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SYMPOSIUM: THE CLASSICAL LIBERAL CONSTITUTION: ON LIBERTY, EQUALITY, AND THE CONSTITUTION: A REVIEW OF RICHARD A. EPSTEIN'S THE CLASSICAL LIBERAL CONSTITUTION

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BIO:

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LEXISNEXIS SUMMARY:

... First, I do not think that Professor Epstein documents as fully as he might have just how committed to classical liberalism the Framers of the Constitution were. ... The Virginia Declaration thus in modern terms protected unenumerated liberty and equality rights as well as liberty rights that were specifically spelled out. ... It must be noted here that the Virginia Declaration of Rights explicitly protects the following individual liberties, which are associated

with Classical Liberalism and which are not protected by the English Bill of Rights: (1) the recognition that there are natural and inalienable rights to life, liberty, and property; (2) the recognition that no man is entitled to special privileges and immunities as compared to other members of the body politic; (3) the recognition that everyone is entitled to an independent judiciary; (4) the recognition that those accused have the right to confront the witnesses against them; (5) the recognition that general warrants are impermissible; (6) the recognition that freedom of the press is guaranteed; and (7) the recognition that religious liberty is guaranteed. ... The Clause appears at the beginning of the Virginia Declaration of Rights, and in George Mason's first draft of Virginia's Lockean Natural Rights Clause he states:

> "That all Men are born equally free and independant sic , and have certain inherent natural Rights, of which they can not by any Compact, derive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety." ... The Virginia Lockean Rights Clause's specific protection of the right of "pursuing and obtaining happiness and safety" is also striking given the later inclusion of the "pursuit of happiness" in the Declaration of Independence. ... As Sofia Vickery and I explain, in addition to influencing other State constitutions, the Lockean Rights language in the Virginia Declaration of Rights also served as Jefferson's model for portions of the Declaration of Independence itself. ... The debate between Edmund Burke, Thomas Paine, and John Stuart Mill was also likely influential in the revisions to the Lockean Rights Clauses that occurred between the adoption in 1776 of the Virginia and Pennsylvanian Lockean Natural Rights Clauses and the twenty-four Lockean Natural rights Clauses as they would have been understood in 1868 when the Fourteenth Amendment was adopted. ... The widespread belief throughout the Empire was that responsible parliamentary government and adherence to the common law made Bills of Rights antiquated and unnecessary. ... While Classical Liberals favor equality of opportunity but not equality of outcomes, classical liberalism is premised on a rejection of feudalism and of the idea that anyone is born a noble or a serf, a Brahmin or an untouchable, or a master or a slave. ... Consider, for example, the words of Massachusetts Senator Charles Sumner:
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> > T here shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with special powers and privileges, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ... Almost all the individual rights cases which Professor Epstein discusses in Part III of his book are really Privileges or Immunities Clauses cases, which makes Professor Epstein's inattention to the original meaning of this Clause a serious flaw in his book. ... President Theodore Roosevelt, for example, felt that the trend in the United States in the early Twentieth Century where people of northern European descent were having fewer children than people of southern and eastern European descent was a form of "race suicide," and he said that "Some day we will realize that the prime duty, the inescapable duty of the good citizen of the right type is to leave his or her blood behind him in the world; and that we have no business to permit the perpetuation of citizens of the wrong type." ...
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> The four dissenters in Lochner offer no defense to the claim that the legislation at issue was enacted to cartelize the baking industry and reduce competition and not out of a genuine concern for public health. ... This time even statist Justice Oliver Wendell Holmes signed Justice McReyonlds liberty-enhancing opinion. ... Compulsory sterilization and eugenics laws are not by any stretch of the imagination just laws enacted for the general good of the whole people. ... As I have argued thus far, twenty-four States in 1868 had Lockean Provisos in their state constitutions and this Lockean Proviso language is thus itself a right that is deeply rooted in American history and tradition. ... Just as common law liberty was held by Sir Edward Coke to include a right to practice your trade in the Case of the Monopolies , and just as Lord Mansfield held that human slavery was a violation of the common law of England in Somersett's

Case , so too is there an inherent natural liberty to have nonproceative sexual relations with other consenting adults.

TEXT:

[*840] Professor Richard A. Epstein is the leading theorist and defender of classical liberal U.S. constitutionalism in modern times. For more than forty years, he has spoken out forcefully and persuasively in defense of classical liberal ideals in the context of U.S. constitutional law. Professor Epstein has had a profound influence on U.S. constitutional law, on all of those associated with the Federalist Society, and even on those conservative justices on the Supreme Court, such as Justice Antonin Scalia, with whom he has occasionally sparred. Professor Epstein was the first major modern legal academic to write in support of reestablishing enumerated powers limits on the federal government; n1 Professor Epstein's 1987 Commerce Clause article was the keynoted address at a U.S. Department of Justice Conference on "Reviving Economic Liberties and Federalism" presided over by then Attorney General Edwin Meese III; and Professor Epstein's landmark book on Takings n2 helped inspire an effort on the Supreme Court to reinvigorate the protection of property rights through the regulatory takings doctrine. n3 Professor Epstein has had more of an influence on current Supreme Court caselaw than many other prominent legal academics including such celebrated figures as Judge Richard Posner, Professor Ronald Dworkin, and Professor Cass Sunstein. He is a legend in his own time.

[*841] *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* is Professor Epstein's *magnum opus--a* 583 page discussion of almost every issue in U.S. constitutional law including most of the leading cases on the separation of powers, federalism, and individual rights. It is a splendid achievement that merits close reading, and it offers wholly novel and exceptionally well-researched observations on Supreme Court case law on every subject under the sun. Professor Epstein's knowledge of U.S. constitutional law is truly encyclopedic, and it would be impossible to respond adequately in a book review to his breathtaking discussion of so many constitutional precedents and doctrines. His book goes well beyond some of his previous writings in trying to root classical liberalism in the original meaning of the text of the Constitution and of the Fourteenth Amendment, and it for the most part succeeds. His discussion of federal power is thorough and persuasive, though his discussion of *The Slaughter-House Cases*, the Privileges or Immunities Clause, and of incorporation and substantive due process is under-developed.

Professor Epstein argues that the original meaning of the text of the U.S. Constitution of 1787, as amended during Reconstruction and by the Nineteenth Amendment, is broadly in harmony with classical liberal constitutional ideals. He contrasts the classical liberalism of the framers of the Constitution and of the Fourteenth Amendment with the redistributive statism of the progressive movement; indeed, this contrast between classical liberalism and progressivism *is* the main theme of the book. Professor Epstein documents how the framers' conception of human nature led them to create a democratic republican government of checks and balances, separation of powers, and federalism while the faith of the Progressives in scientific experts led them to champion, ultimately, total national power, the delegation of all legislative power to the President, the packing of the Supreme Court, and a rational basis test for rubberstamping almost all federal and state intrusions on individual constitutional rights. It is a stunning and chastening story in every respect, and Professor Epstein tells the story with great [*842] verve and vigor. For this reason alone, the book makes a huge contribution.

One can challenge aspects of Professor Epstein's story at the margin, as left wing critics will undoubtedly do, but his basic bottom line is quite right. Thus some left wing critics might note that some of the framers, like Alexander Hamilton and John Marshall, were mercantilists and monopolists and that Chief Justice Marshall's famous opinion in *McCulloch v. Maryland* celebrated their non-classical liberal nationalist, monopolistic views. But those on the left who celebrate *McCulloch* have no response to the argument that President Andrew Jackson decisively repudiated *McCulloch* when he killed the Bank of the United States by vetoing its renewal on *constitutional* grounds because it was a monopoly in 1832, and the Bank was never re-created. A Whig Congress voted twice in the 1840's to re-create the Bank, but the two Bank bills were both separately vetoed by President Tyler on the same constitutional grounds relied on by President Jackson. Had the two Bank bills of the 1840's not been vetoed, the Taney Court might very well have overruled *McCulloch* and held the Bank of the United States unconstitutional just as the Taney Court repudiated Chief

Justice Marshall's views on the Commerce Clause in *Mayor of the City of New York v. Miln* and of the Contract Clause in the *Charles River Bridge* case. The brute fact of the matter is that the Hamiltonian mercantilists and monopolists lost the Election of 1800, and they never returned to power ever again. Eventually Theodore Roosevelt sought to resurrect Hamilton's views on national power, but the progressive movement owed more intellectually to Nineteenth Century thinkers than it did to Hamilton.

A more serious left wing challenge to Professor Epstein's account of the classical liberalism of the framers of the original Constitution is that document's inexcusable compromises with slavery -- compromises that Professor Epstein acknowledges were indefensible. The Three-Fifths Clause and the Fugitive Slave Clause, as well as the Clause allowing importation of new slaves from Africa until 1808, may have been necessary compromises with evil in order to [*843] set up a national government on the North American continent that would eventually become powerful enough to abolish slavery, but we should not delude ourselves into thinking that the pre-Civil War Constitution mostly maintained a classical liberal regime. It did not. Thirteen of the fifteen presidents before Abraham Lincoln--all but the two Adams--were supporters of slavery, and almost all of them--ten out of thirteen--owned slaves personally themselves at some point in their lives (Washington, Jefferson, Madison, Monroe, Jackson, Van Buren, William Henry Harrison, Tyler, Polk, and Taylor). n4 The Three-Fifths Clause, which allowed white slaveowners to vote their slaves, gave the South and its northern doughface allies a lock on the House of Representatives, the Electoral College, and on the presidency. But for the Three Fifths Clause, Thomas Jefferson would have lost the pivotal Election of 1800 to John Adams.

With the lock on the Electoral College that the Three-Fifths Clause gave to the slave states, there came a lock on the U.S. Supreme Court since the two Adams picked only four of the thirty-six men who were appointed to the Supreme Court before Abraham Lincoln's presidency. The *Dred Scott* constitutional fiasco was thus not a random accident that occurred only because of Roger B. Taney's willfulness, although Taney's lack of judgment did not help matters. The *Dred Scott* fiasco was the logical culmination of the Three-Fifths Clause in constitutional doctrine. Once the South's lock on the Electoral College broke in 1860 with the election of a president, Abraham Lincoln, who was committed to stopping the spread of slavery to the territories, the South rebelled and the Civil War began. The U.S. Constitution as amended during Reconstruction and by the Nineteenth Amendment set up a classical liberal constitutional regime, but the U.S. Constitution as it existed from 1789 to [*844] Reconstruction did not. Professor Epstein does not dispute any of this, but it should be stated forcefully for the record.

The classical liberal Constitution from 1877 onward did come under a withering assault from the progressives, as Professor Epstein suggests, and we continue to struggle with the legacy of the progressives down to the present day. But Professor Epstein's account of the struggle between classical liberals and progressives from 1776 to the present day could benefit from some further elaboration and that is what I will seek to provide in this essay. First, I do not think that Professor Epstein documents as fully as he might have just how committed to classical liberalism the Framers of the Constitution were. An examination of State constitutional law from 1776 to 1877 helps to support Professor Epstein's assertion in a whole host of ways that the Framers were classical liberals. Second, Professor Epstein greatly understates just how evil the progressives really were by overlooking their support for a scientific, expert-administered law of eugenics, which would in their view lead to the emergence of a master race. It was American progressive eugenicists who got Hitler interested in racial genocide guided by scientific experts. In the wake of the Nazis and the Holocaust, American progressives' racism and trampling on individual rights came to be widely deplored all over the world, which causes me to think that Professor Epstein overstates the continuing influence of the progressives on U.S. constitutional law today. In my opinion, there has been a rebirth, since 1945, and most especially, since the presidency of Ronald Reagan, in the influence of classical liberalism -- a modern-day phenomenon that might be called be called high liberalism when used by the American left and neo-liberalism when used by the American right to distinguish it from its Eighteenth and Nineteenth Century ancestor.

I want in this book review to tell the story of the rise, fall, and rebirth of the classical liberal constitution by adding details and information that I think broadly speaking support and elaborate on the core thesis of Professor Epstein's book. In Part I, below, I will discuss the origins of the American commitment to the classical liberal [*845] ideals of

liberty and equality during the period from 1776 to 1877. I mean in this section to document the classical liberal zeitgeist in which the text of the Constitution and of the Reconstruction Amendments were written. I think that zeitgeist was substantially more consistent with classical liberalism than Professor Epstein acknowledges. In Part II, I will discuss the global attacks on ideals of liberty and of equality that began to manifest themselves in U.S. law after 1877, and which reached a peak of destructiveness in the 1930's and 1940's when these ideas were adopted by the Nazis and led to the Holocaust. Finally, Part III tells the story of the rise of neo-liberalism in the U.S. from the 1940's to the present day. I begin with the high liberalism of the Warren Court and Burger Court justices and end with the neo-liberalism of the Reagan-Thatcher era.

I. LIBERTY AND EQUALITY FROM 1776 TO 1877

Professor Epstein writes of the classical liberal tendencies of James Madison and of others of the American framers, but he is hard-put to point to a place where classical liberalism is endorsed in the text of the U.S. Constitution of 1787 or even in the federal Bill of Rights ratified in 1791. The classical liberalism of the Framing generation is in display, however, in the Declarations of Rights in the original state constitutions adopted from 1776 on. These state constitutions better reflect the zeitgeist of their time than does the federal Constitution even though the text of the U.S. Constitution ought to be read against a backdrop of classical liberalism. Consider, for example, the following famous language from the Massachusetts Constitution of 1780:

> Art. I.--*All men are born free and equal*, and have certain *natural, essential, and unalienable rights;* among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. . . .
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> [*846] VI.--No man, nor corporation, or association of men, have any other title *to obtain advantages, or particular and exclusive privileges, distinct from those of the community*, than what arises from the consideration of services rendered to the public; and this title being in nature *neither hereditary, nor transmissible to children, or descendants, or relations by blood*, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.
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> VII.--Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men; Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it. n5

This language articulates two core classical liberal ideas both of which are essential features of a classical liberal Constitution. First, there is the idea that "All men are born free"--that the natural condition of man is one of freedom and that there ought to be, in Professor Randy Barnett's words, "a presumption of liberty." n6 Second there is the idea that "All men are born equal" and that no "man, family, or class of men" is entitled to hereditary "advantages, or particular and exclusive privileges, distinct from those of the community." Both these ideas grow out of the framers' rejection of English interference with their liberty and their rejection of English feudalism as manifested in a hereditary monarchy and House of Lords. [*847] Consulting state constitutional law greatly strengthens the argument in Professor Epstein's book by giving us more material to work with. In subsection A, below, I will examine the historical underpinning of the legal idea that "All men are born free" while, in subsection B, I will examine the historical underpinnings of the legal idea that "All men are born equal." In part II, I will examine how founding era conceptions of liberty and of equality came under sustained assault in the Nineteenth and Twentieth Centuries prior to 1945.

A. LIBERTY

When the thirteen American colonies declared independence from the Kingdom of Great Britain on July 4, 1776,

eleven of those colonies proceeded to draft new state constitutions, most of which protected liberty with fairly elaborate Bills or Declarations of Rights. Many of these state Bills of Rights began with Lockean Natural Rights Clauses like the one from the Massachusetts Constitution of 1780 quoted above saying in essence that "All men are born free and equal." Where did this classical liberal idea come from? What are its origins in colonial and English law?

