seems to suggest that the decisive changes it brought to professional economics were, by themselves, a major

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163. See HOVENKAMP, *supra* note 6, at 123–55 (discussing common law); *id.* at 159–239 (discussing business, finance, and corporate law); *id.* at 243–98 (discussing constitutional law).

164. *Id.* at 16.

165. *Id.*

166. *Id.*

167. See, e.g., *United States, Economics in (1885–1945)*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2d ed. 2008). See generally DAVID LAIDLER, FABRICATING THE KEYNESIAN REVOLUTION: STUDIES OF THE INTER-WAR LITERATURE ON MONEY, THE CYCLE, AND UNEMPLOYMENT (1997).

168. HOVENKAMP, *supra* note 6, at 9.

169. See generally Geoffrey P. Miller, *The Rise and Fall of the Classical Business Corporation*, 59 U. CHI. L. REV. 1677 (1992); Gerald Spindler, *Reshaping Legal and Economic History in the 19th Century*, 42 AM. J. COMP. L. 811 (1994) (reviewing HOVENKAMP, ENTERPRISE AND AMERICAN LAW, *supra* note 43).

force in changing legal doctrines.<sup>170</sup>

One, too, could question some specific points. His treatment of the zoning issue in *Village of Euclid v. Ambler Realty Co.*,<sup>171</sup> for example, focuses on a straightforward conflict between property rights and the police power, fitting the case snugly into his story about the spread of marginalist thinking in common law areas.<sup>172</sup> While marginalism may have taken over subsequent thinking in nuisance law, as he argues, his discussion leaves out an essential part of the history behind the case, its social roots. Racial and class conflict made the zoning law challenged in *Euclid* a highly controversial social issue and drove the litigation, and those factors likely had a significant influence on the Supreme Court's decision.<sup>173</sup>

Hovenkamp has written a well-considered and valuable historical study. Critics may find flaws in his analyses or challenge some of his specific claims, but such criticisms will come only as normal parts of an ongoing scholarly dialogue designed to further deepen our understanding of the nature, processes, and consequences of intellectual and legal change.

#### V. EPSTEIN: "HISTORY" AS THE EFFORT TO USE THE PAST

Epstein is, as he describes himself, a "legal theorist"<sup>174</sup> who holds an intense commitment to a public-choice methodology<sup>175</sup> and a libertarian, free-market ideology.<sup>176</sup> He believes passionately that the United States would be far better off if it adopted his ideas and values,<sup>177</sup> and his book is designed to advance those views by giving them the sanction of historical truth and the blessing of the founders. He embeds his personal beliefs in his concept of the "classical liberal tradition" and then seeks to embed that "tradition" in the thinking of the founders and thus in the Constitution.<sup>178</sup>

170. In an earlier book Hovenkamp suggested that economics and politics were inextricably related. "There is no dichotomy between science and politics. On the contrary, science is a form of politics." HOVENKAMP, *ENTERPRISE AND AMERICAN LAW*, *supra* note 43, at 7.

171. *See generally* *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1923).

172. HOVENKAMP, *supra* note 6, at 130–31.

173. *See generally* Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001).

174. Epstein, *supra* note 1, at 90. "Ideas of unfairness are dangerous when not moored to any substantive theory." RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 320 (1995). Epstein feels free to rework the ideas of some of the major theorists he discusses. In an earlier work, for example, he undertook to "correct" Locke on key points of theory. EPSTEIN, *supra* note 5, at 11; *see also id.* at 14–15.

175. EPSTEIN, *supra* note 5, at 20 ("The modern rubric for analyzing these problems is public choice theory . . .").

176. For Epstein's libertarian and free-market beliefs, see the works cited at *supra* note 7. Those views are apparent, for example, in his analysis of federalism. *See* EPSTEIN, *supra* note 5, at 147–53.

177. "The blunt truth is that a strong embrace of the classical liberal constitution offers the only sure path to rejuvenation of America's constitutional and political institutions." EPSTEIN, *supra* note 5, at 583.

178. *See id.* at ix (stating that the "various provisions" of the Constitution "can best be

Epstein's historical claims constitute yet another version of specifically directive constitutional "originalism."<sup>179</sup> His version is highly refined, carefully reasoned, and ostensibly qualified, but his historical analysis is nonetheless strained, unconvincing, and ideologically pre-determined.<sup>180</sup> *The Classical Liberal Constitution* illustrates a basic scholarly truth. It is dangerous "to empirical good sense," Quintin Skinner wrote, "for the historian of ideas to approach his material with preconceived paradigms."<sup>181</sup> Epstein approaches history determined to support his own "preconceived" paradigm, and his book confirms the wisdom of Skinner's warning.<sup>182</sup>

Epstein's underlying thesis stands on two sweeping historical claims. The first is that the "classical liberal tradition" guided the founders in drafting the Constitution, and the second is that it also continued to shape American constitutional thinking from 1787 to 1936 when it finally fell under the assault of "progressive" legal theory. In elaborating those two claims, he rehearses well-known ideas, references famous political theorists, and notes

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explained in light of classical liberal theory").

179. Originalist theories that purport to provide clear direction in resolving most constitutional issues have been repeatedly and thoroughly discredited. See generally FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013).

180. At best, Epstein has a somewhat casual attitude toward history when he deals with constitutional doctrine. "I have long championed a consciously ahistorical application of the Takings Clause to regulatory issues[s]" he notes. "Oddly enough that approach makes more sense of the historical record than Treanor's self-conscious appeal to history." EPSTEIN, *supra* note 5, at 352. Epstein was referring to William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). As Epstein generously points out, Treanor's thesis was subsequently supported by Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053 (2004).

181. Quintin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 28 (1969).

182. Examining the economic provisions of the Constitution in the context of eighteenth century political and economic ideas, G. Edward White came much nearer the historical truth. "Nothing in the Constitution and its history," he concluded

suggests that the Framers of the original Constitution had any guiding definition of the relationship between government and market forces in the arena of economic activity. The attitudes described above are attitudes about the relationship of economic activity to the behavior of humans holding positions of public power, not attitudes toward the form economic activity might take. . . . [I]t would be anachronistic to think of the original Constitution as embodying a "free market" approach to the regulation of economic activity. If anything, the document assumes—in its provisions protecting property rights from usurpation by state legislatures or Congress—a promotional or regulatory relationship between the state and markets. Such an assumption would be entirely consistent with the usual model of economic activity in late eighteenth century America, in which towns, colonies, and states distributed land grants, exercised eminent domain powers, granted exclusive franchises to promote the building of turnpikes and bridges, and created opportunities for public officeholders to attach private emoluments to their offices.

G. Edward White, *The Political Economy of the Original Constitution*, 35 HARV. J. L. & PUB. POL'Y 61, 84 (2011).

some basic social and political developments. Like his economic theory, however, his history is highly selective and severely stripped down, with little place for context, complexity, variation, or—except for the alleged cataclysm of the New Deal—change itself.<sup>183</sup> *The Classical Liberal Constitution* offers a history of American constitutionalism in the same way that Picasso's "Guernica"—surely another work of "passionate intensity"—presents a history of the Spanish Civil War.

Epstein uses two techniques to establish the existence and content of his "classical liberal tradition." First, he equates the tradition with the most basic and accepted ideas of modern political thought—ideas so basic, abstract, and general that most Americans shared them in the eighteenth century and continue to share them today.<sup>184</sup> Indeed, Epstein seems to equate his capacious "classical liberal tradition" with his own selective interpretation of the nobler aspects of what has been called "the Western Intellectual Tradition."<sup>185</sup> Second, he ignores the complexities, variations, and nuances that mark the history of those ideas and dismisses the many changes they underwent over the centuries, including changes that occurred during the 1780s as the Constitution was being debated, drafted, and ratified.<sup>186</sup>

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183. Epstein's historical work has previously been subject to severe and justified criticism. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556–67 (1995). See generally Calvin R. Massey, *An Assault upon "Takings" Doctrine: Finding New Answers in Old Theory*, 63 IND. L. J. 113 (1978). For one example of the kinds of complexities he ignores, see SUSANNA L. BLUMENTHAL, *LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE* (2016) (exploring changing ideas about insanity, personal responsibility, and legal liability in the nineteenth century).

184. Epstein seems on occasion to acknowledge that consensus among the founders extended mainly to generalities: "All sides of the debate couched their arguments in terms of natural rights to liberty and property, and structural protections against government abuse." EPSTEIN, *supra* note 5, at 23. Although the statement implies consensus, it also implies that the various "sides" agreed only on ideas and principles so lacking in specific meaning that they could readily interpret them to advance their various conflicting positions. In another way, too, the statement illustrates the amorphous quality of the consensus Epstein sees among the founders, for he tries to make it seem relatively substantive by comparing it to later and, in his view, profoundly misguided and destructive groups. "None of the participants in this historical intellectual fray," he explains, "were social democrats or progressives, let alone socialists." *Id.*

185. Epstein's "classical liberal tradition" is explicitly elastic when necessary: "It is possible, therefore," he explains when addressing issues of "morals" regulation, "to reconceptualize the understanding of the morals power so that its application becomes more consistent with classical liberal theory." EPSTEIN, *supra* note 5, at 368–69. Thus, he is able to conform it to some, but not all, elements of "the stunning transformation of the meaning of liberty under the Due Process Clause." *Id.* Apparently rights to use contraception and engage in homosexual sodomy are parts of "liberty," but abortion and gay marriage are not. *Id.* at 369–80.

186. The very "vocabulary of political discourse was, during the eighteenth century, in a state of flux." FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 4 (1985); accord GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 8 (1992) ("The Revolution did not just eliminate monarchy and create republics; it actually reconstituted what Americans meant by public or state power and brought about an entirely new kind of popular politics and a new kind of democratic officeholder. The Revolution not only changed the culture of Americans—making over their art, architecture, and

A. *THE IDEOLOGICALLY CONSTRUCTED “CLASSICAL LIBERAL TRADITION”*

The sheer complexity and variation of ideas that marked the Founding confounds Epstein’s claim that it was shaped by one coherent, dominant, and particularized “classical liberal tradition.”<sup>187</sup> His repeated invocations of John Locke, for example, illustrate his studied inattention to the actual intellectual history of the Founding. Casually acknowledging that the founders’ nation-building “did not align itself neatly” with Locke’s “political theory teachings,”<sup>188</sup> he nonetheless repeatedly characterizes American constitutional thinking as “Lockean.”<sup>189</sup> He ignores questions about the nature and extent of Locke’s actual influence and the extent to which supposedly “Lockean” ideas were actually only commonly accepted and quite general ideas that were supported by a wide range of disparate sources.<sup>190</sup>

iconography—but even altered their understanding of history, knowledge, and truth.”).

187. See, e.g., McDONALD, *supra* note 186, at 97–99. This undeniable, and for most prescriptive purposes, frustrating truth seriously undermines all who attempt to use history to identify the single “true” and “original” meaning of the Constitution. On the opposite side of the political spectrum from Epstein, for example, Justice Stephen Breyer attempted to identify “the original Constitution’s primary objective” and found it “as furthering active liberty, as creating a form of government in which all citizens share the government’s authority, participating in the creation of public policy.” STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 33 (2005). In a thoughtful review, Judge Michael W. McConnell decisively stated: “[T]he relevant history is more complicated and ambivalent . . .” and that “[w]ithin the broad republican consensus of the American [f]ounders, there were sharp differences of opinion . . .” Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2392 (2006) (reviewing BREYER, *supra*).

188. EPSTEIN, *supra* note 5, at 3.

189. In the book, Epstein states that his “classical liberal tradition” is “Lockean, has a “central Lockean premise,” represents a “Lockean tradition,” embodies “Lockean theory,” and reflects “Lockean concerns.” *Id.* at 7, 18, 251, 331, 325, 352, 461. For an earlier critique identifying Epstein’s easy and unreliable appropriation of the “Lockean” label, see Flaherty, *supra* note 183, at 560–67. Epstein’s “interpretative approach precludes him from making specific factual claims to begin with.” *Id.* at 560–61.

Ironically, Epstein’s use of the phrase “Lockean” is not only clichéd, but also quite awkward. It ignores the fact that Locke did more than write his famous *Second Treatise of Government*, to which Epstein refers. See EPSTEIN, *supra* note 5, at 82. Locke also helped write the *Fundamental Constitutions of Carolina* to which Epstein does not refer. That document granted freemen in the Carolina colony “absolute power” over their “Negro Slaves” and, further, set the terms for a feudalistic social and economic order with a permanent underclass of white peasant laborers. Indeed, Locke was also a founding member and major shareholder of the Royal African Company which enjoyed a monopoly over the British slave trade. Thus, Locke was not only a promoter of slavery and a feudalistic colonial social order but also a commercial monopolist. See NANCY ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* 43–46 (2016). Historians dispute the exact relationship between Locke’s *Second Treatise* and his involvements with the Carolina colony and the slave trade. See generally David Armitage, *John Locke, Carolina and the Two Treatises of Government*, 32 POL. THEORY 602 (2004); James Farr, *Locke, Natural Law and New World Slavery*, 36 POL. THEORY 495 (2008); Wayne Glausser, *Three Approaches to Locke and the Slave Trade*, 51 J. HIST. IDEAS 199 (1990).

190. While not denying that “Lockean” ideas were in the mix, Pauline Maier identified some of the wide range of sources that Jefferson likely drew on in drafting the Declaration of Independence. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF*

More specifically, he ignores a substantial body of historical scholarship that identifies other varied and partially overlapping influences that helped shape American thinking at the Founding. J.G.A. Pocock stressed the influence of sixteenth-century “civic republicanism” coming from Italy;<sup>191</sup> John Phillip Reid emphasized the influence of seventeenth-century British customary and common-law thinking;<sup>192</sup> Adrienne Koch stressed the influence of eighteenth-century French intellectuals;<sup>193</sup> and Caroline Robbins highlighted the influence of eighteenth-century British political “dissenters.”<sup>194</sup> Indeed, Garry Wills denied Locke’s influence altogether.<sup>195</sup> In consistently invoking Locke, Epstein ignores all of that scholarship.

