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Property is the New Privacy

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PROPERTY IS THE NEW PRIVACY: THE COMING CONSTITUTIONAL REVOLUTION

THE CLASSICAL LIBERAL CONSTITUTION. By Richard A. Epstein.
Cambridge, Mass.: Harvard University Press. 2014. Pp. 684. \$49.95.

*Reviewed by Suzanna Sherry**

Richard Epstein's new book, *The Classical Liberal Constitution*, is the latest entry in what might be called conservative foundationalist constitutional theory. Epstein himself is one of the stalwarts of this movement, which includes libertarians as well as more traditional conservatives. The movement's primary goal is to ensure that economic rights receive the same level of judicial protection as non-economic or personal rights, and thus to make it much more difficult for the government to regulate economic activity. Freedom of contract, for these theorists, is on a par with freedom of speech, and property rights are as important as privacy rights. The theory is foundationalist in the sense that it seeks to ground all of constitutional law on a few foundational principles¹ and conservative in its opposition to government economic regulation.

Epstein's version of the theory, although sophisticated and nuanced, is ultimately unpersuasive for reasons I catalogue in Part I of this Review. But the book's real flaw lies in the underlying belief that Epstein shares with other conservative foundationalists: that economic and personal rights are equivalent and should be treated accordingly. Indeed, as I suggest in Part II, even Epstein occasionally seems reluctant to take this premise to its ultimate conclusion; he sometimes blinks.²

And it turns out that the whole issue of the equivalence of economic and personal rights raises some very interesting questions about the last seventy-five years of American constitutional scholarship. Black-letter law since 1938 has unequivocally separated economic from personal rights, leaving the former largely to the mercy of the legislature while zealously protecting the latter. Surprisingly, however, as I dis-

* Herman O. Loewenstein Professor of Law, Vanderbilt University Law School. I thank Rebecca Haw Allensworth, Paul Edelman, Rick Eldridge, Brian Fitzpatrick, Ganesh Sitaraman, and participants in the Vanderbilt summer brown-bag colloquium for helpful comments on earlier drafts. Daniel Hay provided his usual superb research assistance.

¹ For more on foundationalism, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

² He is, in other words, a fainthearted foundationalist. See *infra* note 36 and accompanying text.

cuss in Part III, there has been almost no sustained academic defense of that post–New Deal status quo. The little that exists is no match for the comprehensive arguments of the conservative foundationalists. Epstein and his fellow travelers are attempting to revolutionize constitutional law, and there is little or no serious scholarly opposition in the legal academy. That missing opposition, and not the book itself, is the real story.

I. EPSTEIN’S CLASSICAL LIBERAL CONSTITUTION: TURNING BACK THE CLOCK

A. *What Epstein Says*

Perhaps the most famous moment in United States constitutional history is the Supreme Court’s monumental about-face in 1937. After decades of striking down state and federal legislation regulating economic activity (including, for example, employer-employee relations), the Court finally upheld crucial parts of the New Deal and abandoned its intense scrutiny of economic regulation.³ As one scholar wittily describes it, “[t]hirty-seven years into it, the Supreme Court of the United States decided by a narrow vote that the twentieth century was constitutional.”⁴ Now comes Richard Epstein three-quarters of a century later, seeking to reverse that accomplishment and invalidate most modern regulation of economic activity. But Epstein is no ordinary constitutional Luddite. Both his interpretive strategy and his substantive views of the Constitution are idiosyncratic and intriguing, even if ultimately unpersuasive. Methodologically, he is neither an originalist nor a textualist, but he also rejects the notion of a “living Constitution.” Substantively, he parts company with progressives on many (but not all) issues, with traditional conservatives on some, and with libertarians on a few. Here, then, is Epstein’s perfect constitution.

Epstein’s constitution, like Dworkin’s,⁵ is constructed from substantive moral values. Unlike Dworkin, however, Epstein identifies those moral values based on history rather than philosophy: Epstein’s moral values are those on which he believes the Founders based their constitution. But, critically, Epstein acknowledges that although those values were selected intentionally, they were expressed imperfectly. Thus, although the Founders intended to create a classical liberal con-

³ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁴ RICHARD KLUGER, *SIMPLE JUSTICE* 209 (2004) (originally published in 1976 but reissued for the fiftieth anniversary of *Brown v. Board of Education*).

⁵ See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996). Of course, Dworkin and Epstein endorse rather different substantive moral values, and use different methods to identify the correct moral values.

stitution, they sometimes erred in implementation. That stance complicates his interpretive project in two ways, both of which yield a stronger and more realistic interpretive theory than the conventional originalist obsession with original meaning.

First, he correctly points out that originalism and textualism allow judges a great deal of discretion. Although Epstein would begin with the text and its original public meaning, he suggests that neither textualism nor originalism will yield a “single settled public meaning” for constitutional provisions that rely on “grand abstractions” (p. 46). Instead, “the constitutional text must be interpreted in light of supplemental norms that arise from within [the] classical liberal tradition” (p. 53). Refreshingly, then, *The Classical Liberal Constitution* puts its interpretive cards on the table rather than hiding behind a pretense that interpretation is a mechanical textual or historical exercise and that judges are just umpires.

The second complication arises from the intersection between the imperfections of the original Constitution and the mistakes of later generations, a concept that Epstein discusses under the rubric of “the prescriptive constitution” (p. 68). After two centuries, mistaken constitutional interpretations — those clearly inconsistent with the text and its original public meaning, even taking into account supplemental norms — have inevitably crept in. A ruthless originalist would overrule those mistaken interpretations. But for Epstein, whether to do so turns on a “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?” (p. 71). For example, although Epstein believes that both judicial review and the jurisprudence of the dormant commerce clause are inconsistent with the original Constitution and the Founders’ norms, he argues that both bring the Constitution closer to the classical liberal ideal motivating the Founders and therefore should be retained. The adoption of the doctrine of judicial review over federal and state actions — in *Marbury v. Madison*⁶ and *Martin v. Hunter’s Lessee*,⁷ respectively — “neutralized some serious errors in the original constitutional design” (p. 97).⁸ And while the dormant commerce clause “is not easily defensible on narrow originalist grounds,” it “should nonetheless be incorporated into modern constitutional law, given that the enormous boost it supplies to free trade is eminently consistent with classical liberal principles” (p. 229). Again, Epstein’s focus on the substantive desirability of particular in-

⁶ 5 U.S. (1 Cranch) 137 (1803).

⁷ 14 U.S. (1 Wheat.) 304 (1816).

⁸ In fact, Epstein overstates the supposed inconsistency between judicial review and the original constitution. See Suzanna Sherry, *The Classical Constitution and the Historical Constitution: Separated at Birth*, 8 N.Y.U. J.L. & LIBERTY 983 (2014).

terpretations of the Constitution is a step forward from the usual claims of originalists and textualists that outcomes should not matter.

But if his interpretive theory is a step forward, his favored interpretations are a step backward. The crux of his analysis and the heart of the book is his description of the principles of the classical liberal constitution, which “starts from the twin pillars of private property and limited government” (p. ix). Readers of Epstein’s prior books probably already know the general outlines of his principles and their consequences. He has previously argued for a broad definition of property with a concomitantly strong prohibition on government economic legislation (making unconstitutional everything from labor laws to workers’ compensation schemes to progressive taxation)⁹ and against anti-discrimination laws.¹⁰ He has insisted that beginning in 1938, “progressives rewrote the Constitution” to allow government-sponsored cartels and monopolies.¹¹ And he has reduced all of public and private law to six simple rules, the most important of which for purposes of constitutional doctrine is that if “the net effect of [any] scheme of [government] regulation is to impose an implicit transfer of wealth from one individual or group to another . . . that regulation should be blocked unless cash compensation is provided.”¹²

The Classical Liberal Constitution links all of these arguments together in a simple constitutional claim: government regulation is presumptively bad. Epstein builds the case for this claim historically. The Founders’ core insights were a “deep ambivalence toward state power” (p. 18) and an “overt hostility to democratic institutions” (p. 28). They agreed with Thomas Paine that “government even in its best state is but a necessary evil” (p. 4).¹³ Thus, the classical liberal vision incorporates broad individual rights and limited room for government regulation.