As Sarah Agudo, Katherine Dore, and I explain in our law review article in the *Southern California Law Review* on this topic, which I draw from here and in the next several paragraphs, one possible source of the state Bills of Rights adopted in and after 1776 is the first Bill of Rights in Anglo-American history which was given that label, i.e. the English Bill of Rights of 1689. In practice, however, the English Bill of Rights was quite different from the American imitators that it spawned because: (1) it was as much about rights to government structure as it was about individual rights and; (2) it asserted the existence of only historic ancient rights that [*848] had in theory always been protected in England, and it did not rest on a belief in the natural law rights of all mankind or indeed in individual liberty or equality. n7

[*849] It should be noted that of the twelve rights protected in the English Bill of Rights only four fairly minor individual rights or liberties are guaranteed: (1) the right to petition the King and the government for the redress of grievance; (2) the right of Protestant subjects of the realm to keep and bear arms; (3) protection against excessive bail and fines and against cruel and unusual punishments; and 4) the right to trial by jury. Most of the rights which are guaranteed in the English Bill of Rights are really limits on the power of the King who is barred from: (1) suspending or dispensing with Acts of Parliament; (2) creating special royal courts; (3) levying taxes without Parliament's consent; (4) maintaining a standing army; and (5) holding sessions of Parliament infrequently. The English Bill of Rights is thus not truly an antecedent of the U.S. Bill of Rights of 1791 or of the French Revolution's Declaration of the Rights of Man and of the Citizen of 1789, as Donald Lutz explains quite persuasively. n8 Professor Lutz shows conclusively that the Federal Bill of Rights of 1789 has its origins in the Colonial Bills of Rights and in the State Bills of Rights adopted in most of the thirteen original states between American independence in 1776 and the writing of the federal Bill of Rights in 1789. n9

[*850] It must be noted as well that the English Bill of Rights lacks key U.S. Bill of Rights liberties such as: (1) the protection of religious liberty in general; (2) the protection of freedom of speech and of the press; (3) the right of non-Protestants to keep and bear arms; (4) the right not to have soldiers quartered in one's home; (5) the right to be free of unusual searches and seizures; (6) the privilege against self incrimination; (7) the right not to be deprived of life, liberty, or property except by due process of law although that right had come to be protected under Magna Charta; and (8) the right to jury trial in civil cases.

The English Bill of Rights is thus radically less comprehensive than the U.S. Bill of Rights of 1791. Where, then, in Anglo-American history did the U.S. Bill of Rights Classical Liberal tradition find its origin? The answer as Donald Lutz explains in the articles cited above is that the U.S. Bill of Rights originated in the thirteen original states' colonial bills of rights and in the sweeping declarations or bills of rights, which many of them adopted in 1776 and thereafter as the states became independent of the United Kingdom. It should be noted that in framing colonial bill of rights provisions and in arguing that the British parliament lacked power to tax the colonies without their legislative consent or to try colonists in Admiralty courts without a jury the American colonists frequently and repeatedly fell back on the writings of that most famous of English jurists Sir Edward Coke. Coke's writings, along with those of John Locke plus the publication by Adam Smith of The Wealth of Nations in 1776 helped lead the American colonies toward a Classical Liberal philosophical outlook.

In early Seventeenth Century England, Sir Edward Coke argued in his report of the *Case of the Monopolies* that Englishmen were naturally free under the common law to pursue a trade or occupation or to sell things, and he established the legal proposition that [*851] all royal grants of monopolies were unconstitutional--a position that was later codified by Parliament when it passed the Statute on Monopolies. n10 In the 1620's as a Member of Parliament, Sir Edward Coke also argued that it was unconstitutional for King Charles I to arrest and detain wealthy merchants without bringing them before a jury for a trial nor could the king condition their release from custody on their making

him a forced "loan," which was in effect a form of taxation without Parliament's consent. This view was codified by Parliament in the Petition of Right, which reaffirmed the right to jury trial and of Parliament's exclusive control over taxation. It is from the Petition of Right that the American revolutionaries derived the idea that taxation without representation was a violation of the English constitution.

Sir Edward Coke also helped develop the idea that England had an ancient Anglo-Saxon constitution of liberty, which constrained even the monarch and, in *Dr. Bonham's Case*, a common law, which constrained Parliament itself. Sir Edward Coke and his followers took the position that the laws of King Edward the Confessor --the *leges Edwardi*--had been affirmed by William the Conqueror in his coronation oath, by his son Henry I in his coronation oath, which became known as the Charter of Liberties, and by bad King John, who transgressed the *leges Edwardi* and was forced to repent by signing Magna Charta, thus restoring English liberties that had predated 1215. Many of Sir Edward Coke's followers who opposed James I and Charles I thought that those two Stuart kings were themselves violating England's Ancient Anglo-Saxon Constitution by imposing, as had bad King John, what Coke's followers called the "yoke of Norman oppression" which deprived Englishmen of liberties that they had held under their Ancient Anglo-Saxon Constitution. [*852] Sir Edward Coke and his followers supported in essence what some American originalists in recent times have called "the Constitution in exile"--a classical liberal constitution under which government oppression is sharply constrained. Professor Epstein's call for overthrowing the yoke of the Progressive/New Deal oppression thus resonates deeply with the thought of Coke and his puritan followers during the 1630's, the 1640's, and the English Civil War who sought to overthrow the yoke of Norman/Stuart oppression.

The relevance of all of this to U.S. constitutional law comes from the fact that all the settlers of the various New England colonies were Puritans or radical Protestants who sided with Sir Edward Coke and with Oliver Cromwell against the Stuart oppressions of James I and Charles I. There was a huge migration of Puritan religious dissenters to Plymouth, Boston, and New Haven during the years between 1620 and 1640. Many Puritans opposed Charles I because his wife was Catholic, his Archbishop of Canterbury, William Laud, was a high church Anglican who suppressed the English Protestant dissenters, and because they feared a return by England to the bloody Roman Catholicism of Queen Mary. The Puritans thought they were picking up the mantle of the Reformation from the hands of Queen Elizabeth I, who had died in 1603, and defending it against an English regime in the 1620's and 1630's that they thought was increasingly hostile. They would thus be in John Winthrop's words "a [shining] city upon a hill"--a beacon of Protestant liberty and purity in a corrupt Popish world.

Sir Edward Coke was quite simply a hero in the New England colonies because of his steely and brave resistance to James I and Charles I, and as a result his liberal views about the ancient pre-Norman liberties of Englishmen were accepted in the American colonies as gospel. These views were then relied on throughout the 1760's and 1770's when New Englanders, joined by the southern colonies, accused King George III and his parliament of violating the ancient English Constitution as the Stuarts had done. As Professor Daniel Farber writes "The Framers found intellectual support [*853] for [the concept of natural common law rights] in the work of great lawyers such as Sir Edward Coke as well as philosophers like Locke." n11 James Otis's arguments in the 1760's against the constitutionality of Parliament authorizing "writs of assistance (basically blank checks to officials to search wherever they wanted) ... [was based on his claim citing Coke that] 'As to Acts of Parliament, an Act against the Constitution is void: an Act against natural Equity is void ... Courts must pass such Acts into disuse.'" n12 Professor Farber adds that:

> Natural law was an important part of English common law. The eminent legal historian R.H. Helmholz recently under-took a thorough survey of the impact of natural law on the English common law. . . . He has compiled a list of more than sixty leading English legal writers who endorse natural law as part of the common law before the American Revolution. The list included many of the great names of English legal History such as Lord Coke, Lord Mansfield, and Matthew Hale--not to mention one bona fide saint (Thomas More).
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> These thinkers, Helmholz concluded, saw natural law as a legitimate source of English law, not an exotic foreign import. He also observed that the idea of natural law surfaced in some of the common law's most

> famous cases. For instance, a case from 1468 referred to the law of nature as 'the ground of all laws' and described it as the basis for decision when precedents were lacking. n13

[*854] It was a belief that the inherent state of Englishmen had always been one of freedom that helped to fuel the Boston Tea Party, the burning of the English revenue ship, the *Gaspee*, and ultimately the American Revolution. Sir Edward Coke's views on the historical Ancient Constitution may have been based on bad "law office history," as J.J.A. Pocock has argued, n14 and they may have been supplanted in England by the Toryish views of William Blackstone, but Sir Edward Coke's views and belief in England's Ancient Constitution, which rejected the yoke of Norman suppression caught on and helped cause the American Revolution. Sir Edward Coke's support for the Ancient Constitution of Liberty echoes down to the present day in Richard Epstein's *The Classical Liberal Constitution*.

Sir Edward Coke followed "a well-trod trail of English legal sources when he implicitly disapproved of 'villeinage or servitude,' saying that "The condition of villeines from freedom to bondage, of ancient time grew by constitutions of nations, and not by the law of nature", which he implied condemned servitude or slavery. n15 Professor Robert Cover notes that, even before Coke, the great English jurist Fortescue had "even more forcefully . . . condemned servitude and praised the English law of villenage as an improvement on the civil law." n16 The celebrated Montesquieu, much beloved by the Framers of our Constitution, wrote sarcastically in *The Spirit of the Laws* that justifications of African American slavery as being warranted because Africans were racially inferior to Europeans were necessary because "It is impossible for us to suppose these creatures to be men, because allowing them to be men, a suspicion would [*855] follow that we ourselves are not Christians." n17 Even the great Tory, William Blackstone, whose *Commentaries on the Laws of England* was influenced by Montesquieu's opposition to slavery, opposed slavery. Professor Cover writes that "The foundation [in the American colonies] of a legal education was Coke--at least until Blackstone appeared in 1769," n18 and Blackstone took the view "that the common law of England embodied . . . great principles of freedom and had done so for ages" saying that:

> And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws; and so far becomes a freeman. n19

In the famous 1772 anti-slavery decision in *Somersett's Case*, one jurist took to its logical conclusion Sir Edward Coke's and William Blackstone's view that men were inherently free under the common law. n20 In that case, Lord Mansfield--one of the greatest jurists in Anglo-American legal history-- had to decide whether a slave brought by his master from Virginia to London had become free once he landed on English soil. Lord Mansfield ruled that:

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, [*856] therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

Slavery was so odious and contrary to natural law that it could not be suffered to endure, unless, it was explicitly authorized by positive law. There was no such authorization under the common law of England. Lord Mansfield held that human slavery was contrary to the liberty guarantee of the common law that Coke and Fortesque had written about.

Lord Mansfield's 1772 ruling in *Somersett's Case* applied to the thirteen North American colonies, and it meant that fugitive slaves in North America became free under English imperial law once they escaped into a free North American state. By the early 1780's, Massachusetts and Vermont had abolished slavery within their borders becoming free states. It is because of *Somersett's Case* that the Framers of the U.S. Constitution had to add a Fugitive Slave Clause to that document to appease the slave-holding South because otherwise fugitive slaves who reached States that had abolished slavery would have been legally free men under British imperial law, which the thirteen original States inherited from

England when they declared Independence in 1776. Lord Mansfield held as had the English Courts in the Case of the Monopolies that the natural state of Englishmen under the common law was one of freedom. The yoke of Norman (or of New Deal) oppression was unconstitutional.

This view, which was not reflected in the English Bill of Rights of 1689, was quite manifest in most of the state Declarations of Rights adopted from 1776 onward. These documents were called Declarations of Rights because their framers believed that they merely "declared" ancient English liberties and did not instead "create" them. The first and by far the most influential of these state Declarations of Rights was the Virginia Declaration of Rights and it is to that document that I turn next.

[*857] The modern world's attachment to liberty and to Bills of Rights in general dates back to the adoption of The Virginia Declaration of Rights by a state constitutional convention in Virginia, on June 12, 1776-- almost a month before the writing and publication of the Declaration of Independence! This Virginia Declaration of Rights also predated the Virginia Constitution itself, which was adopted on June 29, 1776. The Virginia Declaration of Rights inspired many of the other rebellious colonies to adopt similar Declarations of Rights of their own. It also inspired Thomas Jefferson in drafting the similar U.S. Declaration of Independence, which was published on July 4, 1776, and it inspired James Madison in writing the U.S. Bill of Rights in 1789. Perhaps even more surprisingly, the Virginia Declaration of Rights actually inspired the Marquis de Lafayette in writing the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789, a document of enormous importance throughout the world. n21 It is not an exaggeration to say that the Virginia Declaration of Rights fundamentally changed the relationship between individuals and their governments all over the world.

A striking feature of the Virginia Declaration of Rights is that it protected liberty and equality in the abstract in Section 1 as well as in various listed particulars. The Virginia Declaration thus in modern terms protected unenumerated liberty and equality rights as well as liberty rights that were specifically spelled out. This protection of unenumerated rights remains a feature of Bills of Rights down to the present day. The Virginia Declaration of Rights began with the same commitment to liberty and equality as were even more evident in the Massachusetts constitution of 1780 quoted [*858] above. Thus, the first four sections of the Virginia Declaration read as follows:

> "Section 1. That all men are *by nature equally free and independent* and have certain *inherent rights*, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, *the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety*.
>
> Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.
>
> Section 3. That government is, or ought to be, instituted for *the common benefit, protection, and security of the people, nation, or community*; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration. And that, when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.
>
> Section 4. That no man, or set of men, is entitled to *exclusive or separate emoluments or privileges from the community*, but in consideration of public services; which, nor being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary." n22

[*859] The rest of the Virginia Declaration is set forth in the margins and explicitly protects a large number of enumerated individual rights. n23

[*860] It must be noted here that the Virginia Declaration of Rights explicitly protects the following individual

liberties, which are associated with Classical Liberalism and which are not protected by the English Bill of Rights: (1) the recognition that there are natural and inalienable rights to life, liberty, and property; (2) the recognition that no man is entitled to special privileges and immunities as compared to other members of the body politic; (3) the recognition that everyone is entitled to an independent judiciary; (4) the recognition that those accused have the right to confront the witnesses against them; (5) the recognition that general warrants are impermissible; [*861] (6) the recognition that freedom of the press is guaranteed; and (7) the recognition that religious liberty is guaranteed. It is really quite clear that it was the Virginia Declaration of Rights, as copied by most of the original thirteen states, which inspired the writing of the more narrowly framed federal Bill of Rights. n24

The Virginia Declaration of Rights of 1776 provided the first protections for individual rights adopted by a popularly elected convention, n25 and it is fitting that it was the first State constitutional document to include a Lockean Proviso like Massachusetts' Lockean Proviso quoted above, which said that "All men are born free and equal." Professor Cover notes that "Similar language found its way into the constitutions of Pennsylvania (1776), Vermont (1777), New Hampshire (1784) . . . Connecticut (1818), and New Jersey (1844). n26 He thus identified seven States that had Lockean Provisos in their State constitutions, but we have found that twenty-four States had such Provisos in 1868 when the Fourteenth Amendment was ratified--nearly two-thirds of the total number of States at that time. The Lockean Proviso language is thus deeply rooted in American history and tradition, a fact of which Professor Cover seems to have been unaware. Professor Cover also overlooks language in sections 3 and 4 of the Massachusetts' Constitution, which were widely copied and which said: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community ..." and "That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services [*862] ...". I think this language foreshadows modern equal protection doctrine.

As Sofia Vickery and I explain, George Mason is widely considered to be the author of Virginia's Declaration of Rights, and the first draft of what became the Lockean Provisos appears in his handwriting. n27 The first traces of Virginia's future Lockean Proviso are found in a transcript of George Mason's *Remarks on Annual Elections for the Fairfax Independent Company* in 1775, which were made just a year before the 1776 adoption of the Virginia Declaration of Rights. In his remarks, George Mason argued that the Fairfax Independent Company should hold annual elections for its militia officers, and he used the opportunity to expound on his theory of government:

> We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated so far for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these [*863] purposes, it may be called government, but it is in fact oppression. n28

These remarks were his first articulation of the language that was to become Virginia's Lockean Natural Rights Clause.