Similarly, Epstein also ignores the importance of other vibrant intellectual forces that were at work in eighteenth-century America.<sup>196</sup> He

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INDEPENDENCE 123–36 (1997). The ideas “in the generalized form captured by Jefferson,” she explained, “had become . . . a political orthodoxy, whose basic principles colonists could pick up from sermons or newspapers or even schoolbooks . . .” *Id.* at 135. They were, in short, “absolutely conventional among Americans of his time.” *Id.* Older scholarship commonly pictured Locke as critical to the founders’ thinking. See generally CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE; A STUDY ON THE HISTORY OF POLITICAL IDEAS* (1922); MERLE E. CURTI, *THE GREAT MR. LOCKE, AMERICA’S PHILOSOPHER, 1783–1861* (1937). There is an immense scholarly literature examining Locke’s thought that offers a wide range of conflicting views and emphases. A bare sample—each subject to criticism from other Lockean scholars—would include the following: BARBARA ARNEIL, *JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM* (1996) (describing Locke as defender of empire and economic exploitation of colonies); JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE “TWO TREATISES OF GOVERNMENT”* (1969) (noting the complex historical context of Locke’s time led to confusions in his thought); GREG FOSTER, *JOHN LOCKE’S POLITICS OF MORAL CONSENSUS* (2005) (stating that Locke was motivated by desire to end religious conflict in England); WILMOORE KENDALL, *JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE* (1941) (observing that Locke was not a radical individualist, but a believer in community generated rights); JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT* (2002) (describing Locke as religiously inspired defender of human equality). Collectively, this body of scholarship highlights Epstein’s clichéd and simplistic use of Locke. See *supra* notes 189, 230; *infra* note 316.

191. See generally J. G. A. POCOCK, *THE MACHIEVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

192. See generally JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* (1988).

193. See generally ADRIENNE KOCH, *THE PHILOSOPHY OF THOMAS JEFFERSON* (1943).

194. See generally CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMEN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES* (1959).

195. See generally GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* (1978). Wills’s book, arguing for a non-Lockean and markedly communitarian interpretation of the Declaration, provoked a debate that brought fierce rejoinders from political conservatives and libertarians. See Ralph E. Luker, *Garry Wills and the New Debate Over the Declaration of Independence*, VA. Q. REV. ONLINE 56.2 (1980), <http://www.vqronline.org/essay/garry-wills-and-new-debate-over-declaration-independence>.

196. See, e.g., Lester Crocker, *Interpreting the Enlightenment: A Political Approach*, 46 J. HIST. OF IDEAS 211, 217–22 (1985); James T. Kloppenberg, *The Virtues of Liberalism Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9, 25 (1987) (“[T]hree

ignores the role of constitutional thinking that developed out of debates over the imperial British Constitution in the eighteenth century and that helped shape American understandings of government, federalism, and constitutionalism.<sup>197</sup> He ignores the broader influence of Protestant religious and political ideas<sup>198</sup> and the influence of the religiously conventional promptings of Scottish “common sense” philosophy.<sup>199</sup> Further, he ignores the pressures of ethnic, geographical, cultural, and ideological conflicts that fragmented the influence of those various intellectual traditions and gave them distinctive and sometimes conflicting political forms.<sup>200</sup> Indeed, he ignores the fact that “liberal” ideas themselves came in different forms and shadings and that their various advocates often advanced interpretations that diverged or conflicted.<sup>201</sup>

Most obviously, Epstein denies the influence of the tradition of “civic republicanism” and its “anti-liberal” ideals of virtue, self-sacrifice, public participation, and service to the common good.<sup>202</sup> “But whatever the historical

of the traditions apparent in colonial American political thought [Christianity, republicanism, and liberalism] persisted into the 1790s, but the relations among them altered as the tensions within each tradition changed.”).

197. See generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); DANIEL HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830* (2005).

198. “To justify revolution by ‘the eternal laws of self-preservation or, as others sometimes said, ‘the first law of nature,’ drew upon a politicized religious literature that equated the laws of God with the laws of nature and described self-preservation as ‘an instinct by God implanted in our nature.’” MAIER, *supra* note 190, at 87; see also *id.* at 87–89. See generally FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC (Daniel L. Breisbach & Mark David Hall eds., 2014); NATHAN O. HATCH, *THE SACRED CAUSE OF LIBERTY: REPUBLICAN THOUGHT AND THE MILLENNIUM IN REVOLUTIONARY NEW ENGLAND* (1977); JONATHAN J. DEN HERTOOG, *PATRIOTISM AND PIETY: FEDERALIST POLITICS AND RELIGIOUS STRUGGLE IN THE NEW AMERICAN NATION* (2015); ELLIS SANDOZ, *A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING* (1990).

199. See generally HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978). Adam Smith was a participant in the “Scottish Enlightenment,” and the “*laissez faire*” economic ideas commonly associated with him were parts of a broader, moralistic, and religiously traditional philosophy.

200. See ROBERT KELLY, *THE CULTURAL PATTERNS IN AMERICAN POLITICS: THE FIRST CENTURY 271–73* (1979) (identifying four modes of republican thought and tracing their differences to differences in ethnicity, culture, ideology, and group emotions and antagonisms).

201. Kloppenborg, *supra* note 196, at 9, 15–19, 27–28. At various points, Epstein refers to many of the great political and economic theorists without noting their numerous areas of disagreement. For a particularly careful examination of the ways in which Hume departed from or rejected much of Locke, for example, see JAMES A. HARRIS, *HUME: AN INTELLECTUAL BIOGRAPHY* 50–51, 85–87, 91–92, 94–99, 127–31, 137–38, 273–74, 327–28 (2015); see also Donald Winch, *Economic Liberalism as Ideology: The Appleby Version*, 38 *ECON. HIST. REV.* 287, 296 (1985) (discussing how Locke differs from Hume and Adam Smith); see also generally PETER MCNAMARA, *POLITICAL ECONOMY AND STATESMANSHIP: SMITH, HAMILTON, AND THE FOUNDATION OF THE COMMERCIAL REPUBLIC* (1998) (discussing how Adam Smith differs from Alexander Hamilton).

202. EPSTEIN, *supra* note 5, at 25. “Specifically, the Framers believed in the existence of a *virtuous elite*—which included the Framers themselves—who would pursue the common good in



ambiguities on this matter,” he notes in passing, “the Anti-Federalists did not embrace the now fashionable ‘republicanism’ that allows the government to demand personal sacrifice or even individual valor in the service of some higher, overriding vision of community good.”<sup>203</sup> His statement reveals, once again, his refusal to consider the historical evidence. First, when confronted with the possibility of “historical ambiguities,” he quickly dismisses any possible uncertainties and complexities as irrelevant to his claims, a technique of avoidance that he uses repeatedly. Second, he limits his dismissal of “civic republicanism” to its influence on “the Anti-Federalists.” That dismissal illustrates both his inattention to the great variety of views that characterized the Anti-Federalists and, more importantly, his refusal to acknowledge the fact that many Anti-Federalists did, in fact, share the ideals of “civic republicanism.”<sup>204</sup> Third, and most salient, he avoids entirely the substantial historical evidence that establishes that “civic republicanism” had an abiding influence on the Federalists themselves—the individuals who actually drafted, defended, and ratified the Constitution.<sup>205</sup> Further, he avoids the evidence

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the public sphere even while pursuing their own interests in the private sphere.” Stephen M. Feldman, *Is the Constitution Laissez-Faire?: The Framers, Original Meaning, and the Market*, 81 BROOKLYN L. REV. 1, 11 (2015). As John Jay wrote, the country needed “rescue,” and “the best men” could accomplish that by bringing “a little virtue and good sense” to public affairs. Letter from John Jay to Jacob Reed (Dec. 12, 1786), in 3 JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 221, 222 (Henry P. Johnston, ed., G.P. Putnam’s Sons 1890). The country needs the leadership of those “who regard the public good with more attention and attachment than they do mere personal concerns.” Letter from John Jay to General George Washington (Jan. 7, 1787), in *id.* at 226. For a review of the literature on “civic republicanism,” see generally Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

203. EPSTEIN, *supra* note 5, at 25.

204. See generally SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999). “Centinel,” for example, one of the most prominent Anti-Federalist writers, declared that a “republican, or free government, can only exist where the body of the people are virtuous.” He deeply distrusted “liberal” ideas. “[I]f the administrators of every government are actuated by views of private interest and ambition, how is the welfare and happiness of the community to be the result of such jarring adverse interests?” “Centinel,” No. 1 (Oct. 5, 1787), 1 THE COMPLETE ANTI-FEDERALIST 138 (Herbert J. Storing, ed. 1985). Another Anti-Federalist, South Carolina’s “Cato,” expressed similar views. Experience should lead Americans to abandon “wild ideas of liberty . . . [W]ith a generous effort let us shake off our libertinism, and wish only to be free so far, as well regulated laws will permit and defend . . . If no ambition be admitted into your counsels, but a laudable emulation acting towards the general good—Then shall we see each day productive of some good, and each year strengthen the sinews of the commonweal.” *Essays of Cato* (Nov. 26, 1787), in 5 THE COMPLETE ANTI-FEDERALIST, *supra*, at 139.

205. As Gordon S. Wood explained, Madison and the Federalists

still clung to the republican ideal of an autonomous public authority that was different from the many private interests of the society . . .

Most of the revolutionary leaders, in other words, continued to hold out the possibility of virtuous politics. They retained the republican hope that at least a few, perhaps only those who were Washington’s ‘drop in the Ocean,’ still had sufficient virtue to become disinterested umpires and promote an exclusively public sphere of

showing that the influence of “civic republicanism” on those founders extended through the eighteenth and into the early nineteenth century.<sup>206</sup> “The aim of every political constitution,” Madison wrote, “is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society . . . .”<sup>207</sup>

Epstein attempts to further minimize the significance of the term “republican” by declaring that it occupied only a “modest office in the historical debates,” essentially standing only for the principle that elected legislatures alone could make laws.<sup>208</sup> The historical literature, however, makes it clear that the term had much broader significance and that it carried profound if varied political and moral implications. “Civic republican” ideas differed substantially from emergent “liberal republican” ideas, for they subordinated individualism, self-interest, private property, and commercial success to contrary ideals of self-sacrifice, civic virtue, devotion to the common good, and the duty of participating in public affairs.<sup>209</sup> “Reading the political pamphlets and private correspondence of the 1790s,” Joyce Appleby concluded, “one gets the impression that ‘republican’ was a label to be fought

activity in government . . . .

The new federal Constitution was designed to ensure that governmental leadership would be entrusted as much as possible to just those kinds of disinterested gentlemen who had neither occupations nor narrow mercantile interests to promote, ‘men who,’ in Madison’s words, ‘possess most wisdom to discern and most virtue to pursue the common good of the society’.

WOOD, *supra* note 186, at 253, 254; see GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* 34 (2009).

206. For the persistence of “civil republican” ideas into the early nineteenth century, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835* 48–53 (1988).

207. THE FEDERALIST NO. 57, at 370 (James Madison) (Edward Mead Earle ed., 1937). “Madison’s solution to this problem [of private interest] was to create a national government that he hoped would be a kind of impartial super-judge over all the competing interests in the society.” WOOD, *supra* note 205, at 32. James Wilson expressed similar views:

Expanded patriotism is a cardinal virtue in the United States. This cardinal virtue—this ‘passion for the commonweal,’ superior to contracted motives or views, will preserve inviolate the connexion [*sic*] of interest between the whole and all its parts, and the connexion [*sic*] of affection as well as interest between all the several parts.

. . . Let us, then, cherish: let us encourage; let us admire; let us teach; let us practice [*sic*] this devotion to the publick, [*sic*] so meritorious, and so necessary to the peace, and greatness, and happiness of the United States.

JAMES WILSON, *THE WORKS OF JAMES WILSON* 268 (Robert Green McCloskey ed., 1967).

208. EPSTEIN, *supra* note 5, at 25.

209. See generally LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789–1829* (1984); DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); COLLEEN A. SHEEHAN, *THE MIND OF JAMES MADISON: THE LEGACY OF CLASSICAL REPUBLICANISM* (2015); Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167 (1974); Rogers, *supra* note 202; Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982);

over, a prized appellation to claim for one's own views."<sup>210</sup>

Appleby, who searched for and found "liberal" ideas in the period, highlights the continued interweaving that occurred in the late eighteenth and early nineteenth centuries between older "civic republican" ideas and newer "liberal" ones.<sup>211</sup> Drawing on a substantial body of historical literature, she argues that "civic republican" ideas developed in the sixteenth century and persisted into the nineteenth and that newer "liberal" ideas grew out of changing economic practices and ideas that began in the seventeenth century and gradually morphed into the "liberalism" that came to dominance in the nineteenth.<sup>212</sup> She shows, moreover, that those newer "liberal" ideas carried varying shades of meaning and pointed toward varying tangents of policy. Most important, as a matter of "originalist" understandings, she concludes that it was only in the 1790s—after the Constitution had been drafted and ratified—when the tide began to turn in favor of "liberalism" and only in the decades after Jefferson's election victory in 1800 that it finally triumphed.<sup>213</sup> Thus, in the late eighteenth century "liberal" ideas were embryonic, fluid, and sharply contested, and they were only one element in the intellectual ferment that marked the Founding.<sup>214</sup>

Similarly, Epstein ignores the true significance of the practical,

210. JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 321 (1992).

211. On the interweaving of "republican" and "liberal" ideas at the Founding, see generally Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 534 (1987) ("The distinction between liberalism and republicanism "assumes a sharp dichotomy between two clearly identifiable traditions that eighteenth-century reality will not support. None of the Founding Fathers ever had any sense that he had to choose or was choosing between Machiavelli and Locke."). Like other Federalists, Madison and Hamilton both appealed to "virtue" as a necessary support for republican government, just as they warned against the dangers of self-interest and corruption. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 368–71, 376–79 (1967). For a similar analysis, see generally ANDREAS KALYVAS & IRA KATZNELSON, *LIBERAL BEGINNINGS: MAKING A REPUBLIC FOR THE MODERNS* 4 (2008) ("[L]iberalism as we know it was born from the spirit of republicanism, from attempts to adapt republicanism to the political, economic, and social revolutions of the eighteenth century and the first decades of the nineteenth. Between 1750 and 1830—not earlier or later—liberalism took a doctrinal and institutional form that has endured.").

212. See generally APPLEBY, *supra* note 210. For her earlier views, see generally JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984) [hereinafter APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER*] and for her more recent discussion, see generally JOYCE APPLEBY, *THE RELENTLESS REVOLUTION: A HISTORY OF CAPITALISM* (2010). For criticism of her earlier views, see generally Winch, *supra* note 201, at 287.