Epstein therefore defines the individual rights we have inherited from the Founders in sweeping terms: they include “liberty of action, the ownership of private property, and the freedom from arbitrary arrest and prosecution” (p. 4). At the same time, however, the Founders endorsed only negative rights, lest the government be empowered to

⁹ See RICHARD A. EPSTEIN, *TAKINGS* 280 (1985) (concluding that “the National Labor Relations Act . . . must fail on eminent domain grounds”); *id.* at 255 (concluding that “workers’ compensation statutes . . . are unconstitutional”); *id.* at 302 (describing “the constitutional prohibition on progressive taxation”); *see also id.* at 281 (acknowledging that his position “invalidates much of the twentieth-century legislation”).

¹⁰ RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

¹¹ RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

¹² RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 135 (1995).

¹³ The author quotes THOMAS PAINE, *COMMON SENSE* (1776). An internal quotation mark has been omitted.

protect some citizens' "rights" at the expense of others'. As a result, there is no right "to housing, health care, or a decent income" (p. 4). Finally, Epstein endorses few, and very limited, justifications for state action infringing on individual liberty. Primary among these justifications are "countering force, fraud, and monopoly" (p. 55).¹⁴

Those insights translate to an across-the-board suspicion of government action: "All proposals that deviate from the basic common law protections of life, liberty, and property should reach the legislature under a presumption of error" (p. 98). Analogously, courts should adopt a similar presumption of unconstitutionality when laws are challenged: "[T]here are virtually no cases, except perhaps on some narrow national security questions, where rational basis sets the right standard of review" (p. 311) because the "classical liberal position gives narrow weight to purported justifications both as to the ends the state chooses and the means it uses to achieve them" (p. 310).¹⁵

Epstein contrasts this classical liberal position with progressives' view of government "not . . . as a necessary evil, but rather as a positive force for good" (p. 6) and their consequent "imperatives" "to narrow or reduce the scope of substantive protections of individual rights" and "to allow the state the benefit of broad new justifications for regulation" (p. 304).¹⁶ The new progressive — and, in Epstein's view, ille-

¹⁴ See also RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 303 (2014) ("[C]lassical liberal theory . . . limit[s] government intervention . . . to cases of force, fraud, and monopoly."); *id.* at 15–16 ("[T]he police power allows the state to deal with the problems that call for government intervention even under the classical liberal view: the use and threat of force; fraud in all its manifold forms; incompetence, as from infancy and insanity; the regulation of monopoly; and the creation and maintenance of public infrastructure.").

¹⁵ Readers may notice that I have not mentioned Epstein's views on federalism — the appropriate relationship between state and federal governments. That is because federalism plays only a cameo role in Epstein's scheme. As he says: "The key task of a theory of federalism . . . depends on developing an ideal vision of a federal system The place to start is the sovereign (that is, irreducibly political) risk of excessive regulation of economic activity inherent in governments at all levels" (p. 149). As Larry Yackle has suggested about the work of one of Epstein's political compatriots, this view of federalism "puts a structural face on what is at bottom a libertarian idea of acceptable government." Larry Yackle, *Competitive Federalism: Five Clarifying Questions*, 94 B.U. L. REV. 1403, 1406 (2014). To the extent that Epstein does rely on independent federalism-based limits on Congress, Richard Primus has recently mounted a thorough and persuasive argument against a key point underlying Epstein's thesis. Epstein explicitly (and necessarily) contends that the "enumerated" powers of the federal government inherently authorize less legislation than the residual, general, police power of the states (pp. 12–13). Primus shows that the relationship between enumerated powers and a residual police power is contingent rather than inherent, and that what Primus labels the "internal-limits canon" on which Epstein and many others rely is in fact not historically accurate. Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

¹⁶ What Epstein pejoratively derides as "progressivism," others have — perhaps more accurately — labeled "modernism." See, e.g., DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); see also Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 641 (1994).

gitimate — justifications include “the equalization of wealth and the elimination of private forms of (invidious) discrimination” (p. 16).

Astute readers will quickly see that the most radical implications of Epstein’s classical liberalism are its effects on government regulation of economic activity, especially in the marketplace. As Epstein himself recognizes, there is overlap between the classical and progressive views “in areas of speech, religion, and privacy, [where both views generally] support a broad reading of the basic protection and a narrow reading of the police power” (p. 305).¹⁷ And, indeed, the heart of Epstein’s objection to the current system, and the reason he wants to turn back the clock, is that most economic regulation is (in his view) simply a massive wealth transfer:

Modern American constitutional law . . . virtually invites the legislature at both the federal and state levels to adopt schemes of redistribution that the Constitution itself is powerless to impose. . . .

The classical liberal worldview does not accept this compromise position whereby the Constitution allows but does not require massive forms of wealth redistribution. Rather, it starts from the assumption that the basic system of negative liberties limits the use of taxes and regulations to overcoming coordination problems for public goods — e.g. infrastructure — that generate across-the-board benefits, *without* requiring huge transfer programs among citizens. (p. 312)¹⁸

To prevent such wealth transfers, Epstein would treat “all individual interests, whether they are classified as economic, expressive, or intimate,” the same (p. 305).¹⁹ *The Classical Liberal Constitution*, then, would dismantle half the New Deal settlement. That settlement, epitomized in *Carolene Products* and its famous footnote four,²⁰ distinguishes between economic and personal rights, allowing the government to regulate the former as long as it has some “rational basis” for doing so but requiring a much more significant government justifica-

¹⁷ Ironically, his description is inaccurate with regard to his own position on privacy and the police power. See *infra* pp. 1463–65.

¹⁸ See also EPSTEIN, *supra* note 14, at 488 (“The current two-tier system of American constitutional law has essentially given up the ghost of trying to fight any generalized redistribution from any well-defined person of group A to any well-defined person of group B through state coercion.”); *id.* at 517 (“[L]egal doctrine . . . must be always on the alert for implicit wealth transfers that warring factions generate through either legislative or administrative action.”); *id.* at 196 (justifying narrow reading of Spending Clause as necessary to provide “an effective limit on the ability of the United States to use taxation as a disguised system of wealth transfer”); *id.* at 339 (criticizing Justice Harlan’s *Lochner* dissent on ground that it “allowed the state to interfere with market forces to equalize the vast disparities of wealth between corporate employers and their individual employees”); *id.* at 351 (arguing that if judicial oversight is “lax,” “political forces will result in massive wealth transfers”); *id.* at 489–90 (defending Establishment Clause as way to prevent “implicit wealth transfers across religious lines,” *id.* at 489).

¹⁹ See also *id.* at 337 (“Classical liberal theory contains no limiting principle that accounts for a categorical difference between economic and personal rights.”).

²⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

tion for laws that affect the latter. Leaving in place *Carolene Products*'s heightened scrutiny for (at least some) personal rights, Epstein would resurrect that scrutiny for all economic rights. No wonder he admits that he is "a voice from the classical liberal fringe" (p. 365).