In 1776, George Mason joined Virginia's State Constitutional Convention, and on May 27, 1776, he submitted the first draft of Virginia's Declaration of Rights to the Convention. This draft included a more full-throated version of the Lockean Natural Rights Clause than was ultimately adopted. The Clause appears at the beginning of the Virginia Declaration of Rights, and in George Mason's first draft of Virginia's Lockean Natural Rights Clause he states:

> "That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, derive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining

Happiness and Safety." n29

This first draft of the Lockean Natural Rights Clause touched off an extensive debate at the Virginia State Convention. Some members opposed the language fearing, quite correctly as it would turn out, that it could be used to abolish slavery. In the words of Thomas Ludwell Lee, a delegate to the Convention:

> [*864] "a certain set of aristocrats, for we have such monsters here, [who upon] finding that their execrating system [of slavery] cannot be reared on such foundations, have to this time kept us at bay on the first line, which declares all men to be born equally free and independent . . . The words as they stand are approved by a very large majority, yet by a thousand masterly fetches and strategems the business has been so delayed that the first clause stands yet unassented to by the Convention." n30

The liberal delegates responded that no revision was required because "slaves not being constituted members of our society could never pretend to any benefit from such a maxim." n31 Ultimately, the Convention appeased the pro-slavery delegates by changing the opening line from "all men are born equally free" to "all men are by nature equally free," and deleting the word "natural" from the phrase "certain inherent natural rights," so that the Clause protected only "certain inherent rights." n32 Edward Pendleton also suggested a qualifying phrase: "when they enter into a state of Society," which was accepted by the Convention. n33 Historians agree that these changes were intended to reassure slaveholders that the Lockean Clause would not be interpreted as abolishing slavery in [*865] Virginia in 1776. n34 The Virginia delegates could not have known that within a few short years similarly worded Lockean Natural Rights Clauses would in fact be used to successfully challenge the constitutionality of slavery in other States, and that the Virginia courts would rely on the legislative history just mentioned to reject the argument that Virginia's own Lockean Clause banned slavery in Virginia. n35

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

The final draft of Virginia's Lockean Rights Clause read as follows. The italicized and crossed out portions represent the edits to the final draft as compared to George Mason's original proposal.

> That all men are [O>born<O] by nature equally free and independent, and have certain inherent [O>natural<O] rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. n36

Thus, on June 12, 1776, the first Lockean Rights Clause was adopted as binding constitutional law as part of the Virginia Declaration of Rights, the first such document in American history.

As Sofia Vickery and I explain, many scholars have speculated on the potential sources of George Mason's theory of government as articulated in the Virginia Lockean Rights Clause, and these scholars have identified several key influences. Perhaps most importantly, all of the Framers, including George Mason, were heavily influenced by the writings of John Locke and his theories on the natural [*866] rights of life, liberty, and property. n37 Mason endorsed the Lockean ideal that all men retain some of their natural rights after subscribing to the social compact, in contrast to the idea put forth by Hobbes and Rousseau that men surrender all their natural rights to the sovereign in exchange for security and public order. n38 George Mason appears to have borrowed almost directly from John Locke's *Second Treatise on Civil Government*, which included the statements "that all men by nature are equal" and that "[m]an being born . . . hath by nature a power, . . . to preserve his property, that is his life, liberty, and estate." n39

The Virginia Lockean Rights Clause's specific protection of the right of "pursuing and obtaining happiness and safety" is also striking given the later inclusion of the "pursuit of happiness" in the Declaration of Independence. Mason's inspiration for including this right is not clear. Some have speculated that the right may have originated from *Cato's Letters*, which included the statement "Happiness is the chief End of Man." n40 Others believe that the happiness right was derived from Locke's *An Essay Concerning Human Understanding*, which stated that "all Men

desire Happiness" and were devoted to "the pursuit of happiness." n41

[*867] *1. Spread of the Lockean Natural Rights Clauses and their Impact*

Regardless of its philosophical sources, George Mason's Virginia Lockean Rights Clause had a far reaching impact in the other States and abroad. Its extensive influence can be attributed both to its timing as the earliest State Declaration of Rights and constitution and thus as a natural model for subsequent drafters, as well as the fact that it seemed to capture the key features of political thought in the colonies at the time. In addition, its adoption in Virginia, one of the most populous colonies with many well-respected Framers, must have given it special credibility.

As Sofia Vickery and I explain, the spread of the Lockean Natural Rights Clause language began almost immediately. Only one month after its passage, in July 1776, delegates at the Pennsylvania constitutional convention used a copy of the Virginia Declaration of Rights in drafting Pennsylvania's constitution. n42 In 1779, John Adams confirmed the influence of the Virginia Proviso on the drafting of the Pennsylvania Constitution in his *Diary* saying that: "The [Pennsylvania] bill of rights is taken almost verbatim from that of Virginia." n43

But, in a remarkable turn of history, the Pennsylvania delegates probably were working from George Mason's *first draft* of the Proviso, which did not contain the pro-slavery qualifications that were ultimately included in the Virginia State constitution to appease pro-slavery delegates. The version published in the *Virginia Gazette* on June 1, 1776 was taken from George Mason's first anti-slavery draft. The draft circulated prior to the addition of the pro-slavery qualifiers, and it is this version that remained the source for other [*868] colonial newspapers. n44 A Virginia delegate likely sent a copy of the first draft to the *Pennsylvania Evening Post*, which published the piece on June 6, 1776. n45 Many other newspapers also published George Mason's first draft thus "spreading the May 27 draft up and down the seaboard." n46

It is therefore not surprising that Pennsylvania's Lockean Natural Rights Clause closely tracked George Mason's first draft of the Virginia Lockean Clause using the words "born equally free" and including an explicit reference to the existence of natural rights. The Pennsylvania Lockean Natural Rights Clause of 1776 stated:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. n47

The Massachusetts Constitution of 1780, quoted above, also tracked the language of the first draft of Virginia's Lockean Natural rights Clause. The first draft of Virginia's Lockean Natural rights Clause subsequently influenced other State conventions in their constitutional deliberations. Indeed, by 1868 twenty-four States out of thirty-seven had ultimately adopted a version of George Mason's Lockean Natural Rights Clause language, while three others had [*869] related language. n48 The state constitutional backdrop when the Fourteenth Amendment was ratified in 1868 was thus one in which the Classical Liberalism of the Lockean Provisos had been adopted in a substantial majority of the thirty-seven States.

As Sofia Vickery and I explain, in addition to influencing other State constitutions, the Lockean Rights language in the Virginia Declaration of Rights also served as Jefferson's model for portions of the Declaration of Independence itself. Working in July of 1776, Jefferson extensively consulted two documents: the draft preamble for the Virginia Constitution and George Mason's original version of the Declaration of Rights. n49 In *American Scripture*, historian Pauline Maier describes how the Declaration of Independence drafts show that Jefferson, and possibly Franklin, carefully edited Mason's original version of Virginia's Lockean Natural Rights Clause to form the first sentence of the Declaration of Independence:

> Jefferson began with Mason's statement "that all men are born equally free and independant," which he rewrote to say that they were "created equal & independent," then (on his "original rough draft") cut out the "& independent." Mason said that all men had "certain inherent natural rights, of which they cannot,

> by any compact, deprive or divest their posterity," which Jefferson compressed marvelously into a statement that men derived from their equal creation "rights inherent & inalienable," then moved the noun to the end of the phrase so it read "inherent & inalienable rights." Among those rights, Mason said, were "the enjoyment of life and liberty, with the means of acquiring [*870] and possessing property, and pursuing and obtaining happiness and safety," which Jefferson again shortened first to "the preservation of life, & liberty, & the pursuit of happiness," and then simply to "life, liberty & the pursuit of happiness." n50

In fact, Maier concludes that Mason's original draft of the Virginia Declaration of Independence "had a far greater impact than either the Declaration of Independence or the Declaration of Rights that the Virginia convention finally adopted, both of which were themselves descended from the Mason draft." n51

As Sofia Vickery and I explain, the influence of George Mason's first draft of the Lockean Natural Rights Clause was not limited to the United States. n52 Shortly after its printing in colonial newspapers, Mason's first draft was published in England in 1776, and from there it went on to strongly influence French political debates from 1776 to 1789. n53 In France, a leading intellectual, Jacques-Pierre Brissot, described "l'immortelle declaration de l'Etat de Virginie sur la liberte des cultes." n54 The influence of the Virginia Declaration of Rights and of its Lockean Rights Clause was limited to intellectual circles in France until the French Revolution of 1789 broke out thirteen years after American independence. But once the Revolution occurred, George Mason's first draft of the Virginia Lockean Natural Rights Clause obviously had a huge effect on the French Revolutionary [*871] Declaration of the Rights of Man and of the Citizen adopted in August 1789, two years before the U.S. Bill of Rights was ratified. n55 The author of the French Declaration of the Rights of Man and of the Citizen was the Marquis de Lafayette, an Americanophile who had served in the Revolutionary War with George Washington.

Although many scholars cite only the Declaration of Independence as Lafayette's inspiration in pushing for a declaration of individual rights, the evidence clearly shows that Lafayette was strongly influenced by the bill of rights found in *state* constitutions and by Mason's first draft of Virginia's Lockean Natural Rights Clause. n56 Several French translations of the American state constitutions were available to Lafayette and the other members of the National Convention. n57 A direct comparison of each provision of the French Declaration to the state constitutions shows nearly identical Classical Liberal language. n58 In fact, the opening sentence of Article I in the French *Declaration of the Rights of Man* is nearly an exact quote of George Mason's first draft of Virginia's Lockean Natural Rights Clause. It states that: "Men are born and remain free and equal in rights." n59 Article II of the Declaration then goes on to list "the natural and imprescriptible rights of man" including "liberty, property, security, and resistance to oppression." n60 In the words of one scholar, "The French Declaration of Rights is for the most part copied from the American declarations or "bill of rights." n61 It was written and promoted in the French National Assembly by the Marquis de [*872] Lafayette, a close friend and former military aide to George Washington who was staunchly pro-American. If you read this document closely you will see that its contents, and especially the first five articles, owe little to Voltaire, Rousseau, or other French Enlightenment figures and that they instead closely resemble the Virginia Declaration of Rights of 1776, as Donald Lutz explains. n62 Consider below the text of the first few articles of *The Declaration of the Rights of Man and of the Citizen of 1789*:

Articles:

> Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
>
> The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.
>
> The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

> Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.
>
> Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

[*873] The rest of the French Declaration is set forth in the footnote below, and the document is clearly a classical liberal constitutional text. n63

[*874] The French revolutionary Declaration of the Rights of Man and of the Citizen of 1789 protects: 1) natural and inalienable liberty rights; 2) criminal procedure rights; 3) religious freedom; 4) freedom of speech and of the press; 5) the separation of powers; and 6) property rights. This French revolutionary document is strikingly libertarian, which makes it unlike the English Bill of Rights of 1689 but similar to the Virginia Declaration of Rights as Georg Jellinek points out in his splendid little book, The Declaration of the Rights of Man and of Citizens: A Contribution to Modern History (translated by Max Farrand 1901).

Note that Section 4 of the French Declaration of the rights of Man and of the Citizen explicitly proclaims the harm principle that most Americans identify with John Stuart Mill's On Liberty, which was not published until 1859 and which therefore does not originate this idea. Section 4 of the French Declaration explicitly provides that: "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."

[*875] As I noted above, the Declaration of the Rights of Man and of the Citizen is incorporated into the French Constitution of the Fifth Republic, in its preamble. The Declaration of the Rights of Man and of the Citizen is enforced, today, by the French Constitutional Court when it reviews the constitutionality of laws. The Declaration of the Rights of Man and of the Citizen was exported by Napoleon's armies to all of Continental Europe where it had a lasting impact. The Declaration also had a huge impact on the countries of Latin America, which attained independence in part as a result of the Napoleonic wars.

2. Political Theory Debates and Amendments to the Provisos

As Sofia Vickery and I explain, the classical liberal principles of the Lockean Natural Rights Clauses clearly won out in the United States between 1776 and the ratification of the Fourteenth Amendment in 1868, but they were not embraced universally all over the world, and their adoption by the French revolutionaries, in 1789, provoked major controversy among political philosophers at the outset of the French Revolution. In 1790, Edmund Burke wrote his famous book, *Reflections on the Revolution in France*, which criticized the abstract language and values promoted by the French Declaration as meaningless and potentially dangerous:

> What is the use of discussing a man's abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics. n64

In the *Rights of Man*, Thomas Paine famously responded to Edmund Burke with a full-throated defense of Enlightenment Rights [*876] provisions like the French Lockean Natural Rights Clause. In explaining his theory of government, Paine emphasized the continued relevance of natural rights:

> Man did not enter into society in order to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights. n65

These same debates continued well into the nineteenth century with Jeremy Bentham and John Austin making important contributions to the debate on inalienable rights and positive law. Jeremy Bentham famously called natural law "nonsense upon stilts," n66 and he argued for a Posnerian embrace of utilitarianism in place of natural law. John Austin's positivism also undermined any commitment to natural and inalienable rights like those addressed in the Declaration of Independence. By the 1860s, shortly before the passage of the Fourteenth Amendment, John Stuart Mill had published *On Liberty*, a powerful defense of liberal individual rights. n67 Mill argued famously for a harm principle under which government can only intervene to prevent citizens from harming one another but not to protect them from harming themselves. n68 This exact idea is codified in the French Declaration of Rights of Man and of the Citizen, which provides:

> Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man [*877] has no other limits than those which assure to other members of society the enjoyment of the same rights. These limits can only be determined by the law. n69

Many of these debates anticipate our modern disagreements regarding the nature of these basic rights and the proper interpretation of broad language on unenumerated rights. In Michael H. v. Gerald D., Justice Antonin Scalia, writing for a plurality, and Justice William Brennan, writing in dissent, argued over whether abstract rights protection clauses ought to be interpreted at the most specific level of generality historically available, as Scalia said, or more abstractly, as Brennan argued. n70

The debate between Edmund Burke, Thomas Paine, and John Stuart Mill was also likely influential in the revisions to the Lockean Rights Clauses that occurred between the adoption in 1776 of the Virginia and Pennsylvanian Lockean Natural Rights Clauses and the twenty-four Lockean Natural rights Clauses as they would have been understood in 1868 when the Fourteenth Amendment was adopted. After comparing the texts of the twenty-four versions, we can make a few observations. First, if a Lockean Natural Rights clause appeared in the first adopted draft of a constitution, it still remained in that state's constitution in 1868. I am not aware of any instance of a state convention permanently removing a Lockean Rights clause altogether from its constitutional text between the Founding and 1868.

Second, nineteen of the twenty-four states included a Lockean Proviso in the original versions of the state constitutions; the remaining five added their Provisos at varying points prior to 1868. This was true of New Hampshire in 1784; of New Jersey in 1844; of Missouri in 1865; of South Carolina in 1865; and of North Carolina [*878] in 1868. This suggests widespread admiration of the Lockean Natural Rights Clause language, and it shows the strength in the United States of the Classical Liberal backdrop, which informs Richard Epstein's new book.

