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The Classical Constitution and the Historical Constitution: Separated at Birth

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I. PRELIMINARIES

Richard Epstein's new book[1] is classic Epstein: erudite, eclectic, and unconventional to the point of being revolutionary. It is filled with blunt pronouncements, flashes of brilliance, and a characteristic willingness to criticize even political allies. But in the end, it fails in its mission to resurrect and defend the American constitutional landscape as it existed before 1937.

The Classical Liberal Constitution presents an intricate and comprehensive theory of our Constitution. Weaving together text, history, political philosophy, and economics, Epstein envisions a radically different constitution that sharply limits government power—especially at the federal level—and provides strong protection for

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[1] RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014).

certain limited categories of individual rights. He would increase protection for broad property-related rights that are mostly unfashionable in post-New Deal American political and judicial culture. On the other hand, he would both excise from constitutional protection, and deprive Congress of the authority to protect, many of the privacy and equality based rights of which the modern Supreme Court has been most solicitous.

At first glance, Epstein's imposing edifice appears internally coherent and almost impregnable despite its novelty. His core insight is that our Constitution, designed as it was by a generation mistrustful of both democratic governance and government power, was focused largely on preventing majorities from enacting wealth transfers, creating monopolies, or forcing cross-subsidization of some individuals or entities by others. It is a Constitution that protects only negative rights—the right to be free from government interference—and protects them especially strongly from government attempts to infringe them in the name of creating positive rights for, or transfer payments to, other citizens.

This fundamental limitation on government power does most of the practical work in Epstein's classical liberal constitution. When it comes to the interlinked rights of property, contract, and association, he sees most government regulation as an illicit attempt to enrich some at the expense of others and therefore as presumptively unconstitutional. Such regulations are justified only if they fall within the police power, which Epstein construes narrowly as covering "matters of safety, health, general welfare, and morals of the community."[2] Thus labor regulations, anti-discrimination laws, agricultural subsidies, and all manner of other government interfer-

[2] *Id.* at 304.

ences with the operation of the free market are unequivocally unconstitutional.[3]

Epstein contrasts his classical liberal constitution with what he labels the "progressive" constitution. The progressive constitutionalist mistrusts the free market and views government regulation as a "positive force for good" and thus as presumptively constitutional.[4] Although Epstein sometimes seems to mistake the United States for Sweden - he describes our government as one that creates "entitlements (as opposed to mere rights) to housing, health care, education, or jobs"[5]—his progressive constitution is, by and large, the Constitution as interpreted by the post-1937 Court.

He defends his choice of the classical constitution over the progressive one largely on historical and political-economic grounds. It is, he argues, both the Constitution envisioned by the Founding generation and the Constitution that would produce (and did produce, when it was in effect) the greatest good for the greatest number of Americans.

I am not foolish enough to argue economics or political theory with Richard Epstein, at least not in public. But I can, and do, quarrel with both his descriptive history and the conclusions he draws

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[3] *See, e.g., id.* at 16 ("Modern social democratic outlook," unlike classical liberal outlook, expands police power to interests such as "the equalization of wealth and the elimination of private forms of (invidious) discrimination"); *id.* at 42 ("classical liberal solutions . . . keep public hands off voluntary transactions in labor, capital, goods, or services"); *id.* at 170 (NLRA "created labor cartels"); *id.* at 178 (criticizing *Wickard v. Filburn*, "because the state-run cartel is the problem, not the solution, to the general question of agricultural production"); *id.* at 179-80 (criticizing the 1964 Civil Rights Act, "especially in the area of employment").

[4] *Id.* at 6.

[5] *Id.* at 35. *See also id.* at 55 ("The modern progressives have a much larger list [than classical liberals] of alleged state interests . . ., including the provision of minimum standards of wealth or happiness for all citizens, restraints on the distribution of wealth more generally, and often a full array of positive entitlements, some of which may even have constitutional weight.").

from it. His generalized description of the Founding generation as manifesting both a "deep ambivalence toward state power"[6] and an "overt hostility to democratic institutions"[7] is accurate and too often overlooked by modern scholars, including both conservative originalists and progressive popular constitutionalists. But the devil is in the details, and Epstein too often gets the details wrong.