B. *What Epstein Doesn't Say*

One significant problem with Epstein's analysis is the weakness of its historical arguments. Epstein airbrushes history, wiping away the disagreements, frequent incompleteness, and occasional incoherence in the Founders' visions of good government. He is right to notice, contrary to contemporary conventional wisdom, that as a historical matter "[t]he last thing . . . that the Constitution represents is a full-throated endorsement of popular democracy" (p. 571). But he goes astray when he tries to fill in the details necessary to turn that basic insight into a blueprint for constitutional doctrine.

His casual conclusion, for example, that "the Founders' common political philosophy meant that much of their deliberations were about means and not ends" (p. 30) is at odds with the deep and abiding differences that were on full display in the Constitutional Convention, the ratification debates, and the squabbles between Federalists and Anti-federalists that led to the bitter election of 1800.²¹ As historian Jack Rakove has noted, "behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion."²² In particular, there is continuing historical debate about whether the classical Lockean liberal philosophy that Epstein favors was in fact the dominant political theory of the 1780s.²³ Indeed, one prominent legal historian has concluded that the prevailing economic philosophy of the Founding generation was preclassical: "The economic views that dominated in late eighteenth century America favored active government involvement in managing the economy and creating infrastructure.

²¹ The historical literature on this period is voluminous. On the specific ideological struggles that Epstein ignores, see, for example, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); LANCE BANNING, *THE JEFFERSONIAN PERSUASION* (1978); SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828* (1999); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); JACK N. RAKOVE, *ORIGINAL MEANINGS* (1996); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). For an overview of the different ideological currents at the time of the Constitutional Convention, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 7-30 (3d ed. 2013).

²² RAKOVE, *supra* note 21, at 9-10. Epstein seems to recognize this inevitable complexity when it comes to the *language* of the Constitution (pp. 46-51) but ignores it when he addresses the even more complex *philosophy* underlying that document.

²³ For an overview of the historical (and legal) academic scholarship, see generally Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 133-36 (1995).

More *laissez-faire* beliefs were outliers.”²⁴ And, as other historical analyses demonstrate, Epstein’s broad definition of property, his property-centric definition of liberty, and his rejection of government intervention in private economic affairs are not well-grounded in the historical evidence.²⁵

Two contrasting statements of political philosophy help illustrate all of these problems. Epstein writes that “[t]he classical liberal tradition of the founding generation prized the protection of liberty and private property under a system of limited government” (p. 17). But at the Constitutional Convention, James Wilson — who had been one of the drafters of the Pennsylvania Constitution and would later become a Supreme Court Justice — succinctly disagreed with a similar position that he believed some of his fellow constitution-makers were advocating: “Again 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.”²⁶ The existence of views like Wilson’s undermines Epstein’s insistence that classical liberalism was *the* pervasive philosophy of the Founding generation and highlights Epstein’s refusal to engage with ongoing historical debates.

Although Epstein is not technically an originalist, these historical lapses are still fatal to his conclusions. That is because he justifies the adoption of the classical liberal position almost entirely on the ground that it reflects the underlying political philosophy of the Founding generation, even if that philosophy was not prominent on the surface of contemporary understanding and did not find its way into the text. His claim, at bottom, is empirical — and thus historical — rather than normative: “In its enduring provisions, our Constitution *is* most emphatically a classical liberal document” (p. 53).²⁷ If he is wrong about

²⁴ Herbert Hovenkamp, *Inventing the Classical Constitution* 9 (Oct. 8, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2486612> [<http://perma.cc/MFN6-AR7A>].

²⁵ See, e.g., John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 AM. J. LEGAL HIST. 253 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 815–25 (1995); Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Calvin R. Massey, *An Assault upon “Takings” Doctrine: Finding New Answers in Old Theory*, 63 IND. L.J. 113, 125–26 (1987) (reviewing EPSTEIN, *supra* note 9).

²⁶ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 287 (Adrienne Koch ed., 1966) (Friday, July 13, 1787).

²⁷ Emphasis has been added. There is also a consequentialist strain in the book, albeit a muted one. The careful reader will find occasional assertions that the classical liberal constitution produces better outcomes than the progressive constitution, but these claims are not backed up with any serious arguments and suffer from the usual problem of disagreement about what constitutes a better outcome.

the history, he is wrong about the Constitution.²⁸ As Michael Greve has pointed out (although, ironically, with regard to views opposite his own and Epstein's), while "[p]olitical philosophers are free . . . to fabricate their own constitution[, t]hey are *not* free to peddle their inventions as the actual Constitution."²⁹ Epstein unsuccessfully tries to peddle his invention, the classical liberal constitution, as the real thing.

Epstein's lack of historical sophistication is exacerbated by his naive view of economic relationships in the real world. As noted earlier, he views much modern legislation as illegitimate wealth transfers. That conclusion derives from what he identifies as the starting premise of the classical liberal tradition, "that it is *not* the role of government to redress inequalities of wealth that were achieved by honest means" (p. 450). By honest means? Is he unaware that at least a portion of the seemingly ordinary wealth inequalities in this country were historically, and still are today, achieved by dishonest — or exploitative, manipulative, immoral, or otherwise shady — means?³⁰ And the advantages gained by the dishonesty of one generation become the "honest wealth" of the next,³¹ making it easy for Epstein to consider all current wealth distributions as natural. At the very least, he should — but doesn't — define "honest means" and provide some historical evidence that most wealth today was acquired that way.

Ignoring the past and starting with current distributions of wealth, as Epstein does, assumes the objectivity of the common law rules and stacks the deck by making all wealth transfers look illegitimate. But as Epstein's former colleague Cass Sunstein put it, "the common law is itself a regulatory system, embodying a series of controversial social choices."³² Once we understand that the distribution resulting from

²⁸ His history of the New Deal — which he views as a progressive rewriting of the Constitution — is also suspect. The move to the principles of the New Deal was neither as sudden nor as unrelated to prior principles as Epstein suggests. See WHITE, *supra* note 16; G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 53–80 (2005); Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders the "Progressive" Peril*, 105 MICH. L. REV. 1233, 1247–48 (2007) (reviewing EPSTEIN, *supra* note 11).

²⁹ Michael S. Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. 1359, 1367 (2014).

³⁰ For a few historical illustrations, see, for example, MATTHEW JOSEPHSON, *THE ROBBER BARONS* 121–27 (1934); RONALD KESSLER, *THE SINS OF THE FATHER: JOSEPH P. KENNEDY AND THE DYNASTY HE FOUNDED* 51–59 (1996); 1 JERRY W. MARKHAM, *A FINANCIAL HISTORY OF THE UNITED STATES* 255–60 (2002); and Chester McArthur Destler, *Entrepreneurial Leadership Among the "Robber Barons": A Trial Balance*, 6 J. ECON. HIST. (Supp.) 28, 30–33 (1946). Readers can supply their own contemporary examples. See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT* 156–57 (2011).

³¹ See Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters*, 32 VAND. J. TRANSNAT'L L. 1023, 1027 (1999).

³² Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 451 (1987); see also *id.* at 501–03.

the common law is not natural or immutable, we can view Epstein's preference for current distributions with the skepticism it deserves. As Sam Issacharoff commented in the context of Epstein's insistence that antidiscrimination laws run afoul of freedom of contract: "The assumption that the freedom to contract stands independent of any wealth issues that the contracting parties must bring to the negotiations is highly disturbing . . ." ³³ It is equally disturbing in the context of Epstein's reliance on the existing distribution of "honest" wealth.