Third, there was a trend in the Nineteenth Century toward deleting the term "natural rights" from the various Lockean Rights Clauses-- perhaps because of Edmund Burke's opposition to Declarations of Rights and because of Jeremy Bentham's view that "natural law was nonsense upon stilts." Three states had deleted their original inclusion of natural rights in state constitutional conventions prior to the Civil War: Indiana, Ohio, and Pennsylvania. n71 [*879] And, by 1868, only five states--Maine, Massachusetts, New Hampshire, New Jersey, and Vermont--explicitly protected natural rights in their Lockean Rights Clauses. Moreover, none of the nine states that either created or amended their constitutions after 1860 included natural rights in their Lockean Rights Clauses to wit: Alabama, Florida, Louisiana, Missouri, North Carolina, Nebraska, Nevada, South Carolina, and Virginia. It is likely that Jeremy Bentham's view that "natural law was nonsense on stilts" and John Austin's embrace of legal positivism in the 1830's had an impact across the Atlantic in leading to the elimination of natural rights rhetoric. Professor Cover argues that Edmund Burke and Jeremy Bentham were influenced by David Hume in rejecting natural law and that the rejection of natural law in England was well under way "[b]y the last decade in the eighteenth century." n72 More broadly, the elimination of natural rights language shows that there was an ongoing debate in the Nineteenth Century as to what the Lockean Rights Clauses should say. Thus, the language of the Lockean Rights Clauses was clearly in flux during the period leading up to the adoption of the Fourteenth Amendment in 1868. Nonetheless, as Professor Farber explains:

> [*880] Natural law pervaded the thinking of antislavery Republicans, who later brought forth the

> Fourteenth Amendment. They were animated by the same vision of human rights that inspired the Framers. Building on the Ninth [Amendment] and the rest of the Bill of Rights, the Fourteenth subjected state governments to constitutional limitations, requiring them to provide due process and equal protection of the law and forbidding them from violating the 'privileges or immunities' of U.S. citizenship. n73

Professor Farber adds that:

> Antislavery Republicans like Lincoln ... considered the Declaration to be part of the law of nations and a cornerstone of American law. ... Adherence to the Declaration became a kind of touchstone for Republicans. In the 1860 platform, the party officially affirmed its belief in the 'principles promulgated in the Declaration of Independence and embodied in the federal Constitution,' and the Republican platform then quoted the key passage from the Declaration about equality and inalienable rights. [Abraham Lincoln] said 'I adhere to the Declaration of Independence [in the Lincoln-Douglas debates]. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.'
>
> [In the Gettysburg Address, Lincoln] said that the nation was founded on the proposition that 'all men are created [*881] equal,' and he ended his speech with a call for a new birth of freedom like that of the Revolutionary War generation. From beginning to end, Lincoln held to the Declaration's pronouncements as the keystone of the American national identity. n74

By 1867, the British North America Act, which became the Constitution of Canada was written and went into effect with detailed federalism provisions but no Bill of Rights or Lockean Natural Rights Clause at all. Similarly, the Australian Constitution Act of 1901 provided for judicially reviewable federalism and separation of powers boundaries but no Bill of Rights or Lockean Rights Clause whatsoever. A similar decision not to provide a Bill of Rights was made in founding British colonial documents for the governance of India, South Africa, and New Zealand. Section 91 of the British North America Act began not with a Lockean Natural Rights Clause but with a clause that empowered the Canadian national government to legislate to provide for the "Peace, Order, and Good Government" of Canada--the so-called POGG Clause. A similar Clause appears in the Australian Constitution of 1901. Edmund Burke's and Jeremy Bentham's rejection of Bills of Rights carried the day throughout the extensive British Empire.

The widespread belief throughout the Empire was that responsible parliamentary government and adherence to the common law made Bills of Rights antiquated and unnecessary. This view carried the day outside the United States until the horrors of the Nazis and of the Holocaust brought Bills of Rights back into fashion from 1945 on. Even in the United States, the Bill of Rights was not enforced against either the federal or state governments until the 1940's and the period of the Warren Court. Between 1905 and 1937, the U.S. [*882] Supreme Court did use the doctrine of substantive due process to protect some individual economic liberties, but widespread application of the Bill of Rights did not begin until the Supreme Court's decisions in *West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).*

B. EQUALITY

Another cornerstone of Professor Richard Epstein's classical liberal Constitution is a belief in a certain kind of equality. While Classical Liberals favor equality of opportunity but not equality of outcomes, classical liberalism is premised on a rejection of feudalism and of the idea that anyone is born a noble or a serf, a Brahmin or an untouchable, or a master or a slave. Equality of a certain kind is just as important to Classical Liberals as is Liberty itself, which is why the Declaration of Independence so memorably declares that "All men are created equal."

The Eighteenth Century concern with equality had deep roots, and it indeed grew out of the Reformation, which

emphasized that all men and women were equally children of God; capable themselves of reading the Bible; which was written not in Latin, Greek, or Hebrew, but in the vernacular; and which was available to everyone thanks to the invention of the printing press. Thus one can find from the 1640's on various striking assertions about human equality. The Massachusetts Body of Liberties, 1641, for example, provided in Article 2 that: "Every person within this Jurisdiction, Whether Inhabitant or forreiner shall enjoy the same justice and law, that is general for the plantation, which we constitute and execute one towards another without partialitie or delay." n75 This would seem to be on its face a forerunner of the Equal Protection [*883] Clause. In England in 1649, the famous poet John Milton--who was the house intellectual of Oliver Cromwell before he gave up on politics to be a poet -- justified the execution of King Charles I and the rejection of the Divine Right of Kings on equality grounds. Milton wrote that "No man who knows aught, can be so stupid to deny that all men naturally were born free, being the image and resemblance of God himself. . . . It follows . . . that since the king or magistrate holds his authority of the people, both originally and naturally for their good in the first place, and not his own, then may the people as oft as they shall judge it for the best, either choose him or reject him, retain him or depose him, though no tyrant, merely by the liberty and right of freeborn men to be governed as seems to them best." n76

Thomas Hobbes, writing in *Leviathan* said that "Nature has made men so equal in their faculties of the body and mind as that ... when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For as to the strength of the body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself. As to the faculties of the mind ...I find yet a greater equality among men than that of strength." n77

John Locke, writing in The Second Treatise of Government, said much the same thing. Locke wrote that:

> To understand political power right and derive it from its original we must consider what state all men are naturally [*884] in, and that is a state of perfect freedom to order their actions and possessions and persons as they think fit, within the bounds of nature, without asking leave or depending upon the will of any other man.
>
> A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties, should also be equal one amongst another without subordination or subjection; unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him by an evident and clear appointment an undoubted right to dominion and sovereignty. n78

This Lockean emphasis on freedom and equality in the state of nature clearly had an impact on the American revolutionaries. In the Virginia Declaration of Rights, George Mason wrote that "*all* men are by nature *equally* free and independent." He added that "government is, or ought to be, instituted for *the common benefit, protection, and security of the people, nation, or community*" and that "*no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary*." n79

The language above emphasizes the borrowing of the equality idea of John Milton's, and Thomas Hobbes's and of John Locke's. The Virginia Declaration of Rights was about inherent and inalienable rights of life, liberty, and property, but it was also about equality. [*885] No one should be born to or inherit either a high or a low social caste or status. As Thomas Jefferson said in rewriting George Mason's language in the Declaration of Independence:

> We hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The Lockean equality language of the Virginia Declaration of Rights appears as well in several other State Declarations of Rights, which were adopted at the time. The State of New York incorporated the entire Declaration of Independence in its State constitution of 1777. The State of Delaware declared on September 11, 1776 that: "Section 1. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole" and in Section 3: "That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society." Maryland in 1776 echoed its neighbor declaring in Section XXXIII of its 1776 Declaration of Rights "That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty. . . ." And, the Pennsylvania Constitution of 1776, adopted on September 28th much more impressively declared as in words stronger than Virginia's:

> I. That *all men are born equally free and independent*, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
>
> V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation [*886] or community; and not for the particular emolument or advantage of any single man, family, or soft of men, who are a part only of that community.

North Carolina similarly declared on December 18, 1776 that:

> III. That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.
>
> XXII. That no hereditary emoluments, privileges or honors ought to be granted or conferred in this State.
>
> XXIII. That *perpetuities and monopolies* are contrary to the genius of a free State, and ought not to be allowed. n80

Other State constitutions from the Founding period say much the same thing. South Carolina's equality guarantee was the narrowest saying only in Article "XXXVIII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. *That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges*."

Other States protected equality much more fully. Thus, the Massachusetts' Constitution of 1780 said that: "*All men are born free and equal,"* and that "No man, nor corporation, or association of men, have any other title *to obtain advantages, or particular and exclusive privileges, distinct from those of the community*, than what arises from the consideration of services rendered to the public;" and that [*887] "Government is instituted *for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men*. "

The New Hampshire Constitution of 1784 said that:

> *All men are born equally free and independent;* therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.
>
> II. All men have certain natural, essential, and inherent rights. among which are --the enjoying and defending life and liberty --acquiring, possessing and protecting property --and in a word, of seeking and obtaining happiness. .

> X. Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government.

A few states like New Jersey and Georgia did not use Lockean Bill of Rights language, and Connecticut and Rhode Island stayed with their colonial charters. The Rhode Island Charter issued by King Charles II in 1663 to Roger Williams had said that:

> That our royal will and pleasure is, that no person within the said colony, at any time hereafter shall be any wise molested, punished, disquieted, or called in question, *for any differences in opinion in matters of religion*, and do not actually disturb the civil peace of our said colony; but *that all and every person and persons* may, from time to time, and at all times hereafter, freely and fully have and enjoy his and their own judgments and consciences, in matters of religious [*888] concernments, throughout the tract of land hereafter mentioned, they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others, any law, statute, or clause therein contained, or to be contained, usage or custom of this realm, to the contrary hereof, in any wise notwithstanding. n81

In sum, I think it is crystal clear that the language of the Declaration of Independence about human equality was not an isolated rhetorical frill from the pen of Thomas Jefferson, a slave owner. Instead, it reflected widespread social acceptance of Lockeanism and of a Classical Liberal idea of equality in 1776 and later during the founding period more generally. This is evident as well, although less clearly in the text of the Articles of Confederation. Article IV of that document provided that:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, *the free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled *to all privileges and immunities of free citizens in the several States*.

This is a striking Clause. The words "free inhabitant" obviously includes free African Americans who could in fact vote in some Northern States. Moreover, the free inhabitants of the thirteen original States, African Americans included, are entitled to all of the privileges and immunities of free citizens in the several States. We saw above several "Privileges or Immunities Clauses" or "Common Benefit Clauses" and the language is always used in an anti-feudal [*889] sense to ban monopolies or hereditary rights. That is undoubtedly part of what it meant here. No State under the Articles of Confederation could set up a monopoly that disadvantaged out of State residents when they were within a State.

> The Constitution, of course, also has a Privileges and Immunities Clause in Article IV, Section 2, which says: "The Citizens of each State shall be entitled to all *Privileges and Immunities* of Citizens in the several States."

Who were the "Citizens of each State" in 1787 who became entitled "to all Privileges and Immunities of Citizens in the several States?" Article IV of the Articles of Confederation clearly answers that question. "The Citizens of each State" are "the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted." The formal text of the Articles of Confederation, and the Constitution were not followed perfectly in this regard at the Founding and were discarded when the Cotton Gin gave slavery a new lease on life in the early Nineteenth Century, but the Founding texts are quite clear in their commitment to equality at least as to privileges and immunities of state citizenship.

Of course, the objection to what I have just said is that the Framers of the Constitution made a deal with the Devil

to protect slavery in exchange for the South joining the Union. But, they did not do anything that legally revoked the citizenship of free African Americans and their entitlement to privileges and immunities. The Three-Fifths Clause, the Fugitive Slave Clause, and the allowance of importation of new slaves until 1868 were a great evil, but they did not take away the citizenship which the Articles of Confederation had granted and which Article IV, Section 2 of the Constitution protected.

[*890] The argument that all of the Framers repudiated equality so as to accept slavery is refuted in Charles Rappleye's *Sons of Providence: The Brown Brothers, the Slave Trade, and the American Revolution*. n82 Rappleye points out that abolitionist sentiment among at least some of the Framers was much stronger than most Americans realize today. As early as 1774, two years before Thomas Jefferson wrote the Declaration of Independence, "the second article of the Continental Association," said explicitly that: "We will neither import nor purchase, any slave imported after the first of December next; after which time we will wholly discontinue the slave trade, and will be neither concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it." n83 As I explain elsewhere, this was an astonishing step for the First Continental Congress to take toward abolition of slavery by a legislature which lacked constitutional powers and even a country of its own at the time. (evidently, some of those fighting for liberty from England in the 1770's appreciated there was something incongruous in their enslaving others). n84 After the adoption of this resolution, the slavery issue would not resurface in government until after peace with England was achieved in the 1780's. n85 Classical liberals at the time of the American founding did recognize that the institution of slavery was not compatible with a classical liberal constitutional legal order.

Moses Brown and other abolitionists petitioned the Continental Government set up under the Articles of Confederation to do something [*891] about slavery, but the national government was too weak to respond. The Continental Congress was able to ban slavery in the huge Northwest Territory, which became the free States of: Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. The Northwest Ordinance's ban on slavery ensured that a national government would grow up in the North, the Midwest, and the West that would eventually be strong enough to abolish slavery in the South and to win the Civil War. This is no small accomplishment for a bunch of Quaker abolitionists backed up by Benjamin Franklin and Alexander Hamilton who also opposed slavery. The Northwest Ordinance also laid the ground for the Missouri Compromise whereby slavery was banned in territories north of the Mason-Dixon line and allowed in territories south of that line. It was the Supreme Court's invalidation of the Missouri Compromise in the *Dred Scott Case, 60 U.S. 393 (1857)* that led most directly to the Civil War.

In 1790, Moses Brown petitioned the House of Representatives to do something to discourage slavery that it might be within federal power to do. James Madison agreed to help by saying he thought federal powers like the commerce power could be used to discourage immoralities. n86 As I have written elsewhere, with Moses Brown's leadership and James Madison's help Congress did pass a bill in 1794 entitled "An act to forbid the carrying on of the slave trade from the United States to any foreign place or country" with substantial enforcement penalties. n87 President George Washington signed the bill into federal law. In 1807, the Jefferson Administration abolished the international slave trade into or out of the United States as soon as this could possibly done. n88

[*892] Was the Framers' record on slavery spotless? Obviously not, as Professor Epstein acknowledges, but they did what they could to create a strong national government that would be powerful enough and motivated enough to eventually abolish slavery. Had the Articles of Confederation remained in place, the North would never have won the Civil War. Nor would slavery have been abolished in 1865 if the Continental Congress had not outlawed slavery in the Northwest Territories in 1787, which became the free States of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. The abolitionist effort made at the Founding is not as appreciated as it should be.

Moving forward in American history to the Jacksonian period, there was a huge growth in opposition to special interest groups enjoying special privileges, immunities, or monopolies not enjoyed by the common man equally. I have written about this with coauthors in *Monopolies and the Constitution: A History of Crony Capitalism, 36 Harv. J. L. Pub. Pol'y 983 (2013)* and in *Religions and the Equal Protection Clause: Why the Constitution Requires School*

Vouchers, 65 Florida L. Rev. 909 (2013), and I draw on this work in the next several paragraphs. A complaint about special privileges, immunities, and monopolies was at the very heart of President Jackson's campaign to kill the Bank of the United States, which he did kill and which stayed dead until 1913 when Woodrow Wilson created the Federal Reserve Board.