213. APPLEBY, *supra* note 210, at 323–27, 336–39 (1992); APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER*, *supra* note 212, at 3–14; accord STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800* 28 (1993).

214. The exact nature of, and relationship between, "civic republicanism" and "liberalism" is still debated. See, e.g., Tom Cutterham, *Putting "Republicanism" in Its Place*, THE JUNTO: A GROUP BLOG ON EARLY AM. HIST. (June 9, 2014), <https://earlyamericanists.com/2014/06/09/putting-republicanism-in-its-place>. The significant point is that the intellectual currents at the Founding were far more varied and complicated than Epstein acknowledges.

compromise-laden nature of the Constitution itself.<sup>215</sup> While the final document reflected widely shared, if vague and contested, republican ideas, it did not embody Epstein's "classical liberal" principles in any specific or clearly understood way.<sup>216</sup> By all accounts the Constitution was a pragmatic product of hard-bargaining and compromise, and it was not entirely satisfactory to anyone involved in its drafting.<sup>217</sup> Its provisions included not only obvious compromises but also carefully embedded finesses designed to paper over disagreements, uncertainties, and doubts. "[B]ehind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion," Jack Rakove explained.<sup>218</sup> "The original interpretations of 1787–88 could yield nothing more than reasonable explanations and predictions of what the Constitution would mean."<sup>219</sup>

Gordon S. Wood brilliantly captured the tumultuous, innovative, and unsettled nature of the Founding and the political ideas of the Federalists. Their theory had "originality," "consistency" and "completeness," he explained, but it was also "diffusive and open-ended; it was not delineated in a single book; it was peculiarly the product of a democratic society, without a precise beginning or an ending."<sup>220</sup> It was, in other words, novel, evolving, variously formulated, and capable of supporting widely divergent interpretations. "The novelty of the undertaking immediately strikes us," Madison acknowledged,<sup>221</sup> and the meaning, significance, and ultimately the

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215. Early on Epstein notes that the Constitutional Convention "produced awkward compromises, omissions, and redundancies—not to mention major blunders," but he does not allow that acknowledgment to affect his claims about the authoritative status of the "classical liberal tradition" that was supposedly responsible for that same Constitution. EPSTEIN, *supra* note 5, at 4.

216. Herbert Storing argued, for example, that the Federalists purposely designed the Bill of Rights to reject broad, vague, and potentially disruptive general principles in favor of "specific protections of traditional civil rights." HERBERT J. STORING, TOWARD A MORE PERFECT UNION: WRITINGS OF HERBERT J. STORING 125 (Joseph M. Bessette ed., 1995); *see also id.* at 23–28.

217. The nature of many of the Constitution's basic provisions "shows that the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations." THE FEDERALIST NO. 37, *supra* note 207, at 231 (James Madison); *see, e.g.*, RICHARD B. BERNSTEIN & KYM S. RICE, ARE WE TO BE A NATION?: THE MAKING OF THE CONSTITUTION 177–78 (1987); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 189, 196–98 (1996); STORING, *supra* note 216, at 34–36. The Constitution "was not a document that gave entire satisfaction to anyone." EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89 143 (3d ed. 1992). For pressures applied by ordinary Americans that also helped shape the Constitution, *see generally* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007).

218. RAKOVE, *supra* note 217, at 9–10.

219. *Id.* at 160. "Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both Federalists and Anti-Federalists were right in predicting how tempered or potent a government the Convention had proposed." *Id.* at 201.

220. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 615 (2d ed. 1969).

221. THE FEDERALIST NO. 37, *supra* note 207, at 226 (James Madison).

fate of the Constitution hinged on the future and its “actual trial.”<sup>222</sup>

Pauline Maier found the same situation in studying the ratification process. The Federalists “had to defend sections of the Constitution about which, in truth, they themselves often had reservations,” she explained, “and they had to make sense of the system of government it proposed in ways that went beyond anything said or even understood in the federal Convention.”<sup>223</sup> The “impressive theoretical achievements” of the founders “are appreciated more in retrospect than they were at the time,” for the participants’ immediate objectives were “primarily political” as they struggled to develop ideas and arguments that would persuade voters to ratify, amend, or defeat the Constitution “on the local level, in the towns and counties where convention delegates were chosen.”<sup>224</sup>

If there remained any doubt that the meaning of the Constitution was deeply unsettled and sharply disputed, the political and ideological conflicts that tore the founders apart in the decade following ratification demonstrated that fact conclusively. When the First Congress sought to structure a federal judicial system in 1789, old disputes immediately re-erupted, and the Constitution gave little specific guidance. The “opponents and proponents” of the proposed Judiciary Act “gave the [constitutional] language diametrically opposed readings.”<sup>225</sup> The “newness of the Constitution, the widespread sense of its fragility, and the bitter antagonism between the contending groups in American society,” James Roger Sharp explained, “prevented that document from providing limits to the political debate and serving as the consensual touchstone for the nation.”<sup>226</sup> It was emblematic, for example, that by 1792 a political and interpretive gulf had opened between Madison and Hamilton.<sup>227</sup> “The politics of the 1790s was a truly cacophonous affair,” Joseph Ellis concluded.<sup>228</sup> “The political dialogue within the highest echelon of the revolutionary generation was a decade-long shouting

222. THE FEDERALIST NO. 38, *supra* note 207, at 235 (James Madison).

223. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 69 (2010).

224. *Id.* at 86.

225. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 13, 17 (Maeva Marcus ed., 1992).

226. JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 20 (1993).

227. WOOD, *supra* note 205, at 148; EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 35, 32–37 (2007). The dispute between Madison and Hamilton over the constitutionality of the Bank of the United States “suggests not only that the meaning of the Constitution was literally debatable but that there was no consensus, even among the Framers, as to what it meant.” Sanford Levinson, *Federalist 37: Human (and Even Divine) Fallibility and Written Constitutions*, in SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE 21ST CENTURY 135, 137 (2015).

228. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 16 (2000).

match.”<sup>229</sup>

Epstein’s “classical liberal tradition” floats unsullied above all of this actual history, lifted only by the lofty generalities in the founders’ political vocabulary. Those generalities—vague concepts of “rights,” liberty,” “property,” “contract,” “republican,” “sovereignty,” “limited government,” and “separation of powers”—were not, however, merely parts of their common vocabulary. They were precisely the parts that generated the most fundamental and bitter disagreements over their meaning and application.<sup>230</sup>

#### B. THE IDEOLOGICALLY DETERMINED TREATMENT OF CHANGE

As Epstein’s ideology gives meaning to his conception of the “classical liberal tradition,” so it determines his treatment of historical change. It requires that he find essential continuity in American constitutionalism from 1787 to 1936 and an abrupt break with the allegedly baleful impact of “progressive” constitutionalism and the New Deal.<sup>231</sup> Thus, he denies or at least minimizes change in the period before 1936 and dismisses anything inconsistent with his continuity thesis as merely inconsequential “ups and downs.”<sup>232</sup>

Methodologically, his approach to issues of historical change is arid, legalistic, and socially abstract. He studiously avoids the social and political dynamics that drive historical change and ignores the impact of interrelated social, economic, and political developments on the law and constitutional

<sup>229</sup>. *Id.*; see also generally John R. Howe, Jr., *Republican Thought and the Political Violence of the 1790s*, 19 AM. Q. 147 (1967); Marshall Smelser, *The Federalist Period as an Age of Passion*, 10 AM. Q. 391 (1958).

<sup>230</sup>. Epstein’s invocation of “Lockean” ideas is particularly ironic on this point about the vague and disputed nature of the key concepts the Founders debated, for Locke’s own analysis of language stressed the changing, subjective, complex, and unstable nature of semantic meanings. See generally HANNA DAWSON, *LOCKE, LANGUAGE, AND EARLY-MODERN PHILOSOPHY* (2007). Indeed, according to Jack Rakove, Madison was merely reflecting Locke’s own language analysis when he wrote *Federalist* No. 37:

[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 593–95 (2011).

<sup>231</sup>. He readily acknowledges that his interpretations and judgments are based on his view of “classical liberal” ideals and values. EPSTEIN, *supra* note 5, at 71.

<sup>232</sup>. Epstein, *supra* note 1, at 80; see also *id.* at 90 (describing mere “ebbs and flows”).

thinking.<sup>233</sup> His arguments rest primarily on the technical and formalistic analysis of legal doctrines and Court decisions. That approach opens the way for his brief-like use of professional craft skills to narrow or expand the meaning of cases to fit his desired conclusions. Further, it readily obscures and implicitly denies the subtle ways that doctrines change over time as they take on new shadings of meaning when courts apply them to new issues, new problems, and new social conditions. That approach, moreover, is oblivious to the fact that judicial opinions are almost invariably designed carefully and purposely to affirm continuity and deny change. To rely primarily on such sources to demonstrate historical continuity, in other words, is to simply beg most historical questions.

In arguing for the essential continuity of “classical liberal constitutionalism” from the seventeenth century to its eclipse in 1936, Epstein minimizes or ignores changes that occurred in American political and constitutional thinking over those same centuries and, most particularly, the pivotal and path-breaking changes that occurred during the Founding itself. He ignores the rapid and tumultuous changes that took place during the 1770s and 1780s, and he misses the very newness and complexity of the ideas that came out of the Constitutional Convention and the innovative political defenses that the Federalists were developing.<sup>234</sup> Similarly, he misses the changes that came with the tumultuous birth of American politics and constitutional debate in the 1790s and the constitutional significance of the “revolution” of 1800 when Thomas Jefferson succeeded John Adams in the

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233. Epstein does, of course, refer to external social and political developments on occasion, but his remarks generally come in passing, seldom affect his analysis, and slip by without seriously accounting for the legitimacy of changes that seem to conflict with “classical liberal” ideas. He explains and seems to accept the subsequent abandonment of the founders’ restrictive ideas about voting rights and their rejection of “democracy,” for example, by merely commenting that “the Founders were prisoners of their own age.” EPSTEIN, *supra* note 5, at 28. Similarly, he seems to accept change that rejects principles of the same “classical liberal tradition” when he notes matter of factly and without further explanation that the law’s “strict moral judgment of sexual and marital practices became anachronistic in the last half of the twentieth century.” *Id.* at 368–69; *see also id.* at 6, 27, 277. Indeed, considering the issue of homosexual sodomy, he states that a mere ten years is sufficient to have “legitimated” the change from the “historically correct” ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to the unjustified “living constitution” decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). EPSTEIN, *supra* note 5, at 379, 377. Thus, he acknowledges that social change happens and may legitimately alter constitutional law, but he does not explain when and why changes properly have normative significance—other than to recognize their propriety when they are, or can somehow be made, consistent with the way he chooses at the time to interpret his “classical liberal theory.”

234. Lance Banning, for example, notes that Madison’s thinking about the nature and structure of the Constitution changed throughout the 1780s, changed during the course of the Constitutional Convention, changed again when he wrote his *Federalist* essays, and continued to change thereafter. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 200–01*, 374, 394 (1995); *see also* BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* (2003); JACK RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* (1979); *see also generally* BAILYN, *supra* note 211; MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015).

presidency and significantly reoriented American constitutional government and politics.<sup>235</sup> He misses, in other words, the decisive fact that the founders' basic ideas about constitutional structure and individual rights were fluid, uncertain, disputed, and changing throughout the late eighteenth century and into the nineteenth.<sup>236</sup>

Beyond the Founding era, Epstein ignores the massive transformations that remade American society, politics, and culture from the early decades of the nineteenth century to the 1930s. "In the half century following the Revolution what remained of the traditional social hierarchy virtually collapsed, and in thousands of different ways connections that had held people together for centuries were further strained and severed."<sup>237</sup> The result was the creation of a new society and a new politics that undermined the intellectual world that the founders had known.<sup>238</sup> Jacksonian politics and ideas brought drastic changes beginning in the 1830s,<sup>239</sup> and the Civil War and Reconstruction brought nationalizing constitutional amendments and shifted the geography of national political power, the direction of national policy, and the consequent application of constitutional principles.<sup>240</sup> The subsequent post-Reconstruction settlement incorporated a new form of constitutionalized racial politics while further reorienting governmental power and remolding the increasingly pivotal law of the Fourteenth Amendment.<sup>241</sup> The first three decades of the twentieth century, in turn,

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235. Wood, *supra* note 211, at 635 ("[M]ost of the Founding Fathers recognized the reality of the self-interested pursuit of happiness by Americans but were unwilling to accept it without regret; indeed, most of them died deeply disillusioned with what they had wrought."). See generally BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005). For another discussion of Jefferson, see generally RICHARD B. BERNSTEIN, *THOMAS JEFFERSON* (2003).

236. See generally BANNING, *supra* 234; JOHN R. HOWE, JR., *THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS* (1966). On changing political and economic ideas, see generally APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER*, *supra* note 212; BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002); *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* (Barry Alan Shain ed., 2007).

237. WOOD, *supra* note 186, at 305.

238. *Id.* at 292-297.

239. See generally DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848* (2009); CHARLES GRIER SELLARS, JR., *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* (1994); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985); Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 *J. AM. HIST.* 970 (1975); Charles McCurdy, *The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment*, 1984 *YEARBOOK OF SUP. CT. HIST. SOC'Y* 20 (1984).

240. See generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988); HAROLD M. HYMAN AND WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982).

241. See generally Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and 'Federal Courts'*, 81 *N. CAR. L. REV.* 1927 (2003).



witnessed the growing impact of economic nationalization, the rapid expansion of national and international markets, the rise of the United States to world economic dominance, and other complex developments that spurred the Court to shape constitutional law in directions that would subsequently lend support to parts of the New Deal.<sup>242</sup>

Thus, throughout the period from 1789 to 1936 the nation and its constitutional law were shifting and evolving. Those changes are fully recognizable and explicable only by understanding them in the dynamic social and political context that drove them.<sup>243</sup> It is only the astigmatic lens of Epstein's "classical liberal constitutionalism" that renders them inconsequential or invisible.<sup>244</sup>

Needless to say, Epstein's fault lies not in claiming that the New Deal marked a substantial change in American constitutional law. The idea that the Roosevelt administration brought a "constitutional revolution" is as old as the New Deal itself.<sup>245</sup> The fault, instead, is threefold. First, the fact that the New Deal brought substantial, or even "revolutionary," change does not mean that other substantial constitutional changes had not occurred earlier. Accepting the idea of a New Deal "constitutional revolution" does not prove the insignificance of prior changes that came with "Jeffersonian," "Jacksonian," "Lincolnian," "post-Reconstruction-settlement," "liberty-of-contract" and "progressive" versions of American constitutionalism.