Epstein's blinkered view of how wealth is acquired is mirrored in his rosy picture of individual economic freedom. In Epstein's free market, all transactions are truly voluntary and therefore beneficial to the participants: "No self-interested trader, supplier, or customer, whether rich or poor, ordinarily enters voluntarily into losing deals" (p. 40). What makes the transactions voluntary is that the participants have other options: employees, for example, can always "work elsewhere" (p. 41), and customers can be "woo[ed] away . . . with a combination of lower prices and superior products" (p. 42).³⁴ Thus, "mutual benefits arise from voluntary exchanges no matter how great the initial wealth differentials may be" (p. 340).

Like his belief that almost all current wealth has been obtained by honest means, his view that employees and consumers (among others) have unfettered choice in a free market and would never enter into losing propositions represents a willful lack of engagement with the real world. In the real world, high unemployment rates, lack of skills, prejudice, and the stickiness of existing arrangements limit employees'

³³ Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1220 (1992) (reviewing EPSTEIN, *supra* note 10).

³⁴ Epstein has continued to base policy prescriptions on this naive view of the "choices" of real people. In defending the result in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), he argues that Hobby Lobby's failure to comply with the contraception mandate is not "forcing women to either abstain from sex or risk pregnancy" because "[t]hey still retain the option of purchasing contraception independently or switching jobs." Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, in CATO SUPREME COURT REVIEW 2013-2014, at 35, 38 (Ilya Shapiro ed., 2014). This despite the fact that women pay, on average, sixty-eight percent more than men for out-of-pocket healthcare costs and that "an IUD can cost a month's salary for a woman earning minimum wage." Tracy Fessenden, *Contraception v. Religious Freedom: Hobby Lobby Heads to the Supreme Court*, RELIGION & POL. (Mar. 19, 2014), <http://religionandpolitics.org/2014/03/19/contraception-v-religious-freedom-hobby-lobby-heads-to-the-supreme-court> [<http://perma.cc/W5AK-RW7F>]. Hobby Lobby's wages are above minimum, but not enough to matter; even at \$14 an hour for full-time and \$9.50 an hour for part-time employees, see Leonardo Blair, *Hobby Lobby Raises Minimum Wage to \$14 for Full-Time Employees*, CHRISTIAN POST (Apr. 18, 2013, 5:29 PM), <http://www.christianpost.com/news/hobby-lobby-raises-minimum-wage-to-14-for-full-time-employees-94233> [<http://perma.cc/ZQC7-NZ5E>], an IUD can cost half a month's salary or more. And for low-wage workers especially, switching jobs would likely carry adverse consequences, as they would lose "[a]ccess to training, benefits, and promotions" that they might never regain. ANNETTE BERNHARDT ET AL., DIVERGENT PATHS: ECONOMIC MOBILITY IN THE NEW AMERICAN LABOR MARKET 87 (2001).

options. In the real world, the high cost of information, and cognitive biases that override rational thinking (perhaps exploited through advertising), limit consumer choice. In the real world, corporate lobbying locks in advantages that a free market then magnifies rather than curbs. In the real world, people make irrational choices such as playing the lottery or using dangerous and addictive drugs like tobacco (both activities that depend on consumer ignorance and corporate seduction) — but Epstein thinks that people will make wise choices in the marketplace if only the limits on corporate greed are lifted. The economic crisis that began in 2008, and from which we have still not recovered, has had a sobering effect on at least one other free-market advocate.³⁵ Epstein apparently doesn't think it is worth mentioning.

As a blueprint for constitutional doctrine, then, *The Classical Liberal Constitution* fails to persuade, at least in part because the historical and factual premises on which the conclusions rest are unrealistic. But the more interesting implications of the book for constitutional theory arise from Epstein's refusal to follow where his theory leads.

II. EPSTEIN BLINKS

There's a funny thing about conservative foundational theorists: in the end, they always blink. They construct grand frameworks that are supposed to drive all of constitutional interpretation, but when those frameworks take them in a truly uncomfortable direction, they back away. They are, in a word, fainthearted.³⁶ Epstein, despite his iconoclasm and admirable willingness to speak his mind regardless of the consequences, turns out to be no different.

His faintheartedness shows in his treatment of certain personal rights. He carefully explains why his definition of the scope of the police power *permits* the government to regulate both abortion and sexual (especially homosexual) activity. But despite that unequivocal conclusion, he then abandons the formalism of his foundationalist theory and argues that — in these two cases only — governmental power should be limited for pragmatic reasons. Pragmatism plays no role in

³⁵ See RICHARD A. POSNER, A FAILURE OF CAPITALISM (2009).

³⁶ Justice Scalia coined the term “faint-hearted originalist,” and has admitted that it includes his own originalism. Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). He has since repudiated that description, calling himself an “honest” originalist. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 14, 2013, at 22, 24, <http://nymag.com/news/features/antonin-scalia-2013-10> [<http://perma.cc/BK38-9JUQ>]. For descriptions of less candid examples of faintheartedness, see FARBER & SHERRY, *supra* note 1, at 21–25; Samuel R. Bagenstos, Essay, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1223–27 (2014); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (explaining how the Supreme Court's interpretation of the Eleventh Amendment, endorsed by avowed textualists on and off the Court, is inconsistent with the text).

his analysis of economic rights, so why should it do so in his analysis of personal rights? If economic rights are, as Epstein contends, equivalent to personal rights (and thus subject to the same judicial scrutiny), why allow pragmatic limits on government power for the latter but not the former? In this Part, I look for a solution to that puzzle.

So far, I have said little about Epstein's view of personal rights. One might expect him to be quite supportive of cases protecting personal rights, given his view that liberty should be broadly defined and government justifications for intervention sharply curtailed. But he has an ace up his sleeve: the police power, which Epstein, following *Lochner v. New York*,³⁷ defines as laws that "relate to the safety, health, morals, and general welfare of the public" (p. 49).³⁸ The police power also allows the government to regulate economic activity (especially contracts) in order to combat fraud, misconduct, and "adverse effects on third parties" (p. 338).

Epstein's discussion of the police power is perhaps the weakest part of the book. His position is confusing, not well explained, and not fully coherent. Unlike most libertarians, he considers safeguarding "morals" to be a legitimate reason for government regulation. But what he means by morals is never made clear. In the nineteenth century — from which he draws essentially all the rest of his inspiration — the morals head of the police power included regulating "a wide range of activities that were thought to be sinful, most notably sexual practices such as adultery, prostitution, sodomy, homosexuality, abortion, and contraception" as well as "activities like gambling, cock-fighting, and perhaps even bowling" (p. 367). He acknowledges, however, that "strict moral judgment of sexual and marital practices became anachronistic in the last half of the twentieth century" (p. 368). He never quite says whether we should (or whether he does) incorporate that transformation into the classical liberal constitution. On the one hand, he argues that "consistent with classical liberal theory, taking personal offense at the knowledge that others may be engaged in some (by the observers' own lights) sordid practice is decidedly not a sufficient ground to stop the activity" (p. 368). On the other hand, "no historical source . . . regards freedom in matters of sexual relations as one of the traditional liberties," and indeed "the long historical reference to the morals head of the police power speaks in the opposite direction" (p. 369). He defends *Griswold v. Connecticut*³⁹ — which invalidated laws banning the use or sale of contraceptives⁴⁰ — not because banning contraceptives cannot be justified except based on

³⁷ 198 U.S. 45 (1905).

³⁸ The author quotes *Lochner*, 198 U.S. at 53. Internal quotation marks have been omitted.

³⁹ 381 U.S. 479 (1965).

⁴⁰ *Id.* at 485–86.

some people's "personal offense" (p. 368), but rather as "a simple matter of freedom of contract" involving the "purchase [of] goods or advice" (p. 370). But he never explains how a ban on the *use* of contraceptives affects contractual rights, and thus we are left to wonder where he actually stands on the morals head of the contemporary police power.