In this short essay, I will focus on two issues about which some combination of mistaken historical analysis, misunderstanding of the nature of the judicial role, and misapplication of his own political theory leads Epstein to exactly the wrong conclusions.

II. CONSTITUTIONAL STRUCTURES

Ironically, one of the most fundamental mistakes in Epstein's description of constitutional structure is actually an obstacle to his preferred interpretation of the Constitution.[8] The thrust of his book is that the Supreme Court has too often deferred to legislative majorities and too seldom invalidated government invasions of classical liberal rights. Looking back over the Supreme Court's history, he concludes that "[t]he horrific decisions all come from the unwillingness to respect the equal rights of all persons or the limitations on federal powers"[9]—in other words, from judicial abdication rather than judicial boldness. Bravo![10]

But the way he characterizes judicial review makes it much harder for him to defend it: He mischaracterizes it as "judicial su-

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[6] *Id.* at 18.

[7] *Id.* at 28.

[8] It is also widely shared, by both conservative and progressive scholars.

[9] EPSTEIN, *supra* note 1, at 79.

[10] *See* Suzanna Sherry, *Why We Need More Judicial Activism* in CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT (Giorgi Areshidze, Paul Carrese, and Suzanna Sherry eds., forthcoming 2014), *available at* http://ssrn.com/abstract=2213372; see also Richard Epstein, *In Praise of Suzanna Sherry and Judicial Activism*, 16 GREEN BAG 2D 443, 445-46 (2013) (taking issue with my list of worst cases).

premacy" as opposed to "judicial parity."[11] That mischaracterization leads him to conclude that such supremacy was not contemplated by the original Constitution,[12] and thus requires him to engage in elaborate argumentation about why we should nevertheless endorse it because of both its benefits and its pedigree.[13] This, of course, raises the obvious question about why we should not similarly endorse the post-New Deal constitution—which is now 75 years old and has produced one of the strongest economic and political powers on the planet—a question he never satisfactorily answers.

In fact, our current system of judicial review is best described as judicial parity, *not* judicial supremacy. Courts are the final arbiter of the Constitution only to the extent that they hold a law *un*constitutional, and even then only because they act last in time, not because their will is supreme. The branches are co-equal when it comes to constitutional interpretation. Each branch makes an independent decision as to the constitutionality of a proposed government action, but all three branches must agree that a law (or other government action) is constitutionally permissible in order for it to be valid. If Congress believes that a proposed law is unconstitutional it will choose not to enact that law, and no other branch can override Congress's decision. If the President believes that a proposed law is unconstitutional, he will veto it, and his view can be overridden only with difficulty (and only by the legislative branch). Judicial review simply ensures that the judiciary has the same opportunity as the other two branches to prevent the government as a whole from acting unconstitutionally. Thus the Court is not unique in its power: A decision by *any* branch that a particular governmental

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[11] *See* EPSTEIN, *supra* note 1, at 77-97.
[12] *See id.* at 80-87.
[13] *See id.* at 97-100.

action is unconstitutional will block that action from occurring. The parity of the branches can be illustrated from the other direction as well: If the Supreme Court finds something to be *constitutional*, that holding is not binding on the other branches[14]—just as a legislative (or executive) determination that a particular action is constitutional is not binding on the Court.

Indeed, an argument can be made that the conventional practice of judicial review puts the Court in a position of inferiority vis-à-vis the other two branches. The legislature and the executive can stymie government action for any reason or no reason at all—and need not even explain themselves. The Court, however, can invalidate a law only on the ground that it violates the Constitution. The more narrowly we define the attribute of unconstitutionality, the less power the Court has. Thus conventional accounts strip the Court of power by minimizing the constitutional provisions that might give courts more discretion: examples include the *Slaughter-house Cases*' evisceration of the Fourteenth Amendment Privileges or Immunities Clause, [15] the pejorative labeling of the Ninth Amendment as an "inkblot," [16] and progressive and conservative

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[14] For example, despite the Supreme Court's holding in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that the National Bank was constitutional, the popular branches continued to spar over the question, and ultimately the Bank's charter was discontinued. *See, e.g.*, DANIEL WALKER HOWE, WHAT GOD HATH WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 373-86 (2007); ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR (1967); BRAY HAMMOND, BANKS IN POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (1957).