Second, accepting the idea of a New Deal "constitutional revolution" leaves open a range of critical historical questions that Epstein ignores and that are essential to understand why and how the New Deal changed

242. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR* (2002); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

243. Epstein's legalistic approach not only filters out change, but it also filters out the many diverse social and cultural forces that shaped American history and helped drive the development of American law. "Laissez-faire in 19th-century America was not a technical argument for the efficiency of free markets, but rather a manifestation of a broader Protestant ethos." *United States, Economics in (1885-1945)*, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (2d ed. 2008). For an excellent example of the way constitutional law changes in new social and political contexts and how such changes are readily obscured and even rendered "invisible," see generally DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* (2016).

244. His book, for example, essentially ignores the historical significance of the Thirteenth and Fifteenth Amendments. According to its index, the former appears only four times and the latter but once, in each instance noted only briefly and for its bare formal content. EPSTEIN, *supra* note 5, at 5, 28, 523, 528, 581.

245. For the idea of a New Deal "constitutional revolution," see generally JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1942); EDWARD S. CORWIN, *COURT OVER CONSTITUTION* (1938); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941). For a more recent synthesis, see generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). For a recent balanced discussion, see generally Alan Brinkley, *AHR Forum: The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005).

American constitutionalism. To what extent, for example, were those changes actually underway prior to the advent of the New Deal? What is the significance of the fact that the New Deal went through various phases and at different times adopted radically different policies, or of the fact that World War II forced wholly new directions and policies on the New Deal? What was the nature of the various specific changes that came with the New Deal, and when and why did each of them occur? How, and to what extent, were each of those changes reasonably justified on constitutional grounds?

Third, a full and fair historical analysis of a New Deal “constitutional revolution” raises another range of critical questions that Epstein also ignores. American law, government, politics, and society, after all, showed and continue to show high degrees of stability and continuity. To what extent did constitutional law and the basic institutions of American constitutionalism remain stable and operate continuously through and after the New Deal? To what extent did the New Deal save or even strengthen American capitalism, corporate enterprise, and a social order built on individual rights, including rights to both “liberty” and “property”? To what extent did the federal government remain “limited”, and to what extent did the states continue to play substantial roles in American government? If there is any cliché used to describe the nature of “revolutions,” after all, it is surely *plus ça change, plus c’est la même chose*.

It is often said of general theories and propositions that “the devil is in the details.”<sup>246</sup> With Epstein’s history, however, “the devil” is not hidden away or buried in technicalities. Rather, it stands nakedly in the open. It is his imagined “classical liberal tradition” that warps the nation’s constitutional history and prefabricates its “details.”

### C. CREATING THE “CLASSICAL LIBERAL TRADITION”: THREE MOVES

Three of Epstein’s key moves illustrate the way his concept of the “classical liberal tradition” distorts American constitutional history and twists its “details” to fit that *idée fixe*.

#### 1. Projecting

“The classical liberal tradition of the founding generation,” Epstein declares, “prized the protection of liberty and private property under a system of limited government.”<sup>247</sup> Into these widely praised concepts, and the values they represent, he packs elaborate meanings that purportedly justify a long

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<sup>246</sup>. In a critical review, Suzanna Sherry argues that the “devil” in Epstein’s book lies in its details because he “too often gets the details wrong.” Suzanna Sherry, *The Classical Constitution and the Historical Constitution: Separated at Birth*, 8 N.Y.U. L. REV. 991, 994 (2014). However many the flawed “details” in Epstein’s book, they are the products of his ideologically-driven imperative to fit his libertarian, free-market ideas into the concept of a “classical liberal tradition” and thereby into the nation’s constitutional history.

<sup>247</sup>. EPSTEIN, *supra* note 5, at 17.

list of “correct” inferences about law and policy.<sup>248</sup> The inferences he draws, however, come not from the concepts themselves or from the thinking of the founders. Rather, they come from the libertarian, free-market views and values that Epstein projects into them.<sup>249</sup>

Consider two of those fundamental concepts, “private property” and “limited government.” The founders surely thought both were essential to republican government, but they lived in a time when the meaning of those concepts was in a state of flux, as was virtually their whole political vocabulary.<sup>250</sup> As for “private property,” the delegates to the Constitutional Convention had different understandings of its nature and implications, and in no clear or detailed way did they reconcile—or even attempt to reconcile—the “rights” of “private property” with the other diverse and sometimes conflicting values of their republican principles.<sup>251</sup> The concept of “limited government” was equally unsettled.<sup>252</sup> The founders fought over the extent to

248. See EPSTEIN, *supra* note 5, at 6, 8 (stating that “[th]e central thesis of this book” is that the “classical liberal” view “of the Constitution was correct[,]” and the progressive attacks on the “classical liberal” view are “wrong at every point”).

249. “The concepts of liberty and private property carried with them a large body of assumptions, customs, attitudes, regulations both tacit and explicit, and rules of behavior. Thus, neither liberty nor property was a right singular; each was a complex and subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state.” MCDONALD, *supra* note 186, at 13. For many of the complexities and limitations on liberty and property based on “The Rights of Englishmen,” see *id.* at 9–56.

250. WOOD, *supra* note 186, at 259–61, 265, 267–68.

251. MCDONALD, *supra* note 186, at 4 (“[T]hough virtually every American believed that *property* and *liberty* were both *natural rights* and *civil rights*, it transpired during the Constitutional Convention that delegates had different understandings of all [four] of the words . . .” (emphasis in original)). As Gordon Wood emphasized, “property” also encompassed many diverse and conflicting economic interests, and one interest was often promoting “a different kind of property” than another. WOOD, *supra* note 186, at 19. Madison offered the classic statement of that pluralistic view. See THE FEDERALIST NO. 10, *supra* note 207, at 55–56 (James Madison).

James Wilson, one of the principal founders, for example, rejected the idea that property was central to republicanism. As he stated in the Constitutional Convention, he “could not agree that property was the sole or the primary object of government and society. The cultivation and improvement of the human mind was the most noble object.” Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1459 (2015) (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 287 (Adrienne Koch, ed., 1966)). “Property, highly deserving security, is, however, not an end, but a means. How miserable, and how contemptible is that man, who inverts the order of nature, and makes his property, not a means, but an end!” WILSON, *supra* note 207, at 84; see also WOOD, *supra* note 220, at 217–19, 404–05, 503–04.

252. From its earliest days the new national government actively used public resources for a great many purposes thought to advance desirable public policy, including land grants, ship subsidies, trade regulation, disaster relief, pensions for veterans, geographical and engineering surveys, and medical care for those who became sick or disabled while navigating the oceans or the nation’s lakes, rivers, and canals. See generally DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829 (2001); MICHELLE DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2012); LAURA JENSEN,

which government should be limited as well as the nature and scope of the limitations they thought desirable, and their final product left wide areas of ambiguity and uncertainty.<sup>253</sup> Their underlying agreement about the relation between “private property” and “limited government,” moreover, extended to only two manifestly indeterminate principles: first, that the rights of “private property” should be limited and, second, that “limited government” should have the power to impose those limits. “Nearly all the activities that constituted the realms of life, liberty, property, and religion were subject to regulation by the state,” Jack Rakove explained; “no obvious landmarks marked the boundaries beyond which its authority could not intrude, *if* its actions met the requirements of law.”<sup>254</sup>

The concepts of “private property” and “limited government” were not only vague and uncertain, but they also existed in inherent tension with the fundamental premise of the new Constitution, the principle that sovereignty resides with “the people.” That idea—novel, radical, and uncertain in its practical consequences—was a wild card in the founders’ constitutional thinking. Consequently, Epstein’s “classical liberal” concepts of “private property” and “limited government” could not have possessed the clear and unchanging significance that he projects into them, for they were both subject to the untested and overriding principle of popular sovereignty.<sup>255</sup>

Consider the third principal element of the “classical liberal tradition” that Epstein specifies, “liberty,” the paramount value that underlay the founders’ commitment to both “private property” and “limited government.”<sup>256</sup> That the Constitution was designed to protect “liberty” is unquestionably true, but that truth resolves little or nothing. “No word,” Rakove concluded, “was more multivalent than *liberty*.”<sup>257</sup> The Constitution

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PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY (2003). Similarly, when free from constitutional restraint, the states regulated wide areas of public concern involving matters of health, safety, and morals. See generally NOVAK, *supra* note 81.

253. PURCELL, *supra* note 227, at 17–82.

254. RAKOVE, *supra* note 217, at 291 (emphasis in original).

255. Madison made the point precisely. His premise: “Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.” His conclusion: “The regulation of these various and interfering interests form the principal task of modern legislation.” THE FEDERALIST NO. 10, *supra* note 207, at 56 (James Madison).

256. The “central Lockean premise” of the “classical liberal tradition” was the idea “that governments were created by individuals who were free, equal, and independent in the state of nature.” EPSTEIN, *supra* note 5, at 18. Epstein readily acknowledges that “liberty” requires limitations, see *id.* at 18–20, but he draws from the “state-of-nature” concept the specific constitutional conclusions mandated by his own libertarianism, especially those supporting “liberty of contract” and anti-regulatory positions. *Id.* at 324 (“Quite simply, it is the full set of liberties that one has in the state of nature, not just some arbitrarily selected subset, that receive protection under the [Due Process] clause.”).

257. RAKOVE, *supra* note 217, at 290 (emphasis in original). John Phillip Reid points out that

itself did not define the term, distinguish it from “license,” or explain its proper content and limitations. Nor did the Constitution specify any proper balance between different kinds of “liberty,” between the conflicting “liberty” of different individuals, or between the “liberty” of individuals and “the general Welfare.” Nor did it explain how “liberty” was to be understood as changes occurred in the social, economic, and political conditions that fostered or threatened it. Nor, finally, did it explain how “liberty” was to be understood when changing conditions brought widely differential social consequences that raised fundamental questions about the relationship between “liberty” and other fundamental republican principles.<sup>258</sup>

In their near unanimous praise of “liberty,” the founders exhibited widely differing ideas about its meaning, scope, and implications.<sup>259</sup> In 1780, for example, James Madison<sup>260</sup> opposed the idea of offering bounties to slaves who enlisted in the Virginia military but approved the idea of freeing those who volunteered for service.<sup>261</sup> His reasoning captured the plastic nature of the concept of “liberty.” The latter proposal “wd. [*sic*] certainly be more consonant to the principles of liberty,” he wrote, adding that those principles “ought never to be lost sight of in a contest for liberty.”<sup>262</sup> His “principles of liberty,” in other words, were sufficiently pliable and self-serving to both incorporate the institution of slavery and justify a red-line distinction—in his mind “rational” given his own particular understanding of “liberty”—between paying slaves to fight and granting freedom to those who did.

Indeed, Madison—who abhorred slavery and repeatedly supported plans

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“[l]iberty was the most cherished right possessed by English-speaking people in the eighteenth century,” but it was also what divided them. REID, *supra* note 192, at 1. In his magisterial four-volume *Constitutional History of the American Revolution* Reid concludes that the Revolution became almost inevitable because “the eighteenth-century British constitution had produced a constitutional dilemma” by giving to the British and Americans profoundly different understandings of the meaning of “liberty.” JOHN PHILLIP REID, 4 CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 173 (1986). The British identified “liberty” with parliamentary supremacy over the crown, while the Americans identified it more broadly as “the right to be free of arbitrary power,” whether parliamentary or royal. *Id.*

258. Hovenkamp wisely notes that one “central question for legal theory” is to develop “defensible concepts of liberty.” HOVENKAMP, *supra* note 6, at 299.

259. “[T]he republican conception of liberty” was “based on establishing political structures to protect individuals against the will and self-interest of others,” and it referred to “the status of citizens in a republic, whom no one restricted, except to serve the common good.” M. N. S. SELLERS, *THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM AND THE LAW* 2, 3 (1998); see *id.* 97–123. Joyce Appleby identified three different conceptions of “liberty,” those of “classical republicanism,” “historic rights,” and an instrumental and individualistic “liberal concept.” APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER*, *supra* note 212, at 16–23, 78. She places the triumph of the last of the three with the triumph of Jeffersonianism in the early nineteenth century. *Id.*

260. Epstein understandably identifies Madison as one of the major “classical liberal” theorists who helped shape the Constitution. EPSTEIN, *supra* note 5, at ix.

261. KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* 23 (2012).

262. *Id.*

for its abolition—remained dependent throughout his life on slave labor for his economic and social position.<sup>263</sup> Thus, he was forced to mold his republican view of “liberty” to fit his own distinctive needs. Another twist emerged, for example, in his retirement when he reacted to a new emancipation proposal. The plan should not only require compensation to slave owners, he reasoned, but it should also require special inducements to the slave.<sup>264</sup> Such inducements were necessary to ensure that “a state of freedom” would appear “preferable in his own estimation, to his actual one in a state of bondage.”<sup>265</sup> Madison’s intellectual twists, in other words, included incorporating a belief that “liberty” was something that slaves might reject in favor of remaining in bondage.<sup>266</sup>

Madison was hardly alone in molding the concept of “liberty” to fit his personal needs.<sup>267</sup> From Independence through the Civil War and beyond, Americans struggled with the problem of race, and they frequently concluded that only colonization—physical separation of blacks and Indians from the white “race”—could solve the problem. To resolve the tensions between their separatism and their republican principles, they conceived the former as benevolently creating “a happier future for non-whites” and fulfilling “their duty to help non-white people complete their journey toward ‘civilized’ status.”<sup>268</sup> Madison shared those views, believing that the best solution was to have blacks “permanently removed beyond the region occupied by, or allotted [*sic*] to, a white population.”<sup>269</sup> Consequently, in 1819 he joined with such other eminent Americans as John Marshall, Bushrod Washington, and Henry

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263. RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 148–49, 375, 552 (1990). Madison “depended all his life on the labor of slaves.” *Id.* at 629. At his death he owned approximate one hundred slaves. DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 308 (1989). In his will he made provisions designed to secure favorable treatment for his slaves, but he did not free them. *Id.* at 318–20.