It gets even more confusing. In two controversial areas — abortion and gay rights — Epstein argues that despite the presumption in favor of liberty, the police power authorizes governmental regulation. Thus Epstein concludes that "*Roe* is wrongly decided even if *Lochner* is right," because "*Lochner*'s health and safety heads of the police power have real purchase in the context of abortion" (p. 372). Never mind that early abortion is safer than childbirth for women, that Epstein does not justify his *ipse dixit* that a fetus is a person, and that anti-abortion laws originated in derogation of the common law as wealth transfers to doctors from unlicensed practitioners like midwives.⁴¹

As for gay rights, Epstein notes that the state traditionally had power to regulate sexual acts and argues that "there are no credible grounds to believe that any portion of the Fourteenth Amendment was intended to remove the power of the state to enact and enforce" bans on homosexual activity (p. 376).⁴² He never explains why the power to regulate morals allows the state to ban sexual activity between two consenting adults but does not allow it to ban economic activity between two consenting adults — a contract to work for less-than-minimum wages, for example. Again, I leave to one side the dubiousness of his insistence that laws against homosexuality actually derived from moral beliefs rather than from prejudice.⁴³

Despite these problems, however, there is a sort of internal consistency here. Once Epstein defines the police power to include morals, describes morals to include (only?) sexual behavior, and declares antiabortion laws to rest squarely on health and safety concerns, we can see how he reaches the conclusions he does. His rejection of abortion and gay rights is thus consistent with his idiosyncratic version of classical liberalism. We might have questions about exactly how far the police power did (historically) or does (in Epstein's view) or should

⁴¹ See Sherry, *supra* note 8, at 992–96. Similarly, he also fails to recognize the implicit transfer of wealth — in the form of increased legitimacy and affirmation — that occurs when the majority foists its religious preferences on objecting minorities. See EPSTEIN, *supra* note 14, at 514–15.

⁴² Epstein is unusually opaque in his discussion of gay rights. At one point he seems to suggest that his theory would make such prohibitions unconstitutional: "tradition took precedence over liberty" in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and "libertarian theory" would support the result in *Lawrence v. Texas*, 539 U.S. 558 (2003) (p. 376). But later he concedes that he "would have voted with the majority in *Bowers* and with the dissent in *Lawrence*" (p. 379).

⁴³ See generally WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* (2008) (detailing the prejudice-based history of sodomy laws).

(normatively) stretch, and — once again — about his underlying factual and historical premises. But the theory, however convoluted it has become, does seem to drive the results.

Except when it doesn't. In a stunning and unprincipled flight from the consequences of his own theory (and his prior work on abortion⁴⁴), Epstein blinks. He says that despite their unequivocal inconsistency with the principles of *his* classical liberal constitution, both *Roe v. Wade*⁴⁵ and *Lawrence v. Texas*⁴⁶ should remain good law. His reasons are worth quoting at length:

What of the simple fact that abortion has been entrenched for over thirty-nine years, now with a clear majority of public support for the view that abortion is legally protected but morally complex? . . . My own sense is that this awkward current accommodation has it about right today. . . . Women should be instructed on the grave issues of abortion but not told that they cannot have one on demand, at least early in pregnancy. . . . We can live with [the current disputes at the margins], fierce as they are, but it is risky to tamper with *Roe* itself in light of the enormous disruption of settled practice. (p. 375)

* * *

[T]en years [after *Lawrence*], I would keep the status quo because even in that short time I think that the outcome has been legitimated. But I would not make the constitutional leap on gay marriage in the face of divided public sentiment on a question that goes to the heart of the morals head of the police power. (p. 379)⁴⁷

After forty years of almost constant controversy, *Roe* is “entrenched”; after ten years as the focus of the culture wars, *Lawrence* has been “legitimated.” And retaining *Roe* has the further benefit of preventing “enormous disruption of settled practice.”⁴⁸ Yet despite seventy-five years of almost unquestioned government regulation of economic activity and the disruption that would be caused by the dis-

⁴⁴ See Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ 539 U.S. 558.

⁴⁷ In more recent work, Epstein makes clear that his acceptance of *Lawrence* is limited in other ways: he opposes extending state or federal antidiscrimination law to protect gays from discrimination by private organizations. See Richard A. Epstein, Essay, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1291 (2014).

⁴⁸ Lest anyone mistake my own criticism of Epstein's views for disagreement with the outcomes (or, for the most part, the reasoning) of *Roe*, *Lawrence*, and, now, *United States v. Windsor*, 133 S. Ct. 2675 (2013), see DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 148–49 (2009); Sherry, *supra* note 8, at 991–96; Suzanna Sherry, *Windsor v. United States*, VAND. L. MAG., Winter 2014, at 18, <http://law.vanderbilt.edu/news/windsor-v-united-states> [<http://perma.cc/J6A9-WR5F>].

mantling of the regulatory state and the invalidation of perhaps thousands of state and federal laws, the New Deal settlement is still, in Epstein's view, up for grabs.

What can possibly explain this disparity between his rigid stance toward economic rights — his insistence that classical liberal principles should govern no matter the consequences — and his more pragmatic treatment of personal rights? Certainly not the passage of time, the level of controversy, or the predicted disruption; all of those factors would suggest that the post-1937 economic cases are entitled to at least as much deference as *Roe* and *Lawrence* (and probably more). He explicitly denies that classical liberalism is equivalent to libertarianism,⁴⁹ so the easy libertarian defenses of *Roe* and *Lawrence* are unavailable to him. He is not known for pulling his punches to please anyone — and he has certainly made claims that are more controversial than arguing that *Roe* and *Lawrence* should be overruled — so it is not simple cowardice.⁵⁰ One could perhaps construct an Ely-like argument,⁵¹ based on scholars' suggestions that the Supreme Court is under the influence of liberal elites,⁵² that economic rights need a strong champion and an unwavering theoretical basis because the courts are more likely to underprotect those rights. But Epstein does not even attempt such an argument.

We are, therefore, still left with the question of why Epstein champions an essentially formalist view of the Constitution — a view that relies on the bright line of the police power to distinguish between justified and unjustified government invasions of rights — but then abandons that formalism in order to further protect personal rights and *only* personal rights. One intriguing possibility is that Epstein himself is more uncertain about equating personal and economic rights than he lets on. In a peculiar way, that might explain his backtracking. He is willing to apply his liberal-not-libertarian theory, police power and all, to economic rights, even conceding that some interfer-

⁴⁹ See, e.g., EPSTEIN, *supra* note 14, at 193 (“[T]he Constitution is not a libertarian document. . . . [I]t is a classical liberal document that allows for both taxation and eminent domain.”).

⁵⁰ Although with regard to gay rights, he says he has “cowardly instincts” (p. 379). Having known and admired him (and disagreed with him) for almost forty years now, I respectfully — but strongly — disagree with this self-characterization.

⁵¹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980).

⁵² See, e.g., Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27, 32–34 (2005); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515, 1545 (2010); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 *NW. U. L. REV.* 663, 689–91 (2009); Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 *HOW. L.J.* 661, 663–64 (2013).

ence with such rights is constitutional.⁵³ So why does he waver on personal rights, refusing to allow regulations that are concededly justified by his own constitutional theory? One possible answer: Because they are more important. Because equating personal and economic rights is a sad and impoverished view of human flourishing.