Abolitionists in the Jacksonian era and then during the Civil War and Reconstruction came to equate slavery, with hereditary social status, privileges, and immunities that made it suspect on egalitarian grounds. Basically, the slave owners monopolized the labor of their slaves, treated them dreadfully, and compensated them not at all. The debates on the ratification of the Fourteenth Amendment feature some great quotes to this effect. Consider, for example, the words of Massachusetts Senator Charles Sumner:

> [T]here shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with special powers and privileges, and [*893] there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law. n89

Senator Sumner elaborated, saying:

> A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a republic. It is Heathenism in religion and tyranny in government. The Brahmins and the Sudra in India from generation to generation, have been separated, as the two races are now separated in these States. If a Sudra presumed to sit on a Brahmin's carpet he was punished with banishment. But our recent rebels undertake to play the part of the Brahmins, and exclude citizens, on the ground of Caste, which according to its Portuguese origin, *casta* is only another term for race.

Consider, lastly, the following statement by Senator Sumner:

> The Rebellion began in two assumptions ... first, the sovereignty of the States with the pretended right of secession; and, secondly, the superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly on account of color. . . . The second showed itself at the beginning, when South Carolina alone, among the thirteen States, allowed her Constitution to be degraded by an exclusion on account of color. n90

Others during the 1860's made the same point as Sumner. Representative John F. Farnsworth said:

> [*894] As a moral being, as a man, I hate slavery in the States of this Union as I hate serfdom in Russia - which, by the way, is about to be abolished in that Empire, while we quarrel over the extension of slavery in this--just as I hate caste in India; just as I hate oppression everywhere. n91

Representative Norton Townshend, a Democrat from Ohio, said:

> I protest against all these interpolations into the Democratic creed, and against any interpretation of Democracy as makes it the ally of slavery and oppression. Democracy and slavery are directly antagonistic. Democracy is opposed to caste, slavery creates it; Democracy is opposed to special interest groups; slavery is but the privilege specially enjoyed by one class--to use another as brute beasts and take their labor without wages; Democracy is for elevating the laboring masses to the dignity of perfect manhood; slavery grinds the laborer into the very dust. . . ." [S]lavery is but the extreme of class legislation... [S]lavery is nothing more than the privilege some have of living out of others. n92

Cumulatively, what I take this history to help illustrate is Founding Era classical liberal concerns with hereditary privileges, immunities, monopolies, and preferential treatment came to undergird both Reconstruction and the three great constitutional amendments, which it produced. No reader needs my assurance to know that the both the Thirteenth

Amendment, abolishing slavery, and the Fourteenth Amendment abolishing all caste systems, including [*895] the racial caste system in the South, were all a great victory for equality in every way. The victory turned out to be fleeting, and it was woefully slow in delivering results, but with the Second Reconstruction in the 1960's the Reconstruction Amendment finally came to play the central, egalitarian role they were meant to play in our national life.

It is necessary to pause for a moment and describe how classical liberal ideals of liberty and equality came to be enshrined in the Fourteenth Amendment. At the end of the Civil War, President Lincoln was assassinated and his racist Vice President Andrew Johnson became president in his place. The Thirteenth Amendment, abolishing slavery, was passed with President Johnson's blessing, but having accomplished that goal President Johnson allowed the southern States of the Confederacy to re-establish their State governments and elect officials to State office. To the great consternation of the North, southerners elected many individuals who had held office under the Confederacy to State offices in 1865. The southern States also adopted Black Codes under which the freed African American slaves were denied the same common law rights to make contracts, own property, testify in court, and inherit as were enjoyed by white southerners. Congressional Republicans responded to the Black Codes by passing the Civil Rights Act of 1866, which said that all persons born in the United States were citizens of the United States and which gave "citizens of every race and color" the "same" common law rights as were "enjoyed by white citizens."

President Johnson vetoed the Civil Rights Act of 1866 on the ground that Congress did not have the enumerated power to pass it. Congress passed the Act by a two-thirds vote of both Houses over Johnson's veto, arguing that Section 2 of the Thirteenth Amendment gave Congress the power to protect the civil rights of the freed slaves, but many feared the 1866 Act might be held unconstitutional in the federal courts. Accordingly, Congress wrote and passed the Fourteenth Amendment to put the Civil Rights Act of 1866 into the Constitution for all time so no court or future Congress [*896] could easily disregard it. Section 1 of the Fourteenth Amendment protected equality and liberty in the following language:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence of the Amendment overrules the *Dred Scott* case and makes African Americans born in the United States citizens of the United States. The second sentence forbids the States from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." Professor Epstein's book barely discusses this Clause, which is a puzzle because to an originalist it is the Privileges or Immunities Clause that undergirds the classical liberal structure of the Fourteenth Amendment. Almost all the individual rights cases which Professor Epstein discusses in Part III of his book are really Privileges or Immunities Clauses cases, which makes Professor Epstein's inattention to the original meaning of this Clause a serious flaw in his book.

Let us begin by examining how the Privileges or Immunities Clause rendered the Black Codes unconstitutional and how it constitutionalized the rule of the Civil Rights Act of 1866. The Clause forbids on its face giving a lesser or "abridged" set of Privileges or Immunities to any citizen than are given to the citizenry as a whole. Forbidden "abridgments" can be imposed only on a class of citizens, like African Americans, or on one citizen as when individual liberty rights are denied. The verb "abridge" is used in an anti-discrimination law sense in the Fifteenth Amendment, which says that the right to vote shall not be "denied or abridged on account of race, color, or previous condition of servitude." But the verb [*897] "abridge" is used to protect individual rights in the First Amendment, which says that "Congress shall pass no law . . . abridging the freedom of speech or of the press." The Privileges or Immunities Clause thus contains both an anti-discrimination law principle and an individual liberties protection principle, which all originalists must agree that it constitutionalizes.

So what are the Privileges or Immunities of citizens of the United States, which the States cannot infringe? The

language of this clause is lifted from the Privileges and Immunities Clause of Article IV, Section 2, which in turn copied the Privileges and Immunities Clause of the Articles of Confederation. In those two contexts, the Privileges and Immunities Clause language was widely and correctly understood as giving out-of-state citizens who were temporarily resident in another State the same civil rights as that other state gave to its own citizens. In other words out of state residents visiting in another state enjoyed the same common law, statutory, and state constitutional law civil rights as were enjoyed by citizens of the host state, but out of state citizens did not have the political right to vote, run for office, or serve on a jury as did citizens of the host state nor did they have the same right to fish for oysters or otherwise use state property as did citizens of the host state. The Privileges or Immunities Clause of the Fourteenth Amendment thus conferred civil rights but not political rights or the right to use a state's property or resources on all persons born in the United States.

The Privileges or Immunities Clause protects the privileges or immunities of citizens of the United States, which include both privileges or immunities of state citizenship, like those just described, as well as privileges or immunities of federal citizenship, like those list in the Bill of Rights to the federal constitution. We know this to be true because the first sentence of the Fourteenth Amendment, which precedes the Privileges or Immunities Clause, explicitly declares that all persons born in the United States are citizens both of the United States *and of the state wherein they reside*. If the Privileges or Immunities Clause protected only privileges or immunities of national citizenship as the Supreme Court mistakenly held in the [*898] *Slaughter-House Cases*, it would be impossible to read the Fourteenth Amendment as banning the Black Codes, which we know the Amendment was meant to do as part of its core meaning. The Privileges or Immunities Clause is the only clause in the second sentence of the Fourteenth Amendment, which addresses the "making" of laws. It explicitly says that no state shall "make or enforce" any law which abridges privileges or immunities.

The Equal Protection Clause does not address the "making" of laws nor is it an anti-discrimination guarantee with respect to the making of laws. The noun in the Equal Protection Clause is "protection" while "equal" is only an adjective. For an originalist, the Equal Protection Clause guarantees that those laws which are already on the books will be used to protect *all* citizens from private violence, not only white, southern men. The text of the Equal Protection Clause guards against state failure to protect freed African Americans and northerners resident in the South from private violence and lynchings and assaults and batteries in the way in which white southern men were protected. The Due Process Clause of the Fourteenth Amendment, as originally understood, adds to this protection by forbidding state executive and judicial officials from depriving anyone of their life, liberty, or property except in accordance with statutes that conform to the constitution or after by a trial by a jury of their peers.

Section 1 of the Fourteenth Amendment, as thus explained, originally meant to protect the classical liberal values of both liberty and equality in a very robust way. The Privileges or Immunities Clause bars the states from abridging the federal Bill of Rights, thus incorporating it against the states, and it also forbids abridgments of liberty or equality as to civil rights of state citizenship. The words of the Fourteenth Amendment are a powerful guarantee of individual liberty and equality. Professor Epstein's failure to explain this clearly is a major weakness with Part III of his book.

The Supreme Court of the United States did eventually rule that Section 1 of the Fourteenth Amendment applies the U.S. Bill of Rights to the fifty states either through the Privileges or Immunities [*899] Clause, as Justices Hugo Black n93 and Clarence Thomas have argued, or through the vehicle of Substantive Due Process as Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito argue. n94 All of the nine current Justices have held that Section 1 of the Fourteenth Amendment protects at least some unenumerated rights. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito all claim that Section 1 of the Fourteenth Amendment protects only rights that are deeply rooted in American history and tradition while the other four Justices would protect natural liberties that are not deeply rooted in history and tradition as well. Since one of the rights that is most deeply rooted in American history and tradition is the Lockean recognition that "All men are born free and equal," the deeply rooted in American history and tradition test is ultimately circular. The constitutional protection of un-enumerated and new natural liberties is itself deeply rooted in Anglo-American history and tradition, as the *Case of the Monopolies* n95 and *Somersett's Case* illustrated prior to U.S. independence. Under the common law, all men and women are born free and equal and enjoy what Randy Barnett has

called a presumption of liberty.

This presumption of liberty is, however, "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole" as is explained in *Corfield v. Coryell* by Justice Bushrod Washington, George's nephew, in a case decided when he was riding circuit and which explicates the police power constraints on the Privileges and Immunities Clause of Article IV. n96 Specifically, Justice Washington said in *Corfield v. Coryell* that:

> [*900] The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

This language is the basis for both the Supreme Court's power to identify and protect fundamental rights and for the balancing which the Supreme Court engages and has always engaged in, even in the First Amendment area where rights are said to be fairly absolute. It explains why the Supreme Court thought in *Lochner v. New York, 198 U.S. 45 (1905)*, that the fundamental right of liberty of contract was nonetheless subject to reasonable regulations of the police power. This form of reasonableness review survived after the New Deal Constitutional Revolution of 1937 only as a rational basis test.

Between 1868 and 1920, the American classical liberal constitution was amended to provide for gender equality. Just as the Caste system of European feudalism led to a reliance on all men being created equal in the Declaration of Independence, and just as slavery and the Black Codes gave rise to the Reconstruction Amendment's guarantees of equality, the Caste system of traditional gender roles led to another great step toward equality when women got the right to vote in all federal and state elections in 1920. Later amendments have abolished poll taxes, given the District of Columbia [*901] electoral votes to cast in presidential elections, and have lowered the voting age in all federal and state elections to eighteen. The Ark of American history has egalitarian roots that go back to Seventeenth Century England and New England, and the U.S. concern with improving our record as to equality has had a global reach.

Unfortunately, constitutional equality guarantees came under siege in the United States between 1877 and 1954 thanks partly to Southern racism and partly to the writing of Thomas Malthus, Herbert Spencer, and Charles Darwin. Social Darwinists took the idea of the survival of the fittest as suggesting that all men were not created equal and that only those who were the most fit should survive, an idea that contributed to tragedies like the American Eugenics movement and the Holocaust. The statement of the French Revolutionary Declaration of the Rights of Man and of the Citizen in 1789 that "All men are born free and equal" came no longer to be believed in the late Nineteenth and early Twentieth Centuries. The text of the French Revolutionary Declaration, as inspired by George Mason's first draft of the Virginia Declaration of Rights, came to be disregarded with catastrophic consequences.

II. LIBERTY, EQUALITY, AND THE PROGRESSIVE ERA

The Progressive Movement, as described by Professor Epstein, in *The Classical Liberal Constitution*, rejected the separation of powers and federalism in favor of a strong national government by scientific experts concentrated on commissions like the Federal Trade Commission. This view was characteristic of the Progressives from the beginning. Woodrow Wilson made his name as a scholar by writing in opposition to the Framers' constitution of checks and balances and in support of the British parliamentary regime of Benjamin Disraeli and William Gladstone. Eventually, Progressive leaders in the U.S. opted for a stronger, more charismatic presidency as a way of concentrating government power. Progressive Presidents Theodore Roosevelt and Woodrow Wilson helped pave the way for [*902] the

unprecedented power of the New Deal President Franklin D. Roosevelt.

The Progressives thought the U.S. Constitution's system of checks and balances, separation of powers, and federalism was an outmoded relic of another age, and they hated judicial review, which often produced laissez-faire results during the *Lochner*-era between 1905 and 1937. As Professor Epstein explains, the Progressives favored government by scientific experts rather than by judges and they loved cartels. The best that can be said about the Progressives is that they fought and opposed corruption, they argued for a short ballot of elected officials so the voting public could make informed choices, and they fought some crony capitalists like the railroad monopolies who had gained their economic power with the collusion of the government, which had granted them powers of eminent domain to build their railroad networks.

The platform of the progressive movement was established during William Jennings Bryan's first run for the presidency in 1896-- a campaign that he lost in a landslide. But, much like Barry Goldwater, whose presidential bid was swamped in 1964, William Jennings Bryan's ideas transformed his political party--in this case turning the Democrats away from a century of advocating Jeffersonian-Jacksonian laissez-faire into a party favoring big government. The progressive movement was the American manifestation of the Social-Democratic parties that were struggling to be born in Europe at the beginning of the Twentieth Century such as the Labor Party in the United Kingdom. Key Progressive reforms included instituting the progressive income and inheritance taxes, mandating a forty-hour work week and a minimum wage, and banning child labor. The Progressives also favored unionization, which was promoted by the passage of the National Labor Relations Act during the New Deal.

Eventually, during the New Deal period, the Progressive New Dealers adopted the economic platform of the Italian Fascist leader Benito Mussolini, who FDR mistakenly thought represented the wave of the future. The National Industrial Relations Act or NIRA [*903] was adopted by Roosevelt and Congress in 1933, and it delegated to management and workers in every industry the power to propose a code of fair competition in each industry which would go into effect once promulgated by the President. The NIRA was a vast scheme for cartelizing the entire U.S. economy, and it delegated sweeping legislative powers to private actors and the President in the very same year the German parliament of the Weimar Republic put itself out of business by delegating all its legislative powers to the Nazi Chancellor, or Prime Minister, Adolph Hitler. The NIRA was struck down by a unanimous Supreme Court on both non-delegation and commerce clause grounds in one of the best and most consequential Supreme Court decisions in U.S. history. n97 The New Dealers were more successful in cartelizing agriculture and labor markets, but their most sweeping fascist initiative, the NIRA, was stopped by the Madisonian system of checks and balances.