264. *Id.* at 625.

265. *Id.* Jefferson had similar views and came to believe that slaves could be satisfied and possibly happy under a well-run slave system. ANNETTE GORDON-REED & PETER S. ONUF, “MOST BLESSED OF THE PATRIARCHS”: THOMAS JEFFERSON AND THE EMPIRE OF THE IMAGINATION 60–61 (2016).

266. “Clearly, Madison thought that blacks, either innately or from long bondage in Africa and America, were so different from and possibly inferior to the white population generally, and that white prejudices against them were so indelible, that meaningful freedom and equality for Negroes in an integrated society was not practical. He hoped, therefor to find a refuge somewhere in the world where freed slaves could develop their full human potentialities entirely removed from the scene of their former degradation.” KETCHAM, *supra* note 263, at 625–26.

267. Jefferson understandably made similar modifications to his idea of “liberty.” *See, e.g.*, GORDON-REED & ONUF, *supra* note 265, at 57–61. In the Virginia ratifying convention Madison insisted that “no power is given to the general government to interpose with respect to the property in slaves now held by the states” and that any effort to do so “would be a usurpation of power.” WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* 82 (1977).

268. NICHOLAS GUYATT, *BIND US APART: HOW ENLIGHTENED AMERICANS INVENTED RACIAL SEGREGATION* 6–8 (2016).

269. KETCHAM, *supra* note 263, at 625.

Clay in founding the American Colonization Society, an organization “dedicated both to the freeing of slaves and to their transportation to the west coast of Africa.”<sup>270</sup> Thus, devotion to “liberty” took many adaptive forms.

The debate over the Constitution revealed the same obvious truth. Anti-Federalists saw the Constitution as a threat to “liberty” and an instrument of despotism.<sup>271</sup> Its “consolidation” of power at the national level, warned twenty-one dissenting members of the Pennsylvania ratifying convention, would mean “the sacrifice of all liberty.”<sup>272</sup> Federalists sought vigorously to refute those charges, but in discussing “liberty” they confined themselves for the most part to broad generalities. Insisting that the Constitution protected “liberty,” Madison spoke of “republican liberty”<sup>273</sup> and Gouverneur Morris of “public liberty”<sup>274</sup>; James Wilson spoke of “civil,” “natural,” and “federal liberty”<sup>275</sup>; and Roger Sherman and many others referred broadly to “liberties” in the plural, some labeled and others not.<sup>276</sup> In spite of the fact that he did not “think favorably of Republican Government,” Alexander Hamilton was nonetheless easily able to declare that he was “as zealous an advocate for liberty as any man whatever.”<sup>277</sup> On the Anti-Federalist side, Patrick Henry may have formulated the most enduring version. He claimed simply to be defending “American liberty.”<sup>278</sup>

The founders well knew that the term “liberty” referred to many different kinds of “liberties” of varying scope, quality, and degrees of importance.<sup>279</sup> Hamilton opposed the idea of a constitutional provision protecting “liberty of the press,” for example, not because he opposed such “liberty” but because of the generality and vagueness of the concept itself. “What,” he asked, “is liberty

270. *Id.* at 626. It seemed an “indelible” impression, Madison wrote in 1826, “that the two races cannot co-exist, both being free and equal. The great *sine qua non*, therefore, is some external asylum for the coloured race.” *Id.* at 628.

271. See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 277–78, 287, 313, 327, 329, 341, 347 (Ralph Ketcham ed., 1986). “The unifying rhetoric of the patriots all too quickly became a source of conflict and division in the aftermath of the Revolution, with controversy about the very meaning of freedom only intensifying after the ratification of the Constitution.” BLUMENTHAL, *supra* note 183, at 22.

272. KETCHAM, *supra* note 263, at 246; see also *id.* at 254–55; 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 204, at 17–18.

273. MADISON, *supra* note 251, at 76.

274. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 76 (rev. ed., 1966).

275. *Id.* at 166. See generally James Wilson, Speech, Pennsylvania Convention (Nov. 24, 1787), in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788 71 (Colleen A. Sheehan & Gary L. McDowell, eds., 1998).

276. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 274, at 423.

277. *Id.* at 424.

278. 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 204, at 223 (emphasis omitted).

279. John Phillip Reid points out that Americans defined the rights they included in their “liberty” with much clarity but that their ideas of those rights were relatively narrow and limited, defined by tradition and the British constitution, and quite different from twentieth-century ideas of constitutional rights. See JOHN PHILLIP REID, 1 CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 4, 13, 16–17, 31–33, 37 (1986).

of the press?”

Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.<sup>280</sup>

More important, the founders understood that “liberty” was not an unadulterated good because it created immense and potentially fatal risks to republican government.<sup>281</sup> George Washington warned that tyranny “is most easily established on the ruins of Liberty abused to licentiousness,”<sup>282</sup> while Hamilton insisted that “liberty may be endangered by the abuses of liberty as well as by the abuses of power.”<sup>283</sup> Madison and Gouverneur Morris defended religious liberty, but they also stressed its dangers. “Religion itself,” Madison declared, “may become a motive to persecution & oppression.”<sup>284</sup> “In Religion,” Morris added, “the Creature is apt to forget its Creator.”<sup>285</sup> Indeed, Madison’s famous Tenth *Federalist* was addressed precisely to the grave risks that “liberty” presented to republican government. “Liberty” was its eternal enemy because “liberty” spurred the “violence of faction” and was “essential to its existence,” he warned.<sup>286</sup> “Liberty is to faction what air is to fire, an aliment without which it instantly expires.”<sup>287</sup> Thus, “liberty” was not only vague and ambiguous in concept but also—if not properly limited and controlled—exceptionally dangerous in practice.

To the founders, then, “liberty” was only meaningful in a special sense, as “liberty under law.” It had to be carefully limited to ensure peace, security, and stability to the whole society. “There is no quarrel between government and liberty; the former is the shield and protector of the latter,” Edmund Pendleton declared at the Virginia ratifying convention.<sup>288</sup> “The war is

280. THE FEDERALIST NO. 84, *supra* note 207, at 560 (Alexander Hamilton).

281. “Every person knows the exorbitant ideas of liberty . . . [are] absolutely incompatible with good government, the general welfare, and their own safety.” Nicholas Collin, *A Foreign Spectator: An Essay on the Means of Promoting Federal Sentiments in the United States*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, *supra* note 275, at 44, 46; accord *A Freeman: Essay to the People of Connecticut*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, *supra* note 275, at 282, 285 (stating that licentious ideas of “liberty . . . ought to be done away and never more stop the progress of justice”).

282. George Washington, *Circular to the States*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, *supra* note 275, at 12, 16.

283. THE FEDERALIST NO. 63, *supra* note 207, at 413 (Alexander Hamilton).

284. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 274, at 135.

285. *Id.* at 512.

286. THE FEDERALIST NO. 10, *supra* note 207, at 55 (James Madison).

287. *Id.*

288. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1888).



between government and licentiousness, faction, turbulence, and other violations of the rules of society, to preserve liberty.”<sup>289</sup> Morris sounded the typical Federalist view. “A firm Govern[ment]. [*sic*] alone can protect our liberties.”<sup>290</sup> As Blackstone had emphasized, “liberty, rightly understood, consists in the power of doing whatever the laws permit.”<sup>291</sup> It was “a peculiarity of eighteenth-century legal thought,” John Phillip Reid explained, that “liberty was characterized as the rule of law and identified as security of person and property.”<sup>292</sup> It was, in other words, the opposite of “licentiousness,” and it required both firm government and reasonable limits on the “liberty” of all. “The liberty of one depends not so much on the removal of all restraint from him, as on the due restraint upon the liberty of others,” Fisher Ames explained in the Massachusetts ratifying convention.<sup>293</sup> “Without such restraint, there can be no liberty.”<sup>294</sup> Thus, contrary to Epstein’s projection, the founders did not regard government as “a necessary evil”<sup>295</sup> but an absolutely necessary good.

The founders also knew that the dangers of “liberty” were compounded by its plastic nature that enabled anyone to seize its banner for self-serving or partisan purposes.<sup>296</sup> “Liberty is a word which, according as it is used, comprehends the most good and the most evil of any in the world,” Oliver

289. *Id.*

290. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 274, at 514.

291. STORING, *supra* note 216, at 226. “Blackstone seems to present a circular argument: defining good law as that which best maintains individual liberty and defining individual liberty as that which is permitted by law.” *Id.* at 226–27.

292. REID, *supra* note 192, at 115. As the founders also recognized, “liberty” depended on government in innumerable ways, perhaps most practically on taxation which raises money from all citizens to spend on selected “public” purposes, including the protection of property rights, contract rights and other commercial rights and practices, and established institutions such as churches and other private associations. *See generally* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999).

293. Fisher Ames, *Speech: Massachusetts Convention, 15 January 1788*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, *supra* note 275, at 196, 198.

294. *Id.* “It is time for our people to distinguish more accurately than they seem to do between liberty and licentiousness.” Letter from John Jay to Jacob Reed (Dec. 12, 1786), in JAY, *supra* note 202, at 221, 222.

295. *See generally* EPSTEIN, *supra* note 5. For a contrary view of one of the principal supporters of ratification, see WILSON, *supra* note 207, at 285 (maintaining that “without government” society “cannot flourish”).

296. The plasticity of terms such as “liberty” was one of the reasons that Hamilton gave to support the need for a federal Supreme Court. “The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.” THE FEDERALIST NO. 80, *supra* note 207, at 516 (Alexander Hamilton). This assertion came, too, from the writer who emphasized that the judiciary had “neither FORCE nor WILL, but merely judgment.” THE FEDERALIST NO. 78, *supra* note 207, at 504 (Alexander Hamilton). Thus, even with “judgment,” massive diversity in interpretation was only to be expected.

Ellsworth declared.<sup>297</sup> The problem was that “in the mouths of some it means any thing,” and meanings attributed to “liberty” include those that would “keep society in confusion for want of a power sufficiently concentered to promote its good.”<sup>298</sup> Hamilton recognized the same truth when he discounted the “liberty” claims of the small-state advocates at the Constitutional Convention. They were, he charged, engaged in “a contest for power, not for liberty.”<sup>299</sup>

If the course of American history has taught anything, it is that the founders were right. Subsequent appeals to “liberty” served virtually every conceivable purpose. It justified revolutionary violence by “The Sons of Liberty,”<sup>300</sup> territorial expansion for an “empire of liberty,”<sup>301</sup> racist appeals to preserve the “liberty” of “white civilization,”<sup>302</sup> evangelizing efforts to advance Christian “liberty,”<sup>303</sup> government appeals to support the United States in World War I by buying “Liberty Bonds,”<sup>304</sup> anti-New Deal screeds in the name of the “American Liberty League,”<sup>305</sup> rapid naval expansion during World War II by building “Liberty ships,”<sup>306</sup> and praise for Senator Joseph McCarthy as the staunch defender of “liberty.”<sup>307</sup> Indeed, it served anti-German anger during World War I by transforming sauerkraut into “Liberty Cabbage.”<sup>308</sup>

When considering the meaning of “liberty” in American history, moreover, it is important to remember that one of the nation’s greatest

297. Oliver Ellsworth, *To the Tillers of the Land III*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, *supra* note 275, at 286, 292.

298. *Id.* at 292.

299. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 274, at 466.

300. In 1765, “the Sons of Liberty had defeated the dreaded Stamp Act by intimidating those royal officials whose job it was to enforce” the Townsend Revenue Act by, among other tactics, the use of tar and feathers. Benjamin H. Irvin, *Tar, Feathers, and the Enemies of American Liberties, 1768–1776*, 76 NEW ENG. Q. 197, 202 (2003).

301. GORDON–REED & ONUF, *supra* note 265, at 204. See *Manifest Destiny*, 2 ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY 68 (2d ed. 2002) (stating the providential mission of the United States was to spread the nation’s “great experiment of liberty”).

302. See generally DAVID C. KEEHN, KNIGHTS OF THE GOLDEN CIRCLE: SECRET EMPIRE, SOUTHERN SECESSION, CIVIL WAR (2013).

303. See generally JOSIAH STRONG, OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS (1885).

304. 2 CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 639 (rev. & enlarged ed., 1940).

305. See generally GEORGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE 1934–1940 (1962).

306. 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 784 (5th ed. 1962).

307. The Senator’s secretary, for example, declared that Senator McCarthy “believed in our Constitution and the American people. He believed that he could help preserve liberty and justice by ridding the nation of its enemies.” *Senator Joseph McCarthy*, ORWELL TODAY (last visited Nov. 19, 2016), <http://www.orwelltoday.com/mccarthy.shtml>.

308. DANIEL A. FARBER, SECURITY VERSUS LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY 32 (2008).

political theorists who produced one of its most elaborate defenses of the Constitution's guarantee of "liberty" was John C. Calhoun. With elaborate historical and textual arguments, he defended the constitutional right to "liberty" and maintained that it was properly a republican society's highest value. "[T]he greatest impulse to development, progress, and improvement" lay with societies "whose liberty is the largest and best secured."<sup>309</sup> He also insisted—as do all political theorists—that liberty had to be limited to its "proper" sphere.<sup>310</sup> It would be a "curse," he explained, if "liberty" were "forced on a people unfit for it."<sup>311</sup> Calhoun used the concept of "liberty" as others used it, to advance his own political and social values. In his case, of course, he used it to ground an elaborate constitutional defense of racist ideas and Southern slavery.

In truth, then, as the founders knew so well, the concept of "liberty" can only be meaningfully understood and evaluated by examining its contingent and contextual meanings and uses. "Liberty" does not exist in the abstract, nor does it have any single and absolute meaning. All, or almost all Americans, believe in "liberty" as a fundamental value and believe that the Constitution was designed to protect it.<sup>312</sup> Their disputes are never about "liberty" as such but always about what "liberty" should mean in some particular context and under certain specific conditions.<sup>313</sup> "Liberty" can only be meaningful in context, and only when claims of "liberty" specify "liberty" for whom, against whom, for what purpose, to what extent, under what conditions, and with what likely consequences. Accordingly, those who defend "liberty" in the abstract and claim it as a purportedly guiding principle proclaim a virtually meaningless standard.