Epstein, of course, explicitly rejects that answer (p. 337). And there is no direct inconsistency between his refusal to distinguish among different rights and his tolerance of *Roe* and *Lawrence* — after all, the upshot is that he effectively proposes we invalidate laws that violate *any* individual rights, whether personal or economic. We could more easily argue that Epstein's inconsistencies stem from his underlying discomfort with abandoning the distinction between personal and economic rights if we could identify an economic-rights parallel to *Roe* or *Lawrence*: a case in which Epstein believes the Supreme Court wrongfully protected an economic right by striking down legislation he considers valid under the police power. If in such a case Epstein would adhere strictly to his formalist approach, insisting that the case should be overruled no matter how "settled" it is, then we would know that he is willing to be pragmatic only with regard to personal rights. However, because Epstein apparently does not think the Court has *ever* overprotected economic rights, no such case exists. Nevertheless, the contrast between his adamant insistence on the principles of classical liberalism when it comes to economic rights (including, where appropriate, government regulation under the police power) and his uncharacteristic pragmatism when it comes to protecting personal rights, creates a suspicion that he views the two types of rights as distinguishable.

In the end, we are left with merely the whisper of an explanation for Epstein's potentially distinguishable treatment of personal and economic rights. But even if a distinction between the two cannot fairly be attributed to Epstein's subconscious, it is an idea worth exploring as a refutation of his classical liberal constitution. Indeed, it is that very distinction, built into the bifurcated standards of review that originated in *Carolene Products*, that is the primary target of Epstein's criticism. But a search for scholarship about the doctrinal distinction and the bifurcated standards of review produced some surprising results, which I explore in the next Part.

⁵³ See, e.g., EPSTEIN, *supra* note 14, at 37 (concluding that antitrust laws restricting territorial and price-fixing arrangements are "all to the good"); *id.* at 152 (approving federal regulation of "network industries"); *id.* at 166 (approving at least "some child-labor law as a health or safety regulation under the police power"); *id.* at 338 (arguing that police power authorizes limits on freedom of contract to avoid "adverse effects on third parties").

III. AN IDEA WHOSE TIME HAS NEVER COME?

Before we can discuss whether there ought to be a distinction between personal and economic rights, we must be clear about what we mean by economic rights. What I mean is the kind of rights that Epstein is primarily focused on protecting: economic rights in the commercial context and, in particular, the right to acquire (or maintain) more than mere subsistence levels of wealth.⁵⁴ In other words, Epstein is most interested in revenue-producing property and market-based economic activity. We are not talking about confiscatory taxation, or about regulation that reduces anyone to poverty, or about the government taking one's home⁵⁵ or livelihood.⁵⁶ The type of interference with economic rights to which Epstein so vehemently objects is ordinary economic regulation of the marketplace or, as Epstein describes it, government failure to "keep public hands off voluntary transactions in labor, capital, goods, or services" (p. 42). Thus the legislation that interferes with these types of economic rights includes federal antitrust law (p. 165),⁵⁷ labor regulations of all sorts at both the state and federal levels (from wage-and-hour regulation to antidiscrimination law to collective bargaining rights) (pp. 180–82, 566, 440–43), progressive taxation (p. 551), and zoning and rent control (pp. 363–65).

The question then is whether a double standard of judicial review can be justified on the ground that personal rights should be more protected from government interference than these marketplace economic rights. Epstein says no. Is he right?

My first thought in tackling this project was to see what other scholars had said about the topic. Much to my surprise, I found almost nothing in the legal literature. Before the Court's 1937 capitulation, Progressives defending the legitimacy of government economic regulation generally did not discuss potential infringements of non-

⁵⁴ This means that the proponents of equal treatment of economic rights cannot rely on the argument that economic rights are necessary to the exercise of personal rights.

⁵⁵ Epstein, like many others across the political spectrum, does point to and lambaste the two Supreme Court decisions that allowed private homes to be taken for arguably nonpublic purposes, *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (p. 358). Cases like those, however, are rarities, and can be condemned without the elaborate classical liberal structure that Epstein erects. See, e.g., Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 336 (2006) ("The principal failing of the *Kelo* decision is that it misreads the case law on which it purports to rely as a seminal precedent . . .").

⁵⁶ Epstein does touch on the issue of occupational licensing (p. 561). But, again, one can criticize licensing laws without accepting Epstein's classical liberal framework. See, e.g., Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014).

⁵⁷ He accepts *state* antitrust law to the extent it is designed to combat monopoly power. See EPSTEIN, *supra* note 14, at 165.

economic rights.⁵⁸ Bifurcated review was simply not on their minds. Then when the *Carolene Products* footnote created bifurcated review, initial responses focused largely on whether there were *any* “preferred rights” or whether the Court’s review ought instead to be uniformly deferential.⁵⁹ Learned Hand, for example, wrote in his 1958 Oliver Wendell Holmes Lectures:

I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between ‘personal’ than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second.⁶⁰

The rare defenses of bifurcation during the decades after *Carolene Products* seemed to take it for granted as a necessary attribute of our constitutional jurisprudence.⁶¹ A typical example is one well-known scholar’s 1972 book-length treatment of *Griswold*, its antecedents, and its progeny:

The different approach utilized by the courts in cases involving personal, individual liberties reflects in part the judicial sensitivity to the importance of the interests involved. It is highly questionable for a political system which purports to exalt human values to treat alleged violations of these interests in the same manner as challenges to the validity of ordinary economic controls. . . . To blandly throw basic human needs and aspirations into the same mix as business and industrial concerns goes far to vindicate the accusations of those critics of our system who claim we have distorted value priorities.⁶²

Most legal scholars seemed to think it unnecessary to defend the distinction as long as the Warren Court was protecting the “right” liberties. When pushed, some scholars turned to justifying judicial protection of *particular* personal rights while still rejecting the “activism”

⁵⁸ For overviews, see, for example, BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* (1998); and EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION 20–38* (2000). To the extent that Progressives did discuss judicial review of non-economic rights (other than free speech, which they viewed as necessary for democracy rather than primarily as an individual right), they tended to favor deferential review across the board. See David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 *NOTRE DAME L. REV.* 2029, 2034 (2014).

⁵⁹ See, e.g., HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 38–56 (1943). For an overview of the “preferred rights” debate of this era, see generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1285–91 (2007).

⁶⁰ LEARNED HAND, *THE BILL OF RIGHTS* 51 (1958).

⁶¹ See, e.g., Paul Abraham Freund, *A Comment on William H. Hastie’s “Judicial Method in Due Process Inquiry,”* in *GOVERNMENT UNDER LAW* 355 (Arthur E. Sutherland ed., 1956); William H. Hastie, *Judicial Method in Due Process Inquiry*, in *GOVERNMENT UNDER LAW*, *supra*, at 326, 334–35; Louis Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410, 1427 (1974); Norman Redlich, *Are There “Certain Rights . . . Retained by the People”?*, 37 *N.Y.U. L. REV.* 787, 794–95 (1962).

⁶² C. THOMAS DIENES, *LAW, POLITICS, AND BIRTH CONTROL* 179 (1972).

of the *Lochner* era.⁶³ These defenses tended to focus on a relatively small subset of rights that were considered necessary to ensuring democratic participation and often explicitly excluded privacy rights. The preferred rights were favored over all other rights, not just economic rights. And the general rejection of heightened scrutiny for economic rights remained an undefended background assumption.

More recently, liberals have seemed unconvinced that a distinction between personal and economic rights is even worth making or defending. Laurence Tribe's second edition of *American Constitutional Law*, published in 1988, rejected the distinction summarily: "[T]he attempt to distinguish the rights protected during the *Lochner* era from the preferred rights . . . in terms of a supposed dichotomy between economic and personal rights must fail"⁶⁴ Walter Dellinger has suggested that "[t]he disparagement by some liberal scholars and jurists of the constitutional protection of economic rights weakens the constitutional foundations of personal liberty."⁶⁵ Another scholar says he "began from a kneejerk liberal's belief" that the distinction "only needed a doctrinal theory to explain the constitutional difference between personal and economic interests" but ultimately concluded that no bright-line differences justify bifurcated review.⁶⁶

Most of the scholars who do purport to defend the modern bifurcation in fact merely reject the way that *Lochner* applied liberty of contract. They provide no justification for an across-the-board distinction between personal and economic rights.⁶⁷ In other words, most of the scholarship explains the need for various economic regulations in a

⁶³ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 277–78 (1977); ELY, *supra* note 51, at 65–66; LOUIS LUSKY, *BY WHAT RIGHT?* 336–38 (1975).