I am not alone by any means in characterizing the NIRA and the early New Deal as being fascist. Wolfgang Schiuelbusch's *Three New Deals: Reflections on Roosevelt's America, Mussolini's Italy, and Hitler's Germany* extensively documents the similarities between FDR's economic policies and those of the Fascists and the Nazis (National Socialists) in Italy and Germany. The point is important enough to merit several paragraphs to document it. Schiuelbusch notes that in the 1930s many:

> Commentators freely noted areas of convergence among the New Deal, Fascism, and National Socialism. All three were considered postliberal state-capitalist or state-socialist systems, more closely related to one another than to classic Anglo-French liberalism. Hitler, Mussolini, and Roosevelt were seen as examples of plebiscite-based leadership: autocrats [*904] who came to power via varying but thoroughly legal means. n98

Classical liberalism's "nadir" in the Twentieth Century came in 1933:

> Fascism was celebrating its eleventh year in power, and with the election of the National Socialists in Germany, liberal democracy suffered an epochal defeat in Europe's largest industrialized nation. In March 1933, as a kind of symbolic confirmation of this triumphant momentum, a Fascist International was founded. At the beginning of the same month, Franklin Delano Roosevelt was inaugurated as

> president of the United States. . . .The broad-ranging powers that were granted to Roosevelt by Congress, before that body went into recess, were unprecedented in times of peace. Through this "delegation of powers," Congress had, in effect, temporarily done away with itself as the legislative branch of the government. The only remaining check on the power of the executive was the Supreme Court. n99

It must be noted in this regard than on March 23rd 1933, the German parliament passed the Enabling Act, transferring all of its legislative power to make laws to Reichschancellor Adolf Hitler, and German President Paul von Hindenburg signed it into law later that day. There was a lot of delegation of legislative power going on in Nazi Germany and in the U.S. in the Spring of 1933.

It was not just commentators who noted the similarities between Italian Fascism and FDR's National Industrial Recovery Act:

> [*905] [Franklin] Roosevelt himself once spoke in the presence of journalists of Mussolini and Stalin as his 'blood brothers.' And during the public unveiling of the National Industrial Recovery Act, when Roosevelt referred to the industrial associations that had been reconstituted by the codes [under that act] as 'modern guilds,' those fluent in the jargon may well have recognized the reference to the corporatist system associated with Fascism.
>
> In private, Roosevelt was much more frank about his sympathy for Mussolini and his interest in the Italian leader's economic and social order. In contrast to Hitler, with whom he always felt a world of social, ideological, and political differences, Roosevelt had nothing but 'sympathy and confidence' in Mussolini up until the mid-1930's [when Mussolini invaded Ethiopia]. 'I don't mind telling you in confidence,' FDR remarked to a White House correspondent, 'that I am keeping in fairly close touch with that admirable Italian gentleman.' [Roosevelt told his ambassador to Italy that] 'There seems to be no question that [Mussolini] is really interested in what we are doing and I am much interested and deeply impressed by what he has accomplished and by his evidenced honest purpose of restoring Italy.' ...
>
> There may be no definitive proof for the allegation that the head of the NRA, Hugh Johnson, was so taken by a book about Italian corporatism that he often gave it as a gift, but there is considerable evidence that argues for the pro-Fascist affinities within the inner and outer circles of the New Deal. n100

[*906] Americans were open to Fascism in the 1930's because so many American intellectuals were, as Judge Richard Posner is today, pragmatists who followed the teachings of John Dewey. Pragmatism:

> proceeded from the assumption that classical enlightened rationalism and liberalism were no longer adequate for the economic and social conditions that had arisen by the end of the nineteenth century. Thus, a number of pragmatist political and social thinkers were prepared to use trans- or postliberal methods to modernize the economy, society, the state, and public morality. No one suggested that individual liberties--one of liberalism's main achievements - be eradicated. But there was a high degree of acceptance for comprehensive state control, planning, and direction, as long as the economic and social goal remained a 'conscious, intelligent ordering of society.' Those were the words of pragmatist philosopher Herbert W. Schneider, a disciple of John Dewey's, who taught at Columbia University. Schneider also described Thomas Jefferson's ideals of the American republic as 'Jefferson's fascism.' . . . Pragmatist sympathizers viewed Fascism's emphasis on political repression as a regrettable but understandable secondary phenomenon. n101

I could go on for pages and pages documenting the similarities between the New Deal's and Mussolini's affinity for establishing cartels and for corporatism, but I think I have by now made clear the fundamental similarities between the economic policies of the U.S. and Italy in the 1930s.

[*907] Up to this point in this book review, I have largely agreed with the argument in Professor Epstein's *The Classical Liberal Constitution*, although he fails to note the fact that FDR borrowed his initial economic program from the Italian fascism of Benito Mussolini, which is a serious omission. I think Professor Epstein understates the damage done by Progressive and New Deal fascism to the American constitutional order precisely because he does not analyze the events in the U.S. between the 1890s and the 1930s in a global comparative constitutional law context. Rule by strongmen was institutionalized during this period in the German Empire, which lasted until the end of World War I and which many Germans wrongly assumed was being recreated by the Nazis in 1933. Mussolini had ruled Italy as a fascist dictator since the early 1920s. In Japan, the Meiji Constitution set up an imperial, Prussian style dictatorship, which was taken over by militaristic army officers in the 1930's who launched wars of aggression on the Asian mainland. Spain fell to a fascist dictatorship in the 1930s after a brutal civil war. Many South American regimes lapsed into fascism. All over the world, in the 1920s and 1930s, classical liberalism was in retreat while fascism and socialism were triumphant. The American manifestation of this phenomenon was the Progressive Movement and the New Deal.

Professor Epstein understates the evil caused by the Progressives and the New Dealers in part because he does not look at them in a comparative constitutional law context. The Progressives and the New Dealers were not content with merely arguing for national government cartels and an imperial, presidential dictatorship, as Professor Epstein implies. They were at least initially opposed to the whole Enlightenment project of Classical Liberal ideals of liberty and of equality as manifested in a judicially-enforced Bill of Rights. Not all Progressives opposed Enlightenment liberty and equality rights, but an important strain in the Progressive movement was to reject such Enlightenment rights in favor of centralized governance by scientific experts. It is important to tell the story of the fall of the Bill of Rights idea before we can understand its resurrection after 1945.

[*908] In Eighteenth Century America and in Revolutionary France, there was a fervent belief in the inherent, inalienable, and natural rights of man, which grew out of the Enlightenment. This belief is associated with the political philosopher John Locke who had a foundational influence on American constitutional law. Locke's belief in natural, inalienable human rights is fully reflected in the Virginia Declaration of Rights, in the Declaration of Independence, and in the French Revolutionary Declaration of the Rights of Man and of the Citizen.

In the early Nineteenth Century, however, as we have seen John Locke's belief in natural and inalienable rights came under withering attack by the English political philosopher Jeremy Bentham who argued for utilitarianism and who claimed that natural rights were nothing more than "nonsense on stilts." This argument built on Edmund Burke's ferocious attack on the French Revolution's Declaration of the Rights of Man and of the Citizen, which had been defended by Thomas Paine and on the work of David Hume who was also a late Eighteenth Century rights skeptic. n102 Jeremy Bentham's utilitarianism influenced even the great classical liberal thinker John Stuart Mill who became a classical liberal utilitarian as a result. The effect of Locke's and Mill's writings was that the British Empire and its Dominions of India, Canada, Australia, New Zealand, and South Africa all rejected the idea of written bills of rights in favor instead of responsible parliamentary government coupled with judicial protection of common law rights during the Nineteenth and Twentieth Centuries. In an era when responsible parliamentary government was identified with such legendary leaders as Benjamin Disraeli and William Gladstone this belief in parliamentary sovereignty is perhaps not so surprising.

[*909] It should also be noted that the U.S. Bill of Rights was not enforced by the U.S. Supreme Court either against the federal government or against the states until the 1940's. American judges did enforce the doctrine of substantive due process between the 1890's and the 1930's to protect some economic and personal liberties in cases like *Lochner v. New York, 198 U.S. 45 (1905); Meyer v. Nebraska, 262 U.S. 390 (1923);* and *Pierce v. Society of Sisters, 268 U.S. 510 (1925),* but such protection began to wane well before FDR's brutal court-packing plan of 1937 with decisions like the one in *Nebbia v. New York, 291 U.S. 502 (1934).* There was a steady diminution in the late Nineteenth and early Twentieth Centuries in the numbers of those who believed in Lockean natural and inalienable rights, and there was little elite philosophical or legal support for the idea of a judicially-enforced Bill of Rights. Liberty, as an ideal, was suffering from a sustained assault.

An even more insidious late Nineteenth Century idea that gained traction, however, was a repudiation of the Protestant Lockean idea of human equality and a growing Darwinian idea that some men were evolutionary better or more fit to survive than were others and that humankind was engaged in a Darwinian struggle for the survival of the fittest in which some races were more fit to survive and prosper than were others. This wicked thought fueled the European colonial empires, nativist immigration laws, and, in the U.S., the era of Jim Crow segregation and the eugenics movement. Social Darwinism appeared as early as 1843 in England when Charles Dickens wrote *A Christmas Carol* in which he excoriated the followers of Thomas Malthus who opposed charity because they thought the poor ought to be allowed to die off so as to reduce the surplus population. Malthus's hideous ideas gained a wider following and more receptiveness after Charles Darwin published his 1859 book on the *Origin of the Species*.

Today, written judicially enforceable Bills of Rights have taken hold even in such former parliamentary sovereignty democracies as the United Kingdom, France, India, South Africa, and Canada. New Zealand has a statutory Bill of Rights, which is enforced as well, [*910] and the Australian state of Victoria and Australia's Capital Territory also have a statutory Bill of rights. In addition, all the great newly emerged democracies of the Twentieth Century have opted for written, judicially enforced Bills of Rights like Germany's. What happened in the Nineteenth and early Twentieth Century that caused Bills of Rights and equality guarantees first to go out of style and later to return with a vengeance?

Bills of Rights and equality guarantees are premised on the idea expressed in the Declaration of Independence that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." As we noted above, this idea of human equality and of unalienable natural rights came under sustained attack in the Nineteenth Century thanks to the writings of the economist Thomas Malthus, the agnostic philosopher Herbert Spencer, and the naturalist Charles Darwin. Thomas Malthus, for example, "reasoned that a finite food supply would naturally inhibit a geometrically expanding human race" and he called for "population control by moral restraint." n103 "[Malthus] even argued that in many instances charitable assistance promoted generation-to-generation poverty and simply made no sense in the natural scheme of human progress." n104

The agnostic political philosopher Herbert Spencer added to this Malthusian argument in the 1850's the claim "that man and society ... followed the laws of cold science, not the will of a caring almighty God", and he "popularized a powerful new term: 'survival of the fittest.'" Spencer "declared that man and society were evolving according to their inherited nature. Through evolution, the [*911] 'fittest' would naturally continue to perfect society. And the 'unfit' would naturally become impoverished, less educated, and ultimately die off, as well they should." n105 Spencer implied that the well-off ought to let the poor die without offspring rather than perpetuate their bad genes.

Charles Darwin, in 1859, captured the imagination of the educated world by espousing "'natural selection' as the survival process governing most living things in a world of limited resources and changing environments. Darwin confirmed that his theory 'is the doctrine of Malthus applied with manifold force to the whole animal and vegetable kingdoms." n106 The thinking of Malthus, Spencer, and Darwin eventually coalesced into a belief in a term that Darwin himself never used, which was Social Darwinism. This was the belief "that in the struggle to survive in a harsh world, many humans were not only less worthy [but] were actually destined to wither away as a rite of progress. To preserve the weak and the needy was, in essence, an immoral and unnatural act." n107 Charles Darwin's cousin, Francis Galton, coined the term "eugenics" to mean good genes, and he helped found the Eugenics Movement, which was led in the United States by Charles Davenport, a direct descendant of the Reverend John Davenport, "the man who had founded the city of New Haven in 1638." n108

Social Darwinism poisoned the Christian and Protestant and Enlightenment idea of the Declaration of Independence that all men are created equal and are endowed with unalienable rights to life, liberty, and the pursuit of happiness. It gave rise to an international movement called eugenics, which began in the United States, with [*912] its paranoid fears of race mixing and miscegenation, and which spread from the U.S. to Nazi Germany where it culminated in the Holocaust. Many leading Progressives were also supporters of Eugenics. The supposed scientific basis for

eugenics appealed to Progressives who worshipped at the altar of supposed scientific expertise. In the United States, the eugenics movement served to validate the regime of Jim Crow segregation upheld as constitution in 1896 in *Plessy v. Ferguson* and the opposition to immigration from southern and eastern Europe which became the basis of federal immigration law in the 1920's. Edwin Black sums up the Progressive/Jim Crow eugenics movement in the following passage:

> The movement was called eugenics. It was conceived at the outset of the twentieth century and implemented by America's wealthiest, most powerful and most learned men against the nation's most vulnerable and helpless. Eugenicists sought to methodically terminate all the racial and ethnic social classes, they disliked or feared. It was nothing less than America's legalized campaign to breed a super race -- and not just any super race. Eugenicists wanted a purely Germanic and Nordic super race, enjoying biological domination over all others.
>
> Nor was America's crusade a mere domestic crime. Using the power of money, prestige and international academic exchanges, American eugenicists exported their philosophy to nations throughout the world, including Germany. Decades after a eugenics campaign of mass sterilization and involuntary incarceration of 'defectives' was institutionalized in the United States, the American effort to create a super Nordic race came to the attention of Adolf Hitler.
>
> Those declared unfit by Virginia did not know it, but they were connected to a global effort of money, manipulation and pseudoscience that stretched from rural America right into the sterilization wards, euthanasia vans and concentration camps of the Third Reich. Prior to World War II, the [*913] Nazis practiced eugenics with the open approval of America's eugenic crusaders. As Joseph DeJarnette, superintendent of Virginia's Western State Hospital complained in 1934, 'Hitler is beating us at our own game.'
>
> Eventually, out of sight of the world, in Buchenwald and Auschwitz, eugenic doctors like Josef Mengele would carry on the research begun years earlier with American financial support, including grants from the Rockefeller Foundation and the Carnegie Institution. Only after the secrets of Nazi eugenics horrified the world, only after Nuremberg declared compulsory sterilization a crime against humanity, did American eugenics recede. n109

Edwin Black concludes that:

> In page after page of *Mein Kampf*'s rantings, Hitler recited social Darwinian imperatives, condemned the concept of charity, and praised the policies of the United States and its quest for Nordic purity. Perhaps no passage better summarized Hitler's views than this from chapter 11: 'The Germanic inhabitant of the American continent, who has remained racially pure and unmixed, rose to be the master of the continent; he will remain the master as long as he does not fall a victim to defilement of the blood.' n110

Many leading Progressives supported the so-called "scientific" eugenics movement. President Theodore Roosevelt, for example, felt that the trend in the United States in the early Twentieth Century where people of northern European descent were having fewer children than people of southern and eastern European descent was [*914] a form of "race suicide," and he said that "Some day we will realize that the prime duty, the inescapable duty of the *good* citizen of the right type is to leave his or her blood behind him in the world; and that we have no business to permit the perpetuation of citizens of the wrong type." n111 Harry Brunius observes that:

> The inventor Alexander Graham Bell, the social crusader Margaret Sanger, and the administrators of the Harriman, Carnegie, and Rockefeller philanthropic foundations were each calling for state-sanctioned programs of better breeding. The editorial pages of newspapers such as the *New York Times*, scholars at Harvard, Yale, and Stanford, as well as professional associations of doctors and social workers were each urging the nation's legislatures to quell the rising tide of 'hereditary defectives.' n112

This racist-eugenicist view was shared by future British Prime Minister Sir Winston Churchill, who wrote Prime Minister Herbert Asquith when Churchill was Home Secretary to urge support for a sterilization bill that was before Parliament:

> The unnatural and increasingly rapid growth of the feebleminded and insane classes, coupled as it is with a steady restriction among all the thrifty, energetic and superior stock, constitutes a national and race danger which it is impossible to exaggerate. . . . I feel that the source from which all the streams of madness is fed should be cut off and sealed up before the year has passed. . . . [A] simple surgical operation [*915] would allow these individuals to live in the world without causing much inconvenience to others. n113

Bruinius observes that in the first quarter of the Twentieth Century "the United States became the pioneer in state-sanctioned programs to rid society of the 'unfit.'" n114

By 1923, twenty-three American states had enacted legislation providing for sterilization of those deemed mentally defective. n115 But "[a]lthough 6,244 state-sanctioned operations were logged from 1907 to July 1925, three-fourths of these were in just one state: California." n116 The eugenics movement in the U.S. concluded that it needed to get the imprimatur of the U.S. Supreme Court to support and spread its activities. This goal was finally accomplished in *Buck v. Bell, 274 U.S. 200 (1927)*, the opinion written by the legendary U.S. Supreme Court Justice Oliver Wendell Holmes. In that case, Justice Holmes famously wrote that:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. [*916] *Jacobson v. Massachusetts, 197 U.S. 11*. Three generations of imbeciles are enough.