Epstein attributes many specific conclusions about law and policy to his "classical liberal tradition" and its concept of "liberty," but those conclusions

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309. John C. Calhoun, *A Disquisition on Government*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 3, 47 (Ross M. Lence, ed., 1992) [hereinafter Calhoun, *Disquisition on Government*]. "In fact, the defence [*sic*] of human liberty against the aggressions of despotic power had been always the most efficient in States where domestic slavery was found to prevail." John C. Calhoun, Speech, Speech on the Reception of Abolition Petitions (Feb. 6, 1837), in *id.* at 461, 468.

310. *Id.* at 40.

311. *Id.* at 42.

312. Hovenkamp readily acknowledges the importance of the idea of "liberty" and its role in American legal and political thought. "Liberty of contract is one of the most pervasive ideas in Anglo-American jurisprudence. Far more than a theory about contract law, liberty of contract was the *raison d'être* of civil government for Locke, Hume, Blackstone, and Adam Smith— indeed, for the democratic ideal that government's legitimacy derives from the 'consent' of the governed." HOVENKAMP, *supra* note 6, at 22.

313. In the late nineteenth century, for example, as Jacksonian anti-monopoly and free-labor ideas exerted increasing influence in American constitutional thought, "people with the same Jacksonian and free-labor roots split over the meaning of liberty and the proper scope of government power." PAUL KENS, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* 8 (1997).

do not and cannot come from either that “tradition” or the founders’ concept of “liberty.”<sup>314</sup> They come, instead, from the particular libertarian, free market views and values that he projects into them.<sup>315</sup>

## 2. Purifying

Although Epstein gives relatively little attention to slavery and racial segregation, he makes a determined effort to save his “classical liberal tradition” from their moral and political stain. That tradition, he insists, had no connection with the peculiar institution.<sup>316</sup> The Constitution’s slavery provisions were an “affront that the Constitution inflicted on the fundamental libertarian premise that all persons have equal and full rights before the law.”<sup>317</sup> Slavery, he maintains, is inherently inconsistent with “classical liberal” principles and wholly irrelevant to their true historical role and significance.<sup>318</sup>

The historical fact, however, is that the thinking of eighteenth- and nineteenth-century Americans did not seal off issues of slavery and race from the rest of their political and social ideas. Slavery was a firmly established institution at the Founding, and it drew on and strengthened a deeply

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314. For his general discussion of the meaning of “life, liberty, or property” under the Due Process Clauses, see EPSTEIN, *supra* note 5, at 322–24. “The obvious rights included under this rubric are those which are protected under classical liberal theories of government.” *Id.* at 322. As for “liberty,” he concludes: “Quite simply, it is the full set of liberties that one has in the state of nature, not just some arbitrarily selected subset, that receive protection under the clause.” *Id.* at 324.

315. “Economic liberty” is Epstein’s main concern and the primary reason for his opposition to post-1936 constitutional law. *Id.* at 6 (stating the “classical liberal synthesis” stressed “the strong protection of economic liberties”). He favors, for example, the “broad reading of liberty under the Due Process Clause of the Fourteenth Amendment” as it was construed in *Lochner v. New York*, 198 U.S. 45 (1905), which he declares simply “right.” *Id.* at 338.

316. His principal treatment comes in a chapter devoted largely to discussing the Privileges and Immunities Clause and attacking modern affirmative action efforts. EPSTEIN, *supra* note 5, at 521–540. Indicative of the ahistorical nature of Epstein’s attempt to distance classical liberalism from slavery is the fact that John Locke, whose name Epstein uses to characterize the nature of the classical liberal tradition, was a founding member and major shareholder of the Royal African Company which held a monopoly over the British slave trade and who, in 1669, helped write the constitution for the new Carolina colony that provided that “every Freeman in Carolina shall have ABSOLUTE POWER AND AUTHORITY over his Negro Slaves.” ISENBERG, *supra* note 189, at 43. Thus, Locke himself had no trouble integrating his own classical liberalism with an embrace of slavery, the slave trade, and economic monopoly.

317. EPSTEIN, *supra* note 5, at 522. Epstein cleverly uses the Constitution’s provisions regarding slavery to support his claim that the founders followed the principles of his “classical liberal tradition.” Citing John Rawls, he suggests that “on most issues” the founders “operated behind a veil of ignorance” that made it “more difficult for anyone to act on parochial motivations.” *Id.* at 30. The slavery provisions become salient for him, then, as the “one glaring exception” to the “general rule” that “[t]he Constitution contains little, if any, textual evidence of special interest provisions that are tied to particular groups.” *Id.* at 31. Thus, he excises slavery from his classical liberal tradition while using the constitutional provisions that supported it to strengthen his contention that “classical liberal” ideas undergirded the Constitution.

318. *Id.* at 4, 8, 309.

embedded range of social, political, intellectual, cultural, and economic attitudes that helped shape the thinking of Americans—and their interpretations of the Constitution—from 1787 to the Civil War and, in many ways, far beyond.<sup>319</sup> Indeed, American society in the late eighteenth century was still shaped by the reciprocal dependencies and duties that flowed from traditional hierarchical relationships, including gentleman/commoner, husband/wife, father/family, parent/child, landlord/tenant, master/servant, and journeyman/apprentice.<sup>320</sup> “Slavery could be regarded therefore as merely the most base and degraded status in a society of several degrees of unfreedom,” Gordon Wood explained, “and most colonists felt little need as yet either to attack or to defend slavery any more than other forms of dependency and debasement.”<sup>321</sup> As a historical matter, the abstract principles and values of Epstein’s “classical liberal tradition” were intertwined with those basic cultural attitudes and assumptions, and those who shared its values and principles found ways to reconcile them with their society’s multiple and long-established forms of social hierarchy, often including its acceptance of the peculiar institution.

Thus, “classical liberal” ideas were not insulated but embedded. They were parts of historically adaptive and multi-tracked practices of interpreting ideas and principles to meet changing contexts and challenges. Personal, emotional, and even irrational elements—feelings stemming from considerations of such factors as race, class, party, ethnicity, religion, geography, and political necessity—helped mold and remold them, giving them various concrete and shifting meanings over time.<sup>322</sup> It is impossible to understand American constitutionalism without understanding the pervasive and continuing impact of slavery and racism.<sup>323</sup>

The conservative constitutional scholar Herbert J. Storing identified one “chain of reasoning” that led from libertarian “classical liberalism” to the justification of slavery.<sup>324</sup> The “very principle of individual liberty for which

319. See Purcell, *supra* note 241, at 2001–38. See generally J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315 (1991).

320. See generally LORRI GLOVER, *FOUNDERS AS FATHERS: THE PRIVATE LIVES AND POLITICS OF THE AMERICAN REVOLUTIONARIES* (2014); see also WOOD, *supra* note 186, at 11–56; Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 344–45 (1989).

321. WOOD, *supra* note 186, at 54. American society incorporated yet another status level. “By 1776, the free black was a kind of half slave in many parts of the country.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 49 (2005); see also RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–1789* 184 (1987) (noting that the state ratifying conventions proposed hundreds of amendments to the Constitution during the ratification debate but none condemned the slave trade. Only Rhode Island, entering the Union belatedly in 1790 after ratification was complete and the new nation underway, proposed such an amendment).

322. See BLUMENTHAL, *supra* note 183, at 7–8, 34. See generally KELLY, *supra* note 200.

323. PURCELL, *supra* note 227, at 63–65.

324. Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, in *TOWARD A MORE PERFECT UNION: WRITINGS OF HERBERT J. STORING*, *supra* note 216, at 131, 144.

the founders worked so brilliantly and successfully,” Storing pointed out, “contains within itself an uncomfortably large opening toward slavery.”<sup>325</sup> Quoting Locke and the Declaration of Independence, he argued that libertarian individualism privileged self-interest to a point where it could become wholly “conclusive” and reduce the idea of justice to one of bare “self-preservation.”<sup>326</sup> Because slavery was both “convenient and achievable,” it enabled the slave owner “to protect his plantation, his children’s patrimony, his flexibility of action, on which his preservation ultimately depends.”<sup>327</sup> Consequently, the slave owner “may conclude that he is entitled to keep his slaves in bondage if he finds it convenient to do so.”<sup>328</sup> Thus, Storing concluded, “American Negro slavery, in this ironic and terrible sense, can be seen as a radicalization of the principle of individual liberty on which the American polity was founded.”<sup>329</sup>

Storing’s chain of reasoning suggests one of the ways that amorphous “classical liberal” ideas could lend themselves to justifying slavery. It thereby illustrates the fact that those principles are conceptually amorphous and manipulable and that people can twist them into many different forms and for many different purposes. It suggests, finally, that it is a society’s historical conditions—its technologies, resources, customs, beliefs, threats, and needs—that determine the range of possible conclusions its members can plausibly draw from them. As a matter of historical fact, the founders did find ways to reconcile their “classical liberal” ideas with the existence of slavery, just as many nineteenth-and twentieth-century American “classical liberals” found their own ways to do the same with racial segregation and disenfranchisement.<sup>330</sup>

Further, “classical liberalism” was torn by a profound internal contradiction. Insofar as it claimed both “private property” and “limited government” as well as “liberty” as fundamental values, it confronted an irresolvable dilemma. Slavery made some human beings “private property” and thus barred them from enjoying “liberty.” Indeed, those enslaved persons constituted an exceptionally valuable form of “private property” for half the country. Thus, at the nation’s beginning the institution of slavery meant that the concepts of both “private property” and “liberty” had to be radically qualified and that the concept of “limited government” had to include the

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325. *Id.* at 142–43.

326. *Id.* at 143.

327. *Id.* at 143–44.

328. *Id.* at 144.

329. *Id.* at 144. Similarly, natural rights theories, premised on ideas of natural human liberty, often led to justifications of slavery or absolute power. RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979).

330. See WILLIAM F. BUCKLEY, JR., *UP FROM LIBERALISM* 126–31 (1959); WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF MORES, MANNERS, CUSTOMS AND MORALS* 76–78, 304–06 (1907). See generally JAMES JACKSON KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* (1957).

idea of absolute power over a large segment of the population.

Epstein's approach has no place for such historical realities. Contrary to his claim that the Constitution's slave provisions were inconsistent with "classical liberal" thinking, then, those provisions were integral parts of the founders' thinking, and they allowed the founders to structure the compromises necessary to reach their immediate goal of protecting their particularized and compromised views of "liberty," "private property," and "limited government."<sup>331</sup> The Constitution's slave provisions are inconsistent with the "classical liberal tradition" only because Epstein defines that tradition not in terms of the founders' actual thinking but in terms of his own ahistorical free-market libertarianism.<sup>332</sup>

Epstein's treatment of legalized segregation and its overthrow confirms that conclusion. He argues that the opinion in *Brown v. Board of Education*<sup>333</sup> was deeply flawed but nonetheless justified because it was necessary "to undo the errors of the previous case law."<sup>334</sup> Repeatedly, he stresses constitutional "error" as the explanation for the legalization of racial segregation and disenfranchisement that followed Reconstruction. It was "earlier flawed constitutional decisions" allowing disenfranchisement that made "pernicious segregation" possible, he writes, and it was "other major constitutional errors" that enabled "the segregated system as a whole to take the monstrous form it did."<sup>335</sup> Racial oppression triumphed constitutionally, in other words, because

331. Luther Martin made the point nicely in opposing the Constitution and its treatment of slavery. "When our liberties were at stake, we *warmly* felt for the *common rights of men*—The danger being thought to be past, which threatened ourselves, we are daily growing *more insensible* to those rights." Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 204, at 19, 62. "The slave trade compromise [at the Constitutional Convention] demonstrated that, for the framers, the highest good was national union. For this, they sacrificed all other considerations, including the well-being of black Americans." WIECEK, *supra* note 267, at 73. For a balanced treatment of the founders ambivalent and pragmatic attitude toward slavery, see Feldman, *supra* note 202, at 19–26. See generally DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (1975); DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820 (1971).

332. "[N]o classical liberal has the slightest patience" with "segregationist institutions." EPSTEIN, *supra* note 5, at 309. Epstein, of course, makes it absolutely clear that he personally regards slavery as "odious," *id.* at 4, and racial segregation as wholly unacceptable, *id.* at 309.

333. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954).

334. EPSTEIN, *supra* note 5, at 534. Although he declares *Brown* rightly decided, he regards the Court's opinion as deeply flawed. It "glossed over all the serious doctrinal pitfalls," relied on "empty generalities," and was "manifestly, if regrettably, incorrect under the original understanding of the Fourteenth Amendment" *Id.*

335. *Id.* Modern commentators can find a great many "errors" in the Court's late nineteenth- and early twentieth-century cases dealing with racial issues, but such "errors" were seldom if ever caused by faulty "logic" or a "misunderstanding" of "true" constitutional principles. See Purcell, *supra* note 241, at 1981–2038. "What stood in the way of enforcing black civil and political rights, then, was not doctrine, logic, drafting, inherited constitutional ideas, or the problem of drawing lines that could limit the Fourteenth Amendment. The problem was that the Justices, and the nation, were unwilling to protect and secure black rights. That unwillingness was, in significant part, the result of

the “classical liberal” Court made logical “errors” in applying its own “classical liberal” principles. Epstein thereby exonerates his “classical liberal tradition” of either causing or justifying legalized racial oppression because its true and logically “correct” meaning condemned such oppression as “monstrous.” Thus, he purifies his “classical liberal tradition” while making it timelessly “correct.” The actual history—what those who accepted racial oppression believed consistent with their supposed “classical liberal” principles—is not relevant.

Epstein seeks to clinch his purification of “classical liberalism” by citing the example of Justice Rufus Peckham, a staunch proponent of liberty of contract who joined the Court’s segregationist opinion in *Berea College v. Kentucky*.<sup>336</sup> How to reconcile such an act by a talisman of “classical liberalism”? Epstein’s answer is that Peckham was “a lifelong racist, who deserted his classical liberal principles when they mattered most.”<sup>337</sup> Peckham’s behavior, in other words, is explicable only on the ground that his racist action was entirely independent of, and wholly contrary to, his “classical liberalism.” For Epstein, it is inconceivable that Peckham could have understood “classical liberalism” as carrying different meanings and supporting different conclusions than those that Epstein proclaims as timelessly “correct.”