[15] 83 U.S. 36 (1873).

[16] *See* The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 249 (Part I) (statement of Robert H. Bork, Judge, United States Court of Appeals for the District of Columbia); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990) (describing Privileges or Immunities Clause as an "inkblot").

attacks on "substantive due process" for its role in, respectively, *Lochner v. New York*[17] and *Roe v. Wade*.[18]

Epstein, to his credit, does not fall into the trap of denigrating the importance of these clauses.[19] But his tendency to let modern critics of broad judicial power set the agenda blinds him to a historical account that would bolster his ultimate preference for a strong judiciary. He fails to notice that early judicial invalidations were effectively *not* constrained to interpreting and applying the written Constitution. Judges—state and federal, from before the adoption of the 1787 Constitution until after the Civil War—often invalidated both state and federal laws for inconsistency with unwritten natural law or unenumerated natural rights.[20] Although still not as unlimited as legislative or executive authority, judicial discretion was once broader than it is today.

Thus Epstein begins with counterproductive mistakes that he then has to overcome. And those mistakes are representative of the presentist approach that undermines his historical analysis. Rather than starting with the history and drawing conclusions from it, he appears to start from the conclusions and try to fit the—admittedly messy and often inconclusive—history to it. Two quick examples illustrate his tendency to ignore inconvenient historical details.

First, his insistence on a narrow interpretation of the Commerce Clause relies heavily on the fact that Congress's powers are specifi-

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[17] 198 U.S. 45 (1905).

[18] 410 U.S. 113 (1973).

[19] *See, e.g.*, EPSTEIN, *supra* note 1, at 370-71, 372, 527-29 (discussing the Ninth Amendment, substantive due process, and Privileges or Immunities Clause respectively).

[20] For descriptions of this phenomenon, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CINCINNATI L. REV. 171 (1992); Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, in TOWARD A USABLE PAST: AN EXAMINATION OF THE ORIGINS AND IMPLICATIONS OF STATE PROTECTIONS OF LIBERTY 157 (Paul Finkelman & Stephen E. Gottlieb, eds., 1991).

cally enumerated.[21] What he fails to recognize is that the enumeration of legislative powers was a very late—and undiscussed—choice by the Committee on Detail, not a considered decision by the body of the Constitutional Convention.[22] It thus cannot bear the weight he puts on it.[23]

A second example is found in his discussion of the appellate power of the Supreme Court under Article III. He argues that because all of the cases listed in Article III "arise in the lower federal courts," Article III confers no Supreme Court appellate jurisdiction over decisions by state courts.[24] Under the original Constitution, then, "there are some cases in which the Supreme Court cannot hear a constitutional matter"[25] and the document "strips the Supreme Court of its distinctive powers to invalidate both federal and state legislation."[26] Unfortunately, he misses an important historical point: The Constitution leaves the establishment of the lower feder-

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[21] *See, e.g.*, EPSTEIN, *supra* note 1, at 12 ("The basic constitutional plan limited the legislative power of Congress to certain listed or 'enumerated' categories"); *id.* at 148 ("The common public understanding of the term 'enumerated' suggests that some activities must necessarily lie outside the enumeration").

[22] *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 203-08 (3d ed. 2013).

[23] The oversight is especially glaring when he castigates Justice Ginsburg for attributing to the Commerce Clause a power to legislate "for the general interests of the Union," because, he argues, the document she misquotes actually confers that power on "the Legislature"; the legislature, he says, "has all sorts of enumerated powers." EPSTEIN, *supra* note 1, at 189-90. But that document - an early draft of the Constitution - long predates the enumeration of powers. *Compare* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 131-32, para. 8 (M. Farrand rev. 1966) (Proceedings of the Convention July 19-July 23) (cited by Ginsburg and Epstein) *with* FARBER & SHERRY, *supra* note 22, at 633 (Committee on Detail Draft, presented August 6).