Only Justice Butler dissented, and he gave no reasons for his dissent from a majority opinion by Justice Holmes, an icon of the Progressive Movement that Justice Louis Brandeis, another icon of the Progressive Movement, among others joined.

After the Supreme Court gave compulsory sterilization of the feeble minded a green light in *Buck v. Bell*, "no fewer than 35,878 men and women had been sterilized or castrated -- almost 30,000 of them after *Buck v. Bell"* itself. n117 Harry Bruinus claims that 65,000 men and women were compulsorily sterilized in the U.S. overall. n118 Buck's claim in *Buck v. Bell* was a substantive due process, or privileges or immunities clause, claim that she had an unenumerated constitutional law right that was deeply rooted in American history to be able to have children. As the Virginia Declaration of Rights declares: "[A]ll men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." The compulsory sterilization law in this case violated this clause, which is embodied in Section 1 of the Fourteenth Amendment, and was also not a just restraint, which the government could justly "prescribe for the general good of the whole" people. n119

Harry Bruinius observes that:

> [*917] In all, at least thirty states, as well as the territory of Puerto Rico, passed laws to quell the tide of hereditary defectives through forced sterilization. After 1927, this American technique of social engineering became the model for laws in Canada, Denmark, Finland, France, and Sweden. In 1933, in

> one of the first acts of the newly elected government of Reichschancellor Adolf Hitler, the National Socialist Party enacted a comprehensive sterilization law modeled consciously on American legislation. n120

Bruinius notes that in less than two years the Nazis sterilized over 150,000 German citizens under their "Law for the Prevention of Genetically Diseased Offspring. n121 Bruinus rightly adds that:

> The heaviest burden of the story of eugenics and forced sterilization, perhaps, is this American connection to the master race theories that culminated in the Holocaust. Hovering over history is the almost unbearable fact that the horrors of the twentieth century were not an outbreak of barbarism in Western culture. They were in many ways the consequences of thoroughly modern ideas, especially the notion that science and technology could eliminate supposed imperfections. ... At the Nuremberg Trials after the war, Nazi doctors defended their actions by citing American precedents, as well as the majority opinion of Oliver Wendell Holmes, Jr. who had sanctioned the forced sterilization of those he claimed were 'manifestly unfit from continuing their own kind.' n122

[*918] Fifteen years after *Buck v. Bell* the Supreme Court revisited the compulsory sterilization issue in *Skinner v. Oklahoma, 316 U.S. 535 (1945),* and although the Court did not overrule *Buck v. Bell* it, in effect, confined it to the ash heap of history. Justice Douglas wrote here that:

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari. . . .
>
> [T]here is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.
>
> We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma, grand larceny is a felony. Okla.Stats.Ann. Tit. 21, §§ 1705, 5. Larceny is grand larceny when the property taken exceeds $ 20 in value. *Id*., § 1704. Embezzlement is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled."*Id*., § 1462. Hence, he who embezzles property worth more than $ 20 is guilty of a felony. A clerk who appropriates over $ 20 from his employer's till (*id*. § 1456) and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony (*id*., § 1719), and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the [*919] property and fraudulently appropriates it, he is an embezzler. *Id*., § 1455. Hence, no matter how habitual his proclivities for embezzlement are, and no matter how often his conviction, he may not be sterilized. Thus, the nature of the two crimes is intrinsically the same, and they are punishable in the same manner.
>
> It was stated in *Buck v. Bell, supra,* that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is "the usual last resort of constitutional arguments." *274 U.S. p. 208.* But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law

> touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

For the record, Professor Epstein does not cite or discuss the implications of classical liberal constitutionalism of either *Buck v. Bell* or *Skinner v. Oklahoma* in *The Classical Liberal Constitution*. We think this omission is a major error.

[*920] Justice Oliver Wendell Holmes' progressive opinion in *Buck v. Bell* was repudiated by the Supreme Court in *Skinner v. Oklahoma* in 1945, but Holmes was by no means the only Progressive leader who supported eugenic racism. Consider, for example the campaign to legalize contraceptives, which was launched by one woman -- Margaret Sanger -- who helped to found Planned Parenthood. Edwin Black says the following about Margaret Sanger:

> Sanger was an ardent, self-confessed eugenicist, and she would turn her otherwise noble birth control organization into a tool for eugenics, which advocated for mass sterilization of so-called defectives, mass incarceration of the unfit and draconian immigration restrictions. Like other staunch eugenicists, Sanger vociferously opposed charitable efforts to uplift the downtrodden and deprived, and argued extensively that it was better that the cold and hungry be left without help, so that the eugenically superior strains could multiply without competition from the 'unfit.' She repeatedly referred to the lower classes and the unfit as 'human waste' not worthy of assistance, and proudly quoted the extreme eugenic view that human 'weeds' should be exterminated. n123

Sanger thought that legalized birth control might help to correct what she saw as the unfortunate fact that Americans of English, German, and Nordic stock were having fewer children than were newly arrived American immigrants from Southern and Eastern Europe. Sanger's advocacy of the legalization of birth control was thus simply another way for her to accomplish her goal of a eugenic policy for the United States.

[*921] Another leading progressive racist was President Woodrow Wilson himself. President Wilson was the son of a Confederate army officer who grew up in the segregated South. While serving as President of the United States, President Wilson arranged for the first ever, private screening of a new movie in the White House itself. The film chosen was *The Birth of a Nation*, a virulently racist movie, which became a major recruiting tool for the Ku Klux Klan, which enjoyed a resurgence in the post-World War I era. President Wilson supported Jim Crow segregation, and it was during his term as president that the visitors' galleries of the two Houses of Congress came to be segregated by race.

President Wilson's confederate heritage led him to be very sympathetic to nationalist movements at the Versailles Peace Conference at the end of World War I. Wilson championed national self-determination and supported breaking up the Classically Liberal Austro-Hungarian Empire into a collection of separate nation states thus sowing the seeds for endless conflict. He also favored breaking up the Ottoman Empire into nation states like Syria, Iraq, Lebanon, and Israel/Palestine thus fomenting warfare down to the present day. President Wilson's commitment to national self-determination in Europe made it impossible for the Western powers in the 1930s to oppose Germany's annexation of Austria and of the Sudetenland. The damage done by Wilson's "Progressive" thinking in international relations is quite literally incalculable.

To sum up, Professor Epstein criticizes the progressives merely for favoring a policy of cartelization at the national level and of excessive delegation of power to the President. These are quite valid criticisms, but they do not go nearly far enough. President Franklin D. Roosevelt got his ideas about the normative desirability of cartels from Fascist leader Benito Mussolini--a key fact which Professor Epstein fails to mention. The Progressive fascination with scientific expertise led not only to the creation of a few independent agencies but also to a eugenics movement, inspired by Social

Darwinism, that culminated in the Holocaust in Germany and the murder of six million European Jews. Even in the United States, between 35,000 [*922] and 65,000 men and women were compulsorily sterilized thanks to the Darwinian eugenics movement, and a racist national immigration law, targeted at southern and eastern Europeans, was put in place in the 1920s and was not repealed until the 1930s. n124 The flaws on progressive thinking were far deeper and led to much more evil than the mere creation of some monopolistic cartels.

Ideas have consequences. The replacement of Lockean natural and inalienable rights, and of the Protestant idea that "All men are born equal," with utilitarianism and Social Darwinism had consequences too. The rejection by the New Dealers of the Framers' Constitution of checks and balances with a Progressive document made possible such triumphs of New Deal constitutionalism as *Korematsu v. United States*. Overseas, this toxic brew of ideas led first to European imperialism and colonialism, then to World Wars I and II, and finally to the Holocaust. By 1945, the Western World had had enough of Progressivism and of National Socialism and Fascism. It was then that the long climb back toward Enlightenment Classical Liberal ideals began in earnest.

III. THE RISE OF NEO-LIBERALISM

In retrospect, the key moment of doctrinal triumph in Supreme Court caselaw for the Progressive/New Deal hostility to classical liberal ideals of liberty and equality came with the decision in *United States v. Carolene Products* n125. In that case, the Supreme Court announced that henceforth all economic and social legislation, which deprived people of life, liberty, or property would be rubber-stamped by the courts and would be upheld if it had any conceivable rational basis. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless [*923] in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." n126 In footnote four, which was appended to this sentence, Justice Stone held out the possibility of heightened scrutiny to protect liberty or equality in three possible situations:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. n127

[*924] Footnote four was all that remained of liberty and equality in 1938, but in a series of decisions thereafter the New Deal Supreme Court even as it eviscerated constitutional federalism began to incorporate the federal Bill of Rights so that it would apply against the States via the Fourteenth Amendment. The Old pre-New Deal Supreme Court had actually already incorporated the freedom of speech and of the press and the Takings Clause in: *Gitlow v. United States; n128 Near v. Minnesota*; n129; and in Chicago, Burlington & Quincy Railroad Co. v. City of Chicago. n130 The New Deal Supreme Court affirmed those cases and also incorporated: 1) the right not to be prohibited from freely exercising ones' religion, in *Cantwell v. Connecticut*; n131 2) the right to be free from an established church, in *Everson v. Board of Education*; n132 3) the right to a public trial and to notice of accusations, in *In re Oliver*; n133 and 4) the right to be free of unreasonable searches and seizures, in *Wolf v. Colorado*. n134 In addition, in *Adamson v. California*, n135 Justice Hugo Black wrote a powerful dissent that argued for the total incorporation of all of the

provisions of the Bill of Rights to apply through the Fourteenth Amendment against the States.

In the end, Justice Black's views carried the day as the Warren Court incorporated almost all the criminal procedural rules in the Federal Bill of Rights into the Fourteenth Amendment and, most recently, the Roberts' Court incorporated the Second Amendment in *McDonald v. City of Chicago*. n136 Professor Akhil Reed Amar has [*925] defended the propriety as a matter of original public meaning of the incorporation of the Bill of Rights quite powerfully in *The Bill of Rights: Creation and Reconstruction* (1998). Professor Epstein does not express a view on either the legal propriety or the normative appeal of the incorporation of the Bill of Rights nor does he respond to or refute Professor Amar's book defending incorporation. This is significant because the incorporation of the Bill of Rights to apply against the States has been a huge help to the cause of liberty both because the state laws that have been blocked as a result and because expansive case law developed in Fourteenth Amendment cases has been relied on in federal cases to fight back against acts of Congress and of the President. It seems like an odd omission for a book on *The Classical Liberal Constitution* that critiques the New Dealers for giving short shrift to liberty not to mention or give the New Dealers credit for something as momentous as the incorporation of the Bill of Rights.

Soon after beginning to incorporate the Bill of Rights against the States, the New Deal Supreme Court also issued one its most important liberty protective opinions of all time in the flag salute case: *West Virginia State Board of Education v. Barnette*. n137 The case concerned whether the government could compel students who were religious objectors to salute the flag and to say the pledge of allegiance. The Court overruled a recent case, which had upheld such laws and struck a powerful blow for liberty. As Justice Jackson said in his opinion for the court:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act [*926] their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. n138

Oddly, Professor Epstein does not mention or discuss this case either even though it is as clear-cut a triumph of classical liberal principles as one could hope for.

Barnette was decided in 1943 and two years later World War II came to a victorious end and the world learned for the first time about the horrors of the Nazi Holocaust in which 6 million Jewish people were murdered in a horrific act of genocide. In 1945 and 1946, the Allied powers tried a large number of top Nazi officials for war crimes and crimes against humanity. Justice Jackson took a special leave of absence from his duties on the Supreme Court to serve as one of the lead Allied prosecutors. The discovery of the Holocaust led the United Nations General Assembly in 1948 to ratify the Universal Declaration of Human Rights. In the first three Articles of the Universal Declaration, the world community essentially adopted a Lockean Proviso that embraced a right to liberty and equality for all persons. These three articles read as follows:

> Article 1.
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Article 2.
>
> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> [*927] Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person. n139

The Universal Declaration of Human Rights is by no means a perfect classical liberal constitutional document. It entitles people to positive rights from government of which many classical liberals disapprove, and it does not give adequate protection to property rights. But, when one compares the Universal Declaration of Human Rights with the Eugenics movement and the Holocaust which preceded it, it is hard not to think that the Declaration represents at least a partial restoration of the Enlightenment values of liberty and equality that came under such fierce assault during the Age of Jeremy Bentham and Charles Darwin. Like a phoenix from the ashes of Adolph Hitler's Concentration Camps liberty and equality rose again as core global values this time with the value of human dignity being added to the list.

In March 1944, Friedrich Hayek, a future Noble Laureate, published a scathing attack on socialism called *The Road to Serfdom*. Five years later, and just one year after the adoption of the Universal Declaration, George Orwell published his own momentous attack on Soviet communism *Nineteen Eighty-Four*. Hayek then published *The Constitution of Liberty* in 1960 and *Law, Legislation, and Liberty* in three volumes published in the 1970s. Together, all of [*928] these books slowly turned the intellectual tide all over the world away from socialism and back toward free market economics. Milton Friedman also contributed powerfully to the birth of neoliberalism with his publication of *Capitalism and Freedom* in 1962.

Strangely, Professor Epstein's *The Classical Liberal Constitution* does not mention Friedrich Hayek's life-long work on classical liberal constitutionalism once nor does he mention Orwell. Friedman is mentioned once for his belief in monetarism but not for his huge role as a classical liberal enthusiast. A more thorough account of the post New Deal Constitution ought to reflect on the triumph of classical liberalism between 1945 and the Glorious Revolutions of 1989 thanks to the political leadership of President Ronald Reagan and Prime Minister Margaret Thatcher who had both been admirers of Hayek's and Orwell's work. While Reagan and Thatcher did not succeed in dismantling Social Security, Medicare, or the U.K.'s National Public Health Service, they did succeed in establishing a neoliberal global economic order.