Epstein’s treatment of slavery, segregation, and Peckham illustrates the artificially constructed nature of his “classical liberal tradition.” For his own constitutional purposes, that “tradition” must be divorced from any possible connection with slavery or legalized racial oppression. To accomplish that purification, actual history becomes irrelevant. His treatment of slavery and segregation illustrates the fact that his “classical liberal tradition” means only and exactly what Epstein chooses to make it mean, not what it actually meant to the historical actors who supposedly carried its principles and values through the Constitution’s “classical liberal” era.

### 3. Perfecting

Epstein believes fervently that a vigorous and aggressive practice of judicial review is essential to protect free-market libertarian values, and he believes equally that the “progressive” ideas of “judicial restraint” and “rational basis” review fatally undermine that necessary practice.<sup>338</sup> Thus, he is compelled to claim that “classical liberalism” also requires vigorous and aggressive judicial review. That he does.<sup>339</sup> Indeed, free-market libertarianism

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racist ideas and attitudes that pervaded the South, the nation, the legal profession, the legislative and executive branches of government, the state and federal courts, and the Justices who sat on the United States Supreme Court itself.” *Id.* at 2033–34 (footnote omitted).

336. See generally *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908).

337. EPSTEIN, *supra* note 5, at 533.

338. *Id.* at 238, 569–83.

339. “The classical liberals are strong supporters of a system of judicial supremacy on all areas touched by the Constitution.” *Id.* at 11; see also *id.* at xi–xii, 98–100.



inspires him to go even farther and claim that “classical liberalism” mandates a form of “judicial supremacy.” He also does that.<sup>340</sup> To justify those claims, however, Epstein is forced to sacrifice both his appeal to “Lockean” principles and his historical claims about the consistent practice of the “classical liberal” Court. Consequently, he does that too.

As for Locke, Epstein has to admit the obvious problem. “Judicial review makes no appearance in Locke’s magisterial *Second Treatise of Government*, where the remedy for tyrannical government is the right of revolution.”<sup>341</sup> Indeed, he acknowledges frankly that “[t]he “selective attack on bad laws through judicial review was not part of Locke’s equation.”<sup>342</sup> Thus, on the issue of judicial review Epstein abandons Locke and molds his claim about the “Lockean” nature of American constitutionalism to fit his own contemporary purposes.

As for the consistency of the “classical liberal” Court before 1936, Epstein is forced to admit another problem. Inconsistencies and changes did occur during the “classical liberal” era. Given the body of relevant cases, he does not deny that the antebellum Court failed to use its powers of judicial review consistently or aggressively. “The overall analysis [of antebellum cases] is, of course, deeply complicated by the erratic nature of Supreme Court decisions, which makes it impossible to give a uniform generalization in favor of either aggressive or minimal judicial review.”<sup>343</sup> While he claims *Marbury v. Madison*<sup>344</sup> as “a clear victory for the theory of limited government” and a “doctrine of judicial supremacy,”<sup>345</sup> he scorns *McCulloch v. Maryland*<sup>346</sup> because it “set the groundwork for the latest progressive movement” by “gravitating to the rational basis test.”<sup>347</sup>

Regardless of that inconsistent historical record, Epstein nonetheless concludes that “classical liberal” principles require a vigorous practice of judicial review. The unsettled “balance” between *Marbury*, *McCulloch*, and the Court’s other “erratic” decisions, he concludes, “is vitally altered in favor of strong judicial review so long as the justices remember that it is a classical

340. *Id.* at 77, 85.

341. *Id.* at 82. Early on Epstein acknowledges that the founders’ thinking “did not align itself neatly” with Locke’s thinking. *Id.* at 3.

342. *Id.* at 82. Similarly, Epstein admits that “all the early thinking on separation of powers” had “no place for a strong version of judicial review.” *Id.*

343. *Id.* at 78.

344. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

345. EPSTEIN, *supra* note 5, at 77; *see id.* at 92 (“Rightly read, *Marbury*’s implications are profound. The decision necessarily preserves for the Supreme Court—and by implication, all lower federal courts and all state courts—the right to determine the constitutionality of any substantive law that is relevant to any case that comes before it.”).

346. *See generally* *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316 (1819).

347. EPSTEIN, *supra* note 5, at 218. This aspect of *McCulloch*, Epstein writes, explains “why the two major architects of limited judicial review—James Bradley Thayer and Felix Frankfurter—adored Marshall’s tour-de-force in *McCulloch*.” *Id.* at 218.

liberal constitution, with strong property rights and limited government, that they are asked to construe.”<sup>348</sup>

Epstein’s historical argument about “classical liberalism” and judicial review highlights three facts. One is that his prescriptive argument is circular. Aggressive judicial review is justified because it is required by “classical liberal” principles, while it is the desirability of enforcing “classical liberal” principles that justifies the practice of aggressive judicial review.

A second fact is that during its first 70 years the “classical liberal” Court was, as Epstein admits, neither consistent in its decisions nor strongly supportive of vigorous judicial review. At a minimum, then, that history shows that the “classical liberal” Court did not, in fact, think or act as though “classical liberal constitutionalism” required a consistent practice of aggressive judicial review.

A third fact is that the “classical liberal” Court changed its practice of judicial review in the late nineteenth century. Thus, “classical liberalism” did not underwrite consistent ideas or practices about judicial review. Indeed, the “classical liberal” Court made substantial changes not because of any timeless “classical liberal” principles but because complex social, political, intellectual, and professional changes altered its very understanding of its role and authority and encouraged it to exercise its powers more broadly and frequently.<sup>349</sup> Indeed, the changes that the Court made between 1880 and World War I were striking. Not only did it begin using the power of judicial review more vigorously, but it also deployed new restrictive doctrines to justify its actions and reshaped federal law across the board to expand the ability of the entire federal judiciary to enforce stricter constitutional limitations on government action.<sup>350</sup>

Thus, neither “Lockean” principles nor a consistent “classical liberal” judicial tradition supports Epstein’s claim that an aggressive form of judicial

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348. *Id.* at 79. Epstein praises both the dormant Commerce Clause and vigorous protections for free speech (not including limitations on “campaign finance expenditures”) on the ground that they follow “classical liberal” reasoning and “are great achievements that could never be sustained under a different model of judicial review.” *Id.*

349. The historical literature on the change is vast, and legal historians commonly refer to the late nineteenth century as the era of “classical legal thought,” using the word “classical” differently than Epstein does. *See generally* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* (1992); HOVENKAMP, *ENTERPRISE AND AMERICAN LAW*, *supra* note 43; DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1975); KENS, *supra* note 313; WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900* (1982); MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* (2003); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998). On the role of legal education in the period, *see generally* BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906* (2009); WILLIAM P. LAPIANA, *LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994).

350. *See generally* Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOLEDO L. REV. 931 (2009).

review is essential to “classical liberal constitutionalism.” His free-market libertarianism, however, does demand such a practice. Accordingly, he perfects “classical liberalism” by projecting his chosen form of “judicial supremacy” into its theory. That such a form of judicial review existed neither in the mind of John Locke nor in any historically consistent “classical liberal” tradition is no matter.

Epstein’s move to perfect “classical liberal constitutionalism” confirms once again its true nature. It is simply Epstein’s ahistorical ideological construct, nothing more and nothing less.

#### D. SOME GENERAL CONCLUSIONS

*The Classical Liberal Constitution* claims our attention because it purports to be a history of the political and legal thought that underlies the United States Constitution and that properly guides its interpretation. It is designed, in other words, to confer “originalist” legitimacy and authority on Epstein’s contemporary version of libertarian politics and free market economics.<sup>351</sup> Whatever one might think of Epstein’s political and social values, however, his book must stand or fall on its historical analysis. If Epstein “is wrong about the history,” Suzanna Sherry wrote, “he is wrong about the Constitution.”<sup>352</sup> Put simply, Epstein is “wrong about the history.”<sup>353</sup>

The history in *The Classical Liberal Constitution* glides along on an abstract plane, focused on general concepts and formal legal reasoning—not on the actual history of the United States and its vibrant constitutional tradition. It systematically homogenizes the ideas and historical developments that marked the decades from the Founding to the New Deal, and it pays no attention to the New Deal’s historical complexities, its changing nature, or its varied consequences. The book’s ultimate historical flaw, however, lies in its determined manipulation of the past to serve two extraneous ideological imperatives: first, to claim that there was a specific libertarian, free-market “classical liberal tradition” that shaped the founders’ thinking; and, second, to claim that this “classical liberal tradition” constitutes the true and

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351. Originalist theories have been subject to severe criticisms, and both their intellectual shortcomings and their ideological roots fully exposed. See generally CROSS, *supra* note 179. Indicative of just one of the kinds of problems that undermine originalist theories, a thorough and methodical study of James Madison’s *Notes on the Philadelphia Convention*—one of the most important historical sources available on the Founding—has established that over several decades after the Convention Madison altered and rewrote many of its sections. He did so as his own views and interests (and those of Thomas Jefferson as well) changed. As times and issues changed, so too did the content of Madison’s notes. See generally BILDER, *supra* note 234. For Madison’s *Notes*, see generally MADISON, *supra* note 251.

352. Sherry, *supra* note 251, at 1459–60.

353. Another recent commentator agreed. “Historical evidence does not support the Roberts Court conservatives or scholars such as Richard Epstein who claim to follow originalist methods while simultaneously insisting that the Constitution creates a laissez-faire political-economic system.” Feldman, *supra* note 202, at 47.

authoritative guide for interpreting the Constitution.<sup>354</sup>

On the most general level, Epstein's "classical liberal tradition" calls to mind Louis Hartz's "liberal tradition in America." Hartz argued that the United States was "born" as a "liberal" nation free from a feudal past and that it was shaped throughout its history by "Lockean" political ideas and values.<sup>355</sup> Epstein similarly portrays the United States as a "classical liberal" nation from its beginning, and he maintains that its "classical liberal tradition" is based on "Lockean" premises.<sup>356</sup>

Despite those gross similarities, however, the two books are revealingly different. Hartz focused on general cultural beliefs and practices and he drew no sharp line at the New Deal. His idea of "liberalism" was all-embracing and swept up virtually all Americans throughout the nation's history.<sup>357</sup> In contrast, Epstein fashions his "classical liberalism" out of legal formalities and abstract theory, and he draws the brightest of lines to proscribe the New Deal. Thus, indicative of its ideological pliability and purpose, Epstein's "classical liberal tradition" is both usefully amorphous and usefully precise. Like Hartz's "liberal tradition," it is elastic enough to encompass wide diversities stretching over some three centuries; unlike Hartz's "liberal tradition" it is precise enough to single out and condemn the New Deal.

Perhaps most important, Hartz recognized a potentially dangerous quality he saw in his "liberal tradition"—its potential to produce a unique kind of "American liberal absolutism."<sup>358</sup> Epstein's work illustrates Hartz's point. To ignore major parts of the historical record, to uncouple understanding of American constitutionalism from its actual past, and to make personal ideology the touchstone of historical truth is to advance a particularly dangerous form of "American liberal absolutism."<sup>359</sup>

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354. Epstein writes that the kinds of criticisms made in this review are "wrong at every point." EPSTEIN, *supra* note 5, at 8.

355. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

356. EPSTEIN, *supra* note 5, at 18. "The Lockean system was dominant at the time when the Constitution was adopted." EPSTEIN, *TAKINGS*, *supra* note 7, at 16. Epstein's book is also similar to Hartz's in that it is subject to one of the same criticisms made against Hartz's book: that its arguments "fail to give due weight to inegalitarian ideologies and conditions that have shaped the participants and the substance of American politics." See generally Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993).

357. See J. David Greenstone, *Political Culture and American Political Development: Liberty, Union, and the Liberal Bipolarity*, *STUD. IN AM. POL. DEV.*, Apr. 1986 at 1, 6. Hartz's argument proves difficult to refute because it is stated so broadly. His concern is with basic commitments rather than detailed policies, and Clay and Webster, like Franklin Roosevelt a century later, shared a liberal commitment to political democracy and private enterprise.

358. HARTZ, *supra* note 355, at 302.

359. Epstein's passionate intensity leads him to particularly harsh statements about those who disagree with him. Commentators who reject his version of "originalism" and advocate a "living" Constitution, he declares at one point, "are prepared to excuse horrific decisions in order to explain why only evolving social perceptions, not textual interpretation or objective facts, lead to advancement in constitutional law." EPSTEIN, *supra* note 5, at 532. His views may have induced

Most fundamentally, Epstein paints a false picture of American constitutionalism. He argues that the “classical liberal tradition” and the Constitution established a relatively clear and specifically directive set of principles and doctrines, and he defines its “rule of law” as the steady and consistent application of those principles and doctrines.<sup>360</sup> As he declared when he first began concentrating on constitutional law, “the idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law.”<sup>361</sup> In *The Classical Liberal Constitution*, he declares that ideas of a “living constitution” are “dangerous talk,”<sup>362</sup> and he identifies the “rule of law” with constitutional interpretations that are guided by and consistent with his “classical liberal tradition.”<sup>363</sup>

The fact is, however, that the United States Constitution does not provide sufficiently clear answers to most of the questions that arise in the modern world, and neither do the historical materials from which Epstein confects his “classical liberal tradition.” The former is far too concise, abstract, and general, and the latter far too varied, imprecise, and often outmoded. American constitutionalism embodies profoundly important and deeply embedded ideas, values, practices, principles, and institutions, and it surely seeks to establish the foundation for an effective “rule of law.” Its “rule of law,” however, is neither the one Epstein hails nor one that requires unchanging understandings and applications.