[24] EPSTEIN, *supra* note 1, at 96.

[25] *Id.*

[26] *Id.* at 97. He rectifies this by incorporating judicial review into the Constitution by prescription—that is, by long usage that makes the original flawed Constitution more consistent with the Founders' idealized classical liberal constitution. *See generally id.* at 97-100 (defending judicial review as the correct "prescriptive approach to judicial power").

al courts to the discretion of Congress precisely on the assumption that without lower federal courts, state courts could and would (and indeed were required to) entertain the cases listed in Article III.[27]

Epstein's historical analysis of the eighteenth century is thus problematic. But he fares little better when it comes to nineteenth- and twentieth-century history. In at least one instance, these failures lead him to misapply his own political theory about exactly what it is that the classical liberal constitution should and should not do. In the next section, I argue that a constitution based on respecting classical liberal rights and preventing governmental wealth transfers would, contrary to Epstein's assertions, invalidate laws prohibiting abortion.

III. INDIVIDUAL RIGHTS

Given Epstein's narrow conception of the police power, his mistrust of government motives, and his wish for more judicial invali-

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[27] *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 71 (Adrienne Koch ed. 1966) (June 5) (quoting John Rutledge of South Carolina opposing the mandatory creation of lower federal courts, on the ground that "the State Tribunals might and ought to be left to decide in the first instance[,] the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of Judgments"). For additional historical support for the conclusion that state courts may hear, and the Supreme Court may review, cases listed in Article III, see, e.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997); *see also* Michael Collins, *The Federal Courts, The First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515 (2005) (arguing that some—but not all—Art. III cases were meant to be excluded from state court jurisdiction); James Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction Stripping*, 101 NW. U. L. REV. 191 (2007) (arguing that history suggests Congress may constitute state tribunals as inferior tribunals by assigning them jurisdiction over Art. III cases).

dations in the service of protecting individual rights, one might expect him to support *Roe v. Wade*[28] and its progeny. After all, by invalidating state laws against early abortions, *Roe* protected individuals from government interference in their private decisions, much as Epstein wants the courts to do for decisions involving contract or association. Indeed, as he recognizes, the same concept of substantive due process that underlies *Lochner* (which he strongly supports) also underlies *Roe*.[29]

Epstein, however, contends that abortion is different. It is within the police power to regulate—despite its curtailment of a woman's freedom—because it protects the life of "the unborn child."[30] *Roe* and *Lochner* are distinguishable because the "health and safety heads of the police power have real purchase in the context of abortion" that they did not in *Lochner*.[31] Thus, he concludes, "the classical liberal position [does] not point in favor of a woman's right to have an abortion."[32]

One obvious problem here is Epstein's *ipse dixit* that the fetus is a person whose life and health are of concern to the state. His only argument in support of that conclusion is his misleading statement that "conception is the only sharp break in the continuous process of reproduction," which, according to Epstein, makes *Roe*'s rejection

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[28] 410 U.S. 113 (1973).

[29] *See* Lochner v. New York, 198 U.S. 45 (1905). For Epstein's support of *Lochner*, see EPSTEIN, *supra* note 1, at 338-39; for his recognition of the underlying similarity between *Lochner* and *Roe*, see *id.* at 372.

[30] EPSTEIN, *supra* note 1, at 78.

[31] *Id.* at 372.