⁶⁴ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 779 (2d ed. 1988) (footnote omitted). His third edition, never completed, does not reach as far as the section discussing personal rights; its discussion of *Lochner* laments the Court's post-*Lochner* jurisprudence and argues that the Court should distinguish between those rights that are "intrusions upon human freedom" and those that are not, but Tribe never explains how to do so. LAURENCE H. TRIBE, *1 AMERICAN CONSTITUTIONAL LAW* 1369 (3d ed. 2000).

⁶⁵ Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 *CATO SUP. CT. REV.* 9, 9.

⁶⁶ Wayne McCormack, *Property and Liberty — Institutional Competence and the Functions of Rights*, 51 *WASH. & LEE L. REV.* 1, 1 (1994); see also Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 *N.C. L. REV.* 329, 330 & n.4 (1995).

⁶⁷ See generally Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 *WM. & MARY L. REV.* 3, 22–58 (1999) (canvassing various defenses and concluding that "none . . . can justify the abandonment of economic liberty generally," *id.* at 57); Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 *CORNELL L. REV.* 839, 840 (2005) (book review). For some specific examples, see LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 65 (1991); David A. Strauss, *Why Was Lochner Wrong?*, 70 *U. CHI. L. REV.* 373, 385 (2003).

modern industrial society, essentially providing exactly what Epstein himself thinks the Court should demand: a compelling governmental interest. But arguing that the state has such an interest effectively concedes Epstein's point even as it serves to repudiate some of his preferred outcomes.

Alternatively, some scholars have finessed the problem by defending the Court's special role in protecting "individual rights," conveniently ignoring the fact that in the current constitutional scheme individual economic rights are excluded. Larry Kramer is typical of such scholars: he defends "the New Deal accommodation" as a "relatively sensible allocation of responsibilities" because "[q]uestions of individual right are, practically by definition, least well handled by majoritarian institutions."⁶⁸ Epstein wholeheartedly agrees, but he, unlike Kramer, includes economic rights among "questions of individual right."

Two scholars have attempted more specific defenses of the distinction. The more detailed is by Edwin Baker, in his 1986 article *Property and Its Relation to Constitutionally Protected Liberty*.⁶⁹ In this dense and prolix article, Baker sets out a complicated taxonomy of property rights and attempts to distinguish them from personal rights. His defense of the distinction — opaque and hard to grasp, buried as it is in the critical legal studies jargon of that era — seems to rest on two grounds: most economic regulation is merely about allocation of resources, and economic activity is instrumental rather than valuable in and of itself. A good start, perhaps, but not sufficiently fleshed out to withstand Epstein's contrary premise that it is not the government's role either to allocate resources or to favor some reasons for individual choices over others. No scholar seems to have built further on Baker's work.⁷⁰

⁶⁸ Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We The Court*, 115 HARV. L. REV. 4, 126 (2001). It turns out that all but one of the scholars he cites in support of this proposition, see *id.* at 126 n.531, similarly fail to defend the bifurcation of individual rights into preferred and nonpreferred classes. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 84 (1980); DWORKIN, *supra* note 5, at 30–31; RONALD DWORKIN, LAW'S EMPIRE 375–77 (1986); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46–108 (2001); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 118 (1982). The one exception is Cass Sunstein, who instead falls into the same category as Ely (on whom he explicitly draws): he defends *certain* personal rights as preferred but does not defend a general distinction between personal and economic rights. See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 142–43 (1993). See generally ELY, *supra* note 51.

⁶⁹ C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986). The article seems to have been written at least partly in response to Epstein's *Takings* book, which had been published the year before.

⁷⁰ The article has been cited in law review articles 113 times in the nearly thirty years since its publication, but almost always in passing and without comment.

Richard Fallon has provided an alternative — albeit less extensive — defense, which rests on three grounds.⁷¹ First, as the *Lochner* era illustrates, the “likely empirical consequences” of strong judicial protection of economic rights are “unacceptable.”⁷² This defense fails for several reasons, including that Epstein and others do not find the results unacceptable and that, like some of the scholarship discussed earlier, it serves only to critique the particular way that *Lochner* applied liberty of contract. It does not really address Epstein’s point that bifurcating individual rights into two categories, one protected and one unprotected, does not make sense. Fallon’s second argument is the *ipse dixit* that the New Deal bifurcation is correct because it reflected a “constitutional revolution.”⁷³ Epstein, however, questions the principles underlying that revolution, and Fallon’s equation of the “is” with the “ought” is not a sufficient response. Fallon’s third argument is that “economic and especially property rights are not ‘natural’ or ‘neutral’ but socially constructed” and thus that “questions of private right can never be divorced from what the government ought to do or be allowed to do.”⁷⁴ The problem with this argument is that it proves too much: almost all individual rights — from free speech to same-sex marriage — are socially constructed in the sense that they do not have meaning, or at least not the same meaning, in the absence of a social context or community.

In the most recent defense — in 1995 — one scholar began by describing as “still unresolved” the question whether personal rights should occupy a preferred position.⁷⁵ But his own argument in favor of the preferred position is unavailing: it is based on a minor reinterpretation of the original meaning of footnote four — which footnote, of course, Epstein rejects altogether as creating indefensible distinctions among equivalent rights.

In short, I found no successful sustained defense of the bifurcated standard of review that has served as the framework for our constitutional jurisprudence for the past seventy-five years. Why not? A partial explanation for the lacuna may perhaps be found in the historical context. Intellectual historian Laura Kalman suggests that during the early 1970s, as legal conservatism blossomed, the liberal professoriate

⁷¹ See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993).

⁷² *Id.* at 379.

⁷³ *Id.* at 380. For a similar argument, see Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 111 (1992).

⁷⁴ Fallon, *supra* note 71, at 380 n.151.

⁷⁵ See Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 278 n.3 (1995).

ignored it.⁷⁶ When the conservative threat finally became palpable, the strongest response from the left was the critical legal studies movement, which abandoned liberalism (and rights) altogether.⁷⁷ And many progressives of all stripes were, and still are, too busy trying to *extend* New Deal principles — to create affirmative economic rights for the poor — to pay attention to the growing rejection of those principles by academics on the right.⁷⁸

But despite what seems to be willful blindness by defenders, attacks on the bifurcation go back more than fifty years. In 1962, Robert McCloskey disparaged “the doubtful distinction between economic and civil rights”⁷⁹ as resting on a “vague, uncritical idea.”⁸⁰ Opposition to the bifurcated jurisprudence then exploded in the 1980s. In 1985, Epstein published his book on takings,⁸¹ which might be viewed as the movement’s first manifesto. The next year, Stephen Macedo — in a book that was meant to show how “the constitutional vision of the New Right . . . [is] faulty”⁸² — argued that “[t]he modern Court’s double standard, which neglects economic liberties and protects other ‘personal’ liberties, like privacy, is incoherent and untenable.”⁸³ In 1987, Judge Alex Kozinski, introducing a volume of essays on economic liberty, boldly asserted that we were “in the midst of a very important phenomenon in jurisprudence: the emergence of a new school of thought.”⁸⁴

⁷⁶ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 77 (1996).