Contrary to Epstein’s image, American constitutionalism and its working

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some of his sympathizers to go even farther. Reviewing *The Classical Liberal Constitution* led one of Epstein’s admiring ex-students to call progressives and New Dealers “evil.” Steven G. Calabresi, *On Liberty, Equality, and the Constitution: Richard A. Epstein’s The Classical Liberal Constitution*, 8 N.Y.U. J.L. & LIBERTY 839, 844 (2014) (reviewing EPSTEIN, *supra* note 5). In an otherwise highly favorable review, he criticized Epstein’s book because it “greatly understates just how evil the progressives really were.” *Id.* The reviewer later extended his charge of “evil” to the New Deal: “Epstein understates the evil caused by the Progressives and the New Dealers.” *Id.* at 907. He also adds a charge of “fascism,” explaining that Epstein “understates the damage done by Progressive and New Deal fascism to the American constitutional order.” *Id.* He nods toward supporting the charge of fascism by linking “progressives” to Hitler, *id.* at 844, and Roosevelt and the New Deal to Mussolini, *id.* at 905, 906, 921, while terming FDR’s “Court packing” plan “brutal,” *id.* at 909, and terming *Korematsu v. United States* one of the “triumphs of New Deal constitutionalism.” *Id.* at 922. Similarly reviewing Epstein’s book, another admiring commentator agreed that the defeat of “classical liberalism” has led to “liberal fascism.” Richard E. Wagner, *Richard Epstein’s The Classical Liberal Constitution: A Public Choice Refraction*, 8 N.Y.U. J.L. & LIBERTY 961, 966 (2014) (citing JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT, FROM MUSSOLINI TO THE POLITICS OF MEANING* (2008)).

360. Epstein does repeatedly acknowledge ambiguity and vagueness in some constitutional provisions, but he maintains that careful interpretation guided by the “classical liberal” tradition will reach sound and probably “correct” conclusions. See EPSTEIN, *supra* note 5, at 52–53, 576–77.

361. EPSTEIN, *TAKINGS*, *supra* note 7, at 24.

362. EPSTEIN, *supra* note 5, at 532.

363. *Id.* The Constitution’s “successful interpretation on all points dealing with text and its surrounding norms should be read in sync with the tradition of strong property rights, voluntary association, and limited government.” *Id.* at 53–54.

“rule of law” are framed and structured by five contributions the Constitution makes to American law and government, and they are sustained only by the continuing efforts of the American people and their governmental institutions to maintain a secure, tolerant, and democratic society and political system.<sup>364</sup> Their constitutional enterprise involves an enduring challenge fraught with uncertainties and dangers, but it is nonetheless the actual collective enterprise that the founders bequeathed to the new nation. The Constitution they drafted and ratified has changed in meaning and application over time, and it has done so unavoidably and as a practical necessity. It is up to the American people and their governmental institutions to ensure that it does so wisely and benevolently, but the Constitution itself underwrites no guarantees.<sup>365</sup> That understanding of American constitutionalism may not satisfy the requirements of some purportedly comprehensive normative theories, but it does suggest—contrary to Epstein’s image of “classical liberal constitutionalism”—the actual nature of both the Constitution’s “rule of law” and American constitutionalism itself.

*E. EPSTEIN’S PLACE IN AMERICAN CONSTITUTIONAL HISTORY*

The arguments in Epstein’s book and Article, and the values and assumptions that inspire them, are products of the late twentieth century. They grow from Epstein’s libertarian, free-market convictions as they have been nourished by powerful intellectual, political, and cultural changes that have occurred over the past half-century. Principal among those changes are the well-known resurgence of laissez-faire and market-oriented economic thinking, the rise of anti-tax and anti-government passions, the election of Ronald Reagan and the reorientation of the Republican Party, and the rapid growth of an energetic libertarian support network of wealthy donors, corporate sponsors, pro-business foundations, well-organized right-wing think tanks, and a newly vibrant libertarian-oriented scholarship.<sup>366</sup> It is the specific ideas and policy preferences of those contemporary advocates, not the ideas of John Locke or James Madison, that determine the specific legal and policy

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364. The Constitution establishes a “compound” structure of divided governmental powers, institutional principles of governmental limitation and individual rights, an enduring symbol of national and communal unity, a profound cultural resonance with certain long-honored Western ideas of well-ordered government, and an ethical mandate of good faith and reasoned discourse in conducting the nation’s public affairs. PURCELL, *supra* note 227, at 197–200.

365. See generally Edward A. Purcell, Jr., *The Judicial Legacy of Louis Brandeis and the Nature of American Constitutionalism*, 33 *TOURO L. REV.* (forthcoming 2016).

366. See generally ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2015); DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2014); GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* (2012); ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* (2013); JASON STAHL, *RIGHT MOVES: THE CONSERVATIVE THINK TANK IN AMERICAN POLITICAL CULTURE SINCE 1945* (2016).

conclusions that Epstein projects into his “classical liberal constitutionalism.”<sup>367</sup>

That Epstein’s claims are rooted in contemporary goals, values, and purposes should come as no surprise. Throughout American history, constitutional thinking has been shaped by contemporary currents and partisan passions, and Epstein’s work is no exception. The basic history is all too familiar. As soon as George Washington took office in 1789, the principal authors of *The Federalist* split sharply with Madison and Hamilton articulating radically different visions of the Constitution as they sought to address new issues and defend new goals. Marshall adapted the Constitution to support national powers, while Jefferson sought to limit those powers. Webster found in the Constitution the grounds necessary to support the idea that the Union was permanent and indissoluble, while Calhoun found in the same document the grounds necessary to defend state sovereignty, nullification, and secession. Such examples could be multiplied endlessly, as the story goes on through every significant figure and period in American constitutional history from the 1790s to the present, from Justices James Wilson and James Iredell in *Chisholm v. Georgia*<sup>368</sup> to Chief Justice John Roberts and Justice Ruth Bader Ginsburg in *Shelby County v. Holder*.<sup>369</sup>

A final example, far less familiar but particularly fitting given Epstein’s claims, illustrates that standard practice of American constitutional argumentation. From colonial times well into the twentieth century American Catholics faced persistent and often harsh discrimination in the United States.<sup>370</sup> Driving the hostility was a conviction among the country’s overwhelmingly Protestant majority that Catholics were loyal to a foreign power, inherently anti-democratic and authoritarian, and potentially fatal to

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367. Epstein’s book “speaks not for the eighteenth-century Constitution, but for the contemporary moral and political views of those who endorse it.” Cass R. Sunstein, *The Man Who Made Libertarians Wrong About the Constitution*, NEW REPUBLIC (March 14, 2016), <https://newrepublic.com/article/117619/classical-liberal-constitution-richard-epstein-reviewed>. The point is confirmed by the fact that those who share Epstein’s political values tend to agree with his ideas of “classical liberal theory.” One sympathizing reviewer declared, for example, that “the original constitution of liberty has not been kept and has been replaced by a constitution of servility.” Wagner, *supra* note 359, at 964.

368. See generally *Chisholm v. Georgia*, 2 U.S. 419 (1793).

369. See generally *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

370. The colonies were overwhelmingly Protestant, and in the seventeenth century, Maryland made being a Catholic a crime. Mark McGarvie & Elizabeth Mensch, *Law and Religion in Colonial America*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815) 363, 359 (Michael Grossberg & Christopher Tomlins, eds., 2008). Into the early nineteenth century, five states had constitutional provisions limiting public office to Protestants, and New Hampshire kept its limiting provision until 1876. Michael Ariens, *Religion and Roman Catholicism in American Legal History*, in AMERICAN LAW FROM A CATHOLIC PERSPECTIVE: THROUGH A CLEARER LENS 8 (Ronald J. Rychlak, ed., 2015); see also generally JENNY FRANCHOT, *ROADS TO ROME: THE ANTEBELLUM PROTESTANT ENCOUNTER WITH CATHOLICISM* (1994).

the Protestant “vision of a ‘Christian nation.’”<sup>371</sup> Although slowly growing in numbers and political influence in the nineteenth century, Catholics remained on the cultural and intellectual defensive until the early twentieth century when the triumph of “godless” Communism in Russia and the rise of Nazism in Germany offered the opportunity to turn the tables. Understandably, then, adopting the established practice of American constitutional argumentation, Catholic lawyers and philosophers claimed the mantle of the founders for themselves and used it to indict their non-Catholic and often secularized tormentors as the true enemies of democracy and the Constitution.<sup>372</sup>

In 1941, Father Stephen F. McNamee, the president of the Jesuit Philosophical Association of the Eastern States, summarized their case. The “metaphysical roots of Hitlerism,” he declared bluntly, lay in Luther’s break from Rome and the consequences of the Protestant Reformation.<sup>373</sup> “Ever since Luther and Calvin, too, modern philosophy has been trying to interpret man apart from God and original sin,” and “blindly along the divergent path have followed most of our modern American non-Catholic philosophers.”<sup>374</sup> The result was that “our own country is faced with an internal crisis more serious than any external invasion.”<sup>375</sup> Father McNamee made the source of that internal crisis explicit. “American non-Catholic educators have been sending forth from the university halls sappers to undermine the principles on which this government was founded,” and those “false teachers in our democracy have perfectly prepared the way for the destructive reality of action that we daily witness in Europe because of Hitler.”<sup>376</sup> Thus, “the supreme danger is from within!”<sup>377</sup> The solution was clear. America’s founders, Father McNamee continued, “professed beliefs that are diametrically opposed to

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371. Sarah Barringer Gordon, *Law and Religion, 1790–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920) 430 (Michael Grossberg & Christopher Tomlins, eds., 2011); see also John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928–1960*, 84 J. AM. HIST. 97, 99 n.7 (1997). See also generally PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 38–42, 108–17, 302–05 (1997); Philip Gleason, *American Catholics and Liberalism, 1789–1960*, in CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY 45–75 (R. Bruce Douglass & David Hollenbach, eds., 1994).

372. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 164–71 (1973). On Catholic intellectuals and their adversaries in the twentieth century, see generally McGreevy, *supra* note 371. On Catholic legal thought, see generally John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought’s Response to Legal Realism*, 98 MARQ. L. REV. 1203 (2015).

373. Rev. Stephen F. McNamee, S.J., *Presidential Address*, in PHASES OF AMERICAN CULTURE 9, 9 (Clarence E. Sloane, S.J., ed., 1941).

374. *Id.* at 9, 10.

375. *Id.* at 10.

376. *Id.* at 10–11.

377. *Id.* at 10.



these false philosophies.”<sup>378</sup> Consequently, the “only way that we Americans can save our democracy in government and in our way of life” was to understand the “historical, economic and above all, philosophic” grounds that “were the very foundation stones of this government.”<sup>379</sup> Those “foundation stones” were the “philosophic” principles that underlay “the Church of Rome,” its “solid philosophical foundations,” and “the medieval feeling for the universal character of truth” typical of Catholic Thomism.<sup>380</sup>

Catholic intellectuals rallied around those claims. “[T]he principles of our own American Constitution,” declared a Jesuit historian, were rooted in the “new and more adequate theory of government and law” developed by St. Thomas.<sup>381</sup> It was “demonstrable,” announced another Catholic priest, “that without the recognition of the natural moral law popular government, as set forth by our founders, is impossible.”<sup>382</sup> Both the common law and American constitutional law were rooted in Catholic principles of natural law, a Catholic law professor explained. Thomistic “natural law,” he maintained, “finds a place in American jurisprudence” both in common law decisions and “as a guiding principle in the construction of constitutional limitations.”<sup>383</sup> The “positive and definite American philosophy of life,” declared another Catholic writer, was “drawn directly from the Catholic philosophy of life.”<sup>384</sup>

Those claims from the 1930s and 1940s make a particularly apt comparison with Epstein’s contemporary claims. Exemplifying the well-established practice of expedient and partisan constitutional argumentation, both adopted many of the same rhetorical techniques, including appeals to “the founders,” justifications in “natural law,” and proclamations of timeless truths. More particularly, both generated their historical arguments in the same way. They dismissed the facts and complexities of the actual American past, projected into key concepts and principles their own chosen meanings, and then purported to draw from those imposed meanings the specific normative conclusions that served their purposes.<sup>385</sup>

378. *Id.* at 13.

379. *Id.*

380. *Id.* at 9, 13, 14 (quoting the Catholic Thomist Etienne Gilson). For specific invocations of Catholic Thomist philosophy, see generally, e.g., Rev. Wilfrid Parsons, S.J., *Philosophical Factors in the Integration of American Culture*, in PHASES OF AMERICAN CULTURE, *supra* note 373, at 15, 15–24.

381. Rev. Moorhous F. X. Millar, S.J., *The Origin of Sound Democratic Principles in Catholic Tradition*, 14 CATH. HIST. REV. 104, 126, 123 (1928).

382. Rev. Charles C. Miltner, C.S.C., *The Philosophical Background of American Democracy*, 15 NOTRE DAME LAW. 183, 186 (1940).

383. William P. Sternberg, *Natural Law in American Jurisprudence*, 13 NOTRE DAME LAW. 89, 100 (1938).

384. William Franklin Sands, *What is an American?*, THE COMMONWEAL, Feb. 21, 1941, at 438; *see also* Purcell, *supra* note 372, at 170 (citing Patrick J. Roche, *Democracy in the Light of Four Current Educational Philosophies* 131 (1942) (Ph.D. dissertation, Catholic University of America)). For a discussion of the place of Catholic Thomists in American legal thinking in the 1930s and 1940s, see JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY* 190–93, 230–39 (1990).

385. *See* Epstein, *supra* note 107, at 219; *see also* EPSTEIN, *supra* note 5, at 316, 525. Regarding

Thus, *The Classical Liberal Constitution* is itself a “classic.” In this context, a classic example of the actual and living tradition of American constitutional argumentation, the continuous effort of partisans to find new and contextually-effective ways to shape the Constitution’s meaning to serve their own ends.

## VI. CONCLUSION

The title of this essay poses a question: in American constitutional law, what changes and what does not? The actual history of American constitutionalism provides two relatively clear answers. What changes, as Professor Hovenkamp illustrates, is the interpretation and application of the Constitution. What does not change, as Professor Epstein illustrates, is the effort of partisan ideologues to impose on the Constitution their own particular views and values.

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natural law, Epstein says that it is “not enough” for any “modern realist” to rest on asserting “the massive indeterminacy of natural law.” Epstein, *supra* note 1, at 64. Though it may not be “enough,” recognizing that “massive indeterminacy” is, nonetheless, an essential starting point. Absent arbitrarily projected meanings and inferences, “natural law” cannot provide necessary conclusions to resolve “live” contemporary constitutional questions. “Doubtless the natural law theorist cannot plausibly make strong claims about the ready and uncontroversial knowability of particular moral truths, if for no other reason than the protracted irreconcilability of moral beliefs held by undoubted leading natural law theorists.” R. George Wright, *Natural Law in the Post-Modern Era: A Review of Natural Law Theory: Contemporary Essays*, 36 AM. J. JURIS. 203, 206 (1991) (reviewing NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992)). For examples of the diversity among natural law theorists, see generally *id.*