[32] *Id.* He ultimately concludes that "the fact that abortion has been entrenched for over thirty-nine years, now with a clear majority of public support," means that we should not overrule *Roe* and risk "enormous disruption." *Id.* at 375. One wonders why he does not reach the same conclusion with regard to the fifty-year-old Civil Rights Act, to say nothing of the seventy-six-year-old New Deal Constitution. Perhaps he recognizes the existence of some sacred cows after all.

of fetal personhood a "verbal evasion[]."[33] But implantation of the fertilized egg,[34] which fails naturally in a large number of cases in which fertilization has taken place,[35] is at least as likely a candidate. One is also hard pressed to consider fertilization the "only sharp break" when at the time of fertilization it is not possible to know even *how many* "persons" have been created: Identical twins are created from a single fertilized egg.[36] Once we recognize that there may be several different obvious breaks, it is less clear that viability should not be considered one of them. Indeed, biologists have identified at least "four stages of development . . . as the point where human life begins": fertilization, gastrulation (after which twinning is no longer possible), EEG activation (human brainwave pattern), and viability.[37] Epstein's use of basic developmental biology, in short, is even more suspect than his use of history.

But the bigger problem is that Epstein seems entirely unaware that state restrictions on abortion were not originally motivated by concerns about fetal (or maternal) life or health. They were in fact enacted for exactly the sort of monopoly-creating, wealth-transferring reasons that he so condemns in the context of government restrictions on property, contract, and association.

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[33] *Id.* at 373.

[34] I assume that by "conception," he means fertilization. He describes *Roe* as excluding "a fertilized egg" from the protection of the Fourteenth Amendment, *id.*, apparently equating the two terms.

[35] *See, e.g.*, A.T. Hertig et al., *Thirty-Four Fertilized Human Ova, Good, Bad and Indifferent, Recovered from 210 Women of Known Fertility: A Study of Biologic Wastage in Early Human Pregnancy*, 23 PEDIATRICS 202, 211 (1959) ("The greatest ovular loss is in the preimplantation stage"); K. Diedrich et al., *The Role of the Endometrium and Embryo in Human Implantation*, 13 HUM. REPROD. UPDATE 365, 366 (2007) ("The majority of spontaneous human conceptions fail to complete implantation.").

[36] *See, e.g.*, SCOTT F. GILBERT, DEVELOPMENTAL BIOLOGY 304-09 (10th ed. 2014).

[37] SCOTT F. GILBERT ET. AL, BIOETHICS AND THE NEW EMBRYOLOGY: SPRINGBOARDS FOR DEBATE 40-41 (2005).

At the time of the adoption of the Constitution and throughout most of the nineteenth century, abortion before quickening[38] was common, legal, and generally not viewed as immoral.[39] Newspapers—including family and religious newspapers—often printed advertisements for discreetly described abortion services and abortifacients.[40] State courts regularly dismissed criminal charges or ordered retrials when it could not be shown that quickening had occurred before the defendant induced an abortion.[41]

During the second half of the nineteenth century, the newly formed American Medical Association and its university-trained doctor members began lobbying for restrictions on early-term abortion. They did so primarily for anti-competitive reasons: to drive everyone else out of the medical business. These elite doctors faced stiff competition from other medical practitioners, but there were not yet licensing schemes to prevent midwives, folk practitioners, faith healers, and other untrained individuals from practicing medicine. Doctors needed a way to distinguish themselves from these other medical practitioners. As one scholar puts it, in terms eerily similar to Epstein's condemnation of most federal regulation of economic activities:

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[38] Quickening is the ability of the mother to feel the fetus kicking, and occurs in the latter half of the second trimester.

[39] *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 13-14, 18-20 (2008); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 3-16 (1978); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 28-29 (1990).

[40] LUKER, *supra* note 39, at 18-19.

[41] *See, e.g.*, Mitchell v. Commonwealth, 78 Ky. 204 (1879); Evans v. People, 1 Cow. Cr. Rep. 494 (N.Y. 1872); Abrams v. Foshee, 3 Clarke 274 (Iowa 1856); State v. Cooper, 22 N.J.L. 52 (N.J. 1849); Commonwealth v. Parker, 50 Mass. (9 Met.) 263 (1845); Commonwealth v. Bangs, 9 Mass. (8 Tyng) 387 (1812). *See also* Filber v. Dautermann, 26 Wis. 518 (1870) (reaffirming quickening doctrine in a non-criminal context); Smith v. Gaffard, 31 Ala. 45 (1857) (same).