The post 1945 world order saw a vast expansion in freedom of trade as tariffs were everywhere reduced leading to a global economic boom. Of the twenty countries that belong to the Group of Twenty economies, which together account for 85% of global GDP, all but Russia, China, and Saudi Arabia are constitutional democracies with written constitutions that include a judicially enforceable bills of rights. Economic liberty continues to be under-valued in the European welfare states and by American leftist elites, but global trade and competition among nation states is pushing nations hard in a neo-liberal direction. The current Neo-Liberal World order is fragile, and powerful forces in Russia, China, and the Islamic World dissent from it, but all of North America and most of Europe and South America consist of neo-liberal regimes at the present moment, as well as important countries in Asia including India, Japan, Indonesia, South Korea, and the Philippines.

Classical liberals like Professor Epstein at this point will likely challenge my analysis so far by asking four important questions: 1) what about the stubborn persistence of the welfare state?; 2) what [*929] about President Obama's ongoing national healthcare fiasco in the United States?; 3) what about the interference with liberty of contract made by the Civil Rights Act of 1964?; and 4) what about the Supreme Court's atrocious decision in *Roe v. Wade*? Do all of these concerns imply that whatever neo-liberal rebirth that Reagan and Thatcher wrought has come to a failed end? The answer is a resounding "no."

First, as I said above, European countries are being squeezed economically to death by their social welfare states, and I think they will ultimately be forced to abandon them. This has already happened to some extent in the Nordic countries where the Netherlands, Denmark and lately Sweden have blazed a path toward economic freedom. The Heritage Foundation's 2014 Index of Economic Freedom list Denmark as the tenth most economically free country in the world while the Netherlands is fifteenth, Germany is eighteenth, and Sweden is twentieth. The United States comes

in at twelve while the United Kingdom is fourteenth. France is seventieth while Italy is eighty-sixth, but both those countries will quite simply go broke if they do not reform their welfare systems. So long as there is global free trade and no global warfare, the European welfare states are doomed and Europeans increasingly realize this and are hastening to reform along U.S. lines. All one needs is patience and time for this particular development to fully unfold.

It is true that the U.S. welfare state is quite entrenched as to social security and medical assistance to the elderly and the poor, but unions have not been as weak as they are today in the U.S. since 1937, thanks in large part to the Taft-Hartley Act of 1947, passed over President Truman's veto, which made constitutional-level adjustments to the National Labor Relations Act. There is more support in the U.S. today for actually implementing Milton Freidman's School Voucher idea than there has ever been before in U.S. history and many States and cities are experimenting with vouchers and with Charter Schools. Freedom of choice in education is slowly carrying the day. President George W. Bush tried and failed to convert social security into a system of individually managed retirement [*930] accounts, but this idea may yet succeed in a different political climate. Moreover, many classical liberal thinkers like Hayek, Friedman, and most recently John Tomasi n140 have argued for classical liberalism with a safety-net to set an economic floor below which no one should be allowed to fall. Reagan and Thatcher both championed this idea, and we think that neo-liberalism with a safety net still enjoys majority support both in the U.S. and in the U.K. Professor Epstein does not address, for example, Milton Friedman's argument for a negative income tax or Hayek's support for a social safety net. Classical liberalism can condone some redistribution of wealth at least for the poor.

The biggest challenge today to classical liberalism comes not from advocates for the poor or socialists but from crony capitalists who want to put the government's thumb on the scale that regulates how the "free" market works. Examples of this are abound in the U.S. For example, we spend a lot of taxpayer money subsidizing farmers. This quite frankly should stop. We also should reform the tax code to eliminate deductions and lower marginal income tax rates, and my best guess is that we will probably do so in the near future. Finally, we should eliminate the power of the states to regulate the health insurance industry in a way that creates a health care oligopoly or monopoly in every state by insulating in-state insurance companies from out-of-state competition. Make Blue Cross/Blue Shield of Illinois or of New York compete with Blue Cross/Blue Shield of Texas for customers and the price of health insurance will go down and the quality of health insurance will go up. The reason we have a health care crisis in the U.S. today is because Congress exempted health-insurers from the Dormant Commerce Clause in the McCarran-Ferguson Act. n141 That Act should be [*931] repealed or struck down by the courts as being unconstitutional. Getting rid of the McCarran-Ferguson Act would go a very long way toward solving our health care problems even if Obamacare is not repealed, which I personally do believe will eventually happen.

This then is the answer to the second of the three objections mentioned above. The passage of the Affordable Care Act is not a triumph of socialism over neo-liberalism. It is a triumph of Crony-Capitalism over neo-liberalism, which is a very important difference as I explain in *The Right to Buy Health Insurance Across State Lines*. n142 Why do the big health insurance companies like Blue Cross/Blue Shield want a mandate that the uninsured buy their health insurance? The answer is because they are used to operating in an oligopoly market where high prices and lousy service drive customers away. There was no free market in health insurance before the Affordable Care Act was passed. There were fifty state oligopoly markets in health insurance propped up by an income tax regime in which income was taxed but employer provided health benefits were not. We need a private health insurance company upstart, which can compete nationwide against all the current oligopoly providers of health care. We need to do in the health insurance market what Southwest Airlines did to TWA and Pan Am. By creating utter chaos as to health insurance, President Obama will bring to power forces that may finally open up the health care market to competitive free market forces.

It should be noted that there are many, many governmental interventions in the free market that may never be repealed but which progress has rendered irrelevant. Let me mention just two especially obvious examples. The federal government has and has always had a monopoly over the Post Office. I do not imagine that the Post [*932] Office will ever be privatized in my lifetime although it should be. But, the government postal monopoly has been made almost comically irrelevant first by the rise of Federal Express and UPS but most dramatically by e-mailing, texting, and using Twitter. The government has a monopoly alright, but it might as well be a monopoly over the buying and selling of quill

pens.

Second, the Federal Communications Commission continues to regulate broadcasting in ways that are both unnecessary and expensive, but the internet and the abolition of the Fairness Doctrine have made Walter Cronkite and the New York Times obsolete. Government can gum up the works in a free society, but so long as core political and economic liberty and equality are guaranteed, ingenious inventors will find an inexpensive and better alternative to whatever it is that the government is trying to sell. That does not mean that we should give up on efforts to privatize the Post Office or to create market property rights in the broadcasting spectrum, but it does mean that the government's power to do harm is significantly curtailed.

This leads me then to the third objection that a classical liberal might make to our current constitutional order, which is the complaint that the Civil Rights Act of 1964 violates liberty of contract by forbidding discrimination on the basis of race, sex, religion, and disability. This argument calls to my mind Senator Charles Sumner's labeling of the southern Black Codes as being systems of caste, feudalism, and monopoly in the way that they limited the rights of freed African Americans on the basis of race. Professor Epstein, of course, must agree as a classical liberal that state action that discriminates on the basis of race, as did the Black Codes and the Jim Crow laws, violates the guarantee that "All men are born free and equal" that was featured in the Lockean Provisos. The abolition of Jim Crow by *Brown v. Board of Education* and *Loving v. Virginia* was thus a great triumph of Classical Liberal constitutionalism in 1954 and 1967 during the height of the High Liberal New Deal and Great Society.

[*933] Nor can the importance of *Brown* be undermined by arguing that classical liberals do not believe in a right to a publicly financed education. Thirty-six out of thirty-seven States in 1868, when the Fourteenth Amendment was ratified, explicitly recognized that the States had a duty at that time to provide children with a publicly financed education. If any right is deeply rooted in American history and tradition it is the right of a child to a publicly financed education. Of the eleven States which wrote new Constitutions immediately after American independence in 1776, at least four guaranteed children the right to a publicly funded education. n143 *Brown v. Board of Education* is a triumph of American Classical Liberalism in the Hayekian-Friedman line of thought. Professor Epstein almost apologizes for it in his book, but he need not do so.

But what about the infringement on liberty of contract made by the employment discrimination laws? Isn't this aspect of the Neo-Liberal consensus today inconsistent with *The Classical Liberal Constitution*. The answer is "no" for the same reason that the Sherman Antitrust Act is not inconsistent with *The Classical Liberal Constitution*. The most dangerous and pernicious monopolies and oligopolies are without a doubt those cartels that are fostered by government like the McCarran-Ferguson Act's exemption of health insurance from the Antitrust laws and the Dormant Commerce Clause, but there can be situations where private economic actors attempt to unlawfully restrain trade or exert monopoly power. Professor Epstein has no quarrel that I am aware of with the Antitrust laws so long as they read to promote consumer welfare as they have been ever since the seminal work of Robert Bork and Richard Posner. I submit that in 1964--a mere ten years after the dismantling of Jim Crow segregation and only 99 years after the abolition of slavery -- [*934] there was in many parts of the country a custom of not contracting with African Americans that was unfair, irrational, and deep-seated and that was inconsistent with the principle that "All men are born free and equal." The Civil Rights Act of 1964, like the Sherman Antitrust Act of 1890, was needed to bust up a private monopoly of economic actors that were still following habits that were formed during the more than two hundred years of African American slavery and the more than eight decades of Jim Crow. So understood, the Civil Rights Act of 1964 is no more irreconcilable with *The Classical Liberal Constitution* than is the Sherman Antitrust Act of 1890, which also regulates liberty of contract. Senator Charles Sumner's condemnation of the South's treatment of African Americans was exactly right. As Senator Sumner said:

> [T]here shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with special powers and privileges, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law. n144

Men cannot be "free and equal" in a society where the 72% of the population that is white will not make contracts with the 12.6% of the population that is African American. Thank God we banned private race discrimination when we did.

This leads me to a fourth and final question that a Classical Liberal like Professor Epstein might ask about--what should a Classical Liberal constitutionalist in the American tradition think about the three key modern substantive due process cases: *Griswold v. Connecticut; n145 Roe v. Wade*; n146 and *Lawrence v. Texas*; n147 as well as [*935] three older substantive due process cases, *Lochner v. New York; n148 Meyer v. Nebraska* n149 and *Pierce v. Society of Sisters*, n150 as well as the key substantive equal protection clause decision in *Skinner v. Oklahoma*, n151 which effectively overruled *Buck v. Bell*? I will discuss these six cases one at a time in the order in which they were decided.

Lochner v. New York overturned a criminal conviction of Joseph Lochner for employing a man to work for him as a baker for more than sixty hours a week in violation of New York state law. Justice Rufus Peckham held that the word "liberty" in the Due Process Clause of the Fourteenth Amendment included the right to work whatever hours one wanted to work in a profession that was not clearly and obviously dangerous like mining coal. Finding the profession of baking to be not especially dangerous, Justice Peckham struck down the New York state maximum hours law on the ground that it was not a reasonable exercise of the police power. n152 Justice Harlan dissented on the ground that baking was a dangerous profession and that the New York state legislature had not made a clear mistake while Justice Holmes would have upheld practically any economic or social legislation that had a rational basis. n153

Which Justice was right in this famous case? I agree with Judge Robert H. Bork's critique of Justice Peckham's substantive due process argument, n154 but I also agree with Professor Bruce Ackerman [*936] that Classical Liberal originalists need to come to grips with the original meaning of the Privileges or Immunities Clause. n155 Twenty-four states out of thirty-seven in 1868 when the Fourteenth Amendment was ratified had Lockean Natural Rights Clauses in their state constitutions, which protected unenumerated liberty rights. George Mason's first draft of Virginia's Lockean Natural Rights Clause, which is the draft that was the most widely copied, said, for example, that:

> That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, derive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety. n156

This first draft Lockean Natural rights Clause is in my opinion deeply rooted in American history and tradition, and it constitutes a Privilege or Immunity of state citizenship, which "No State shall abridge." One cannot enjoy one's inherent freedom and independence nor one's inherent natural Right to Enjoy Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety if the government can prevent you from working when you really want to work. There is therefore a Privileges or Immunities Clause liberty interest which is implicated by the New York state law forbidding bakers from working for more than sixty hours a week. The next question for an originalist is [*937] whether the New York state law is a just law enacted for the general good of the whole people.

It is helpful at this point to consult again what Justice Bushrod Washington said about the privileges and immunities clause of Article IV, Section 2 in *Corfield v. Coryell* while riding circuit. Justice Washington's dictum was widely praised by the authors of the Fourteenth Amendment and helps capture the rights those framers thought the amendment protected as well as the police power limitation the framers thought that these rights were subject to. Professor Epstein's *The Classical Liberal Constitution* talks about and rightly acknowledges that there are police power limitations on rights, but he does not cite any historical sources that explain where that power comes from and how it is defined. The answer is that the police power comes from Justice Washington's dictum in *Corfield v. Coryell*. Consider again the following famous statement:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no

> hesitation in confining these expressions to those privileges and immunities which are, *in their nature, fundamental*; which belong, of right, to the citizens of all free governments; *and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign*. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such* [*938] *restraints as the government may justly prescribe for the general good of the whole*. n157

I have put three phrases in the quotation above in italics. First, Justice Washington endorses the idea that some rights are "in their nature fundamental." This constitutes an endorsement of the appeal of many of the Lockean Rights Clauses to natural and inalienable rights. Second, Justice Washington does endorse the deeply rooted in history and tradition test of *Washington v. Glucksberg* n158 when he describes protected rights as including those "which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." Finally, Justice Washington offers us the only textual or legislative history description that I know of as to the scope of the police power upon which Professor Epstein relies upon so much. Justice Washington says that all privileges and immunities are "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole" people. Police power limits on rights must thus be: (1) *just;* and (2) enacted for *the general good of the whole people* and not merely to benefit a special interest group or faction.

So to return to *Lochner v. New York*, I agree with Justice Peckham that liberty of contract, including the liberty to work for as long as you want to, is constitutionally protected by the Privileges or Immunities Clause of the Fourteenth Amendment, but it must still be established that Lochner's particular claim of liberty of contract cannot be trumped by the police power as it is described in *Corfield v. Coryell*. Liberty of contract is not limitless nor is it free of regulatory limitation. Lochnerian liberty of contract is "*subject nevertheless to such restraints as the government may justly prescribe for the* [*939] *general good of the whole*." n159 Thus, contractual liberty to engage in dueling or prostitution or polygamy can be regulated under the morals head of the police power, as Professor Epstein acknowledges, because the laws against those practices are *just* laws *enacted for the general good of the whole people*. It is even arguable that a minimum wage law or a law banning child labor might be a just law enacted for the good of the whole people if it eliminates legal rights that would demean human dignity and if they encourage a vicious competition that hurts workers who would otherwise earn a little bit more than the minimum wage. I do not want to push my support for the outcome in *Lochner* very far. I just think that I as a law professor have a constitutional liberty right to work more than sixty hours a week, which I exercise, and that the government has no right to come in and tell me to stop working nor does it have such a right for some engaged in the very ordinary profession of baking. The Supreme Court in *Lochner* expresses "a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare." n160 Justice Peckham adds that:

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect [*940] of the language employed, and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78.* The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins, 118 U. S. 356.* n161

The four dissenters in *Lochner* offer no defense to the claim that the legislation at issue was enacted to cartelize the baking industry and reduce competition and not out of a genuine concern for public health. As a result, I think *Lochner*

v. New York was decided correctly. A law limiting coal miners to an 8 hour work day might well be a just law enacted for the general good of the whole people given the extreme dangers associated with coal mining. Justice Peckham made it quite clear, however, in his majority opinion that he thought the law in *Lochner* was