⁷⁷ See *id.* at 82–87.

⁷⁸ See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659; Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Sunstein, *supra* note 32. For a recent example of liberals’ obliviousness to political realities in the United States and their consequent refusal to confront the real threat from the libertarian right, see Martha C. Nussbaum, *The Supreme Court, 2006 Term — Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007).

⁷⁹ Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45; see also *id.* at 45–50.

⁸⁰ *Id.* at 54. McCloskey ultimately concluded that for pragmatic reasons the Court should not resurrect heightened scrutiny for economic regulations: the Court is too busy with personal rights to clog its docket with economic rights as well. See *id.* at 60–62; see also HAND, *supra* note 60; Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

⁸¹ See EPSTEIN, *supra* note 9.

⁸² STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 4 (1986).

⁸³ *Id.* at 47.

⁸⁴ Alex Kozinski, *Foreword to ECONOMIC LIBERTIES AND THE JUDICIARY*, at xi, xi (James A. Dorn & Henry G. Manne eds., 1987). The book included essays by many who were — and some who still are — leaders of the movement, including Epstein, Macedo, and Barnett. Other, similar work from the same period includes BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV.

The Classical Liberal Constitution is thus only the latest in a long line of scholarship urging the revitalized protection of economic rights. That body of work, moreover, has recently increased in volume, prominence, and influence. In addition to Epstein's steady stream of books, recent work by Randy Barnett, David Bernstein, Michael Greve, and others⁸⁵ argues for increased judicial scrutiny of economic regulation. And it seems to be working: given the precedent, who (except Epstein and his fellow travelers) would have predicted that a majority of the Supreme Court would hold that Congress lacks power under the Commerce Clause to regulate health insurance?⁸⁶

It's not like we weren't warned. Bruce Ackerman told us in 1985 that *Carolene Products* had outlived its usefulness and would soon become a liability.⁸⁷ Mark Kelman, reviewing Epstein's *Takings* in 1986, focused even more directly on the threat from Epstein and his ilk. He described the primary purpose of his review as "to remind political centrists and liberals, particularly those in the law schools, that this sort of work is anything but marginal even though it may strike them as intellectually vacuous and disreputable," and "to remind them that in the mainstream *political* culture" Epstein's views were broadly shared.⁸⁸ George Rutherglen made a similar point in 1992, cautioning that "an offhand dismissal" of Epstein's views on antidiscrimination laws "would be a mistake."⁸⁹ I suppose it is not surprising that the

293 (1985); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

⁸⁵ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011); MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); DAVID N. MAYER, *LIBERTY OF CONTRACT* (2011). The New Deal's other major transformation — the creation of the administrative state — has also come under attack recently. See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). Polymath that he is, Epstein has also written a book against the administrative state. RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY* (2011).

⁸⁶ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Prior to the decision, most constitutional experts (other than libertarians) probably agreed with Jamal Greene that the Commerce Clause challenge "bordered on frivolous" under existing precedent, Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 266 (2012). One well-respected lawyer-journalist predicted that the Chief Justice and Justice Alito could be counted on to uphold the ACA because to do otherwise would be to "return to a pre-New Deal understanding of the Commerce Clause." Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARV. J.L. & PUB. POL'Y 13, 22 (2012); see also *id.* at 14–15. For further accounts of the effectiveness of conservative foundationalist arguments, see THOMAS O. MCGARITY, *FREEDOM TO HARM* (2013); G. Edward White, Response, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145, 1146–51 (2010); Cass R. Sunstein, *Tea Party Constitutionalism*, NEW REPUBLIC, May 26, 2014, at 31, 31–32.

⁸⁷ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 717 (1985).

⁸⁸ Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CALIF. L. REV. 1829, 1830 (1986) (book review).

⁸⁹ George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1464 (1992) (reviewing EPSTEIN, *supra* note 10).

warnings were ignored. As Laura Kalman points out, *Lochner* had become an ineffectual bogeyman useful only for scaring little children and law students:

[M]embers of a new generation who went to law school during the Warren years and entered law teaching at Harvard and elsewhere during the 1960s — a group including Jesse Choper, Bruce Ackerman, Ronald Dworkin, John Hart Ely, Owen Fiss, Frank Michelman, and Lawrence [sic] Tribe — were not haunted by memories of the old Court and viewed judicial activism even more tolerantly than did their teachers.⁹⁰

So another warning is probably futile. It may also be chimerical. As Ted White has pointed out, frameworks of constitutional jurisprudence are historically contingent on “shared social and political attitudes that shape[] conceptions of the role of the judiciary.”⁹¹ Bifurcated standards of review may well be going the way of departmentalism and other discredited legal theories. If popular views predate academic scholarship rather than the other way around, it may already be too late.

Nevertheless: The future of constitutional scholarship — and probably constitutional jurisprudence — lies in economic issues.⁹² If liberal legal academics continue to assume the legitimacy of the New Deal and dismiss contrary conservative theory as out of the mainstream, they will be marginalized while Epstein, Barnett, and the others march unopposed all the way to the Supreme Court.

CONCLUSION

Epstein’s book marks — or at least serves as the paradigmatic example of — a shift in constitutional argument. We can no longer take for granted that legal academics (to say nothing of judges) endorse the New Deal’s basic principles. Constitutional theory is at a crossroads, and it is up to us to make a choice. We must either defend a hierarchy of rights⁹³ or concede that liberty of property and contract deserve the

⁹⁰ KALMAN, *supra* note 76, at 50.

⁹¹ White, *supra* note 28, at 83.

⁹² See Ganesh Sitaraman, *America’s Post-Crash Constitution*, POLITICO (Oct. 5, 2014), <http://www.politico.com/magazine/story/2014/10/americas-post-crash-constitution-111596.html> [<http://perma.cc/N347-BPAC>].

⁹³ I, of course, have a full-blown defense of the distinction between personal and economic rights, but unfortunately it won’t fit in the footnotes or within the word limits. Cf. *Fermat’s Last Theorem*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fermat%27s_Last_Theorem [<http://perma.cc/G4G7-MUGM>]. Places to start might include John Rawls’s lexical ordering of his two principles of justice, which places non-economic liberties ahead of economic liberties, see JOHN RAWLS, *A THEORY OF JUSTICE* 60–61, 543 (1971); Hilaire Belloc’s recognition of “the discrepancy between the state’s moral assumptions in favour of a society of free and equal citizens, and the economic structure of capitalism which produced an unequal ownership of property (particularly in the ownership of the means of production), and allowed one class to increase its own political and economic strength at the expense of another,” H.V. EMY, *LIBERALS, RADICALS AND SOCIAL*

same protection as other, more personal, liberties. Epstein boldly defends his choice; those of us on the other side should be equally forceful about ours.

POLITICS, 1892–1914, at 290 (1973) (describing Belloc’s theory); Frank Michelman’s argument that speech rights warrant more protection than economic rights because the latter but not the former operate against a background of scarcity, *see* Michelman, *supra* note 73, a distinction that might justify bifurcation generally (although he uses it only to justify preferential treatment for speech rights); Trevor Morrison’s brief but intriguing suggestion that a “liberty-equality connection” helps justify the holding of *Lawrence*, *see* Morrison, *supra* note 67, at 869–70, which might be developed into an argument that while infringements on personal liberty decrease equality, infringements on economic liberty tend to increase it; Justice Hughes’s idea of “property rights as contingent — as compensation for service to society,” James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115, 126 (2006); and the recent historical article by Joseph Fishkin and William Forbath documenting an anti-oligarchic resistance to a “moneyed aristocracy” as a constitutional principle (and thus defending government economic regulation without addressing a hierarchy of rights), Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014).

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