> Nineteenth-century physicians needed to be "better" than their competition in order to persuade the public that licensing laws were not simply a self-serving "restraint of trade," designed only to raise the price of a doctor's bill by eliminating the competition . . . . Because they could offer no direct, easily observable, and dramatic proof of their superiority, regular physicians were forced to make an indirect *symbolic* claim about their status. By becoming visible activists on an issue such as abortion, they could claim both *moral stature* (as a high-minded, self-regulating group of professionals) and *technical expertise* (derived from their superior training).[42]

In the words of another scholar, "the medical profession was attempting to establish itself as a profession, and graduates of elite medical schools ('regulars') were attempting to drive competing popular practitioners ('irregulars') from the field."[43] The anti-abortion agenda as a way to raise the status—and remuneration—of some groups continued well into the twentieth century, used by obstetricians and gynecologists first to distinguish themselves from other doctors and then to campaign against midwives.[44]

Although physicians of the time claimed to be taking a moral stand, their actions are much more consistent with an attempt to control the field than with an attempt to outlaw an immoral practice. They urged legislatures to adopt laws that "would forbid non-

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[42] LUKER, *supra* note 39, at 28-31.

[43] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 283 (1992); *see also* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 82 (1997) ("Nineteenth-century Regulars had fought abortion as part of a larger campaign to wrest control over medical practice from competing sects.").

[44] *See* REAGAN, *supra* note 43, at 82, 90-92.

physicians to perform abortions but would give physicians a great deal of legal discretion to perform abortions when they wanted to."[45] These new laws generally permitted "therapeutic" abortions, and outspokenly anti-abortion physicians interpreted "therapeutic" extremely broadly; some even opposed legislative attempts to tighten restrictions on "therapeutic" abortions performed by physicians.[46]

Thus regulation of early-term abortions followed the same pattern—albeit half a century earlier—that Epstein identifies for regulation of economic rights, such as wage-and-hour legislation limiting freedom of contract. Under the common law, there was no regulation and individuals were free to act as they liked. One group decided that it would be in their own economic interest to restrict the right, and used health and safety arguments as a pretext to persuade legislatures to enact laws that created cartels and blocked competition.

And there is one additional ironic similarity. In Epstein's view, progressives have pulled the wool over the eyes of the American public (to say nothing of the Supreme Court) in disguising the sordid rent-seeking nature of labor laws, civil rights laws, and the rest. The AMA and its right-to-life successors, however, have apparently pulled the wool over Epstein's eyes. He argues that abortion regulations are based on health and safety, and then asks rhetorically "[w]hy ignore the strong historical spread of abortion laws starting in the nineteenth century?"[47] No one who is both familiar with that history and opposed to government wealth transfers would ask such a question.

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[45] LUKER, *supra* note 39, at 32.
[46] *Id.* at 33-34.
[47] EPSTEIN, *supra* note 1, at 374.

IV. CONCLUSION

Epstein wisely eschews creating constitutional doctrine on purely abstract political theory. Instead, he uses the Constitution's text and history to create the context in which he can develop his more grounded political theory. Unfortunately, he often gets the historical context wrong.[48] And once that foundation is undermined, the whole edifice crumbles.

In the end, *The Classical Liberal Constitution* is the latest in a long line of scholarly works that attempt to create a grand theory of constitutional law.[49] Like many of its predecessors, it is elegant and fun to read. But also like its predecessors, it seems designed more to achieve certain results—to legitimate some cases and undermine others—than to describe an intellectually or historically sound approach to constitutional interpretation across the board. Those who do not agree with Epstein's judgments about which cases are right and which are wrong are unlikely to be persuaded by either the historical analysis or the political theorizing that just happens to coincide with those judgments.

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[48] Bertrand Russell's description of Hegel's historical theory seems equally applicable to Epstein's: "It was an interesting thesis [but] [l]ike other historical theories, it required, if it was to be made plausible, some distortion of facts and considerable ignorance." BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 735 (1945) (14th cloth edition 1964).

[49] Some of the best of the genre include JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) and BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); BRUCE ACKERMAN: WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). For a critique of "grand theory" in general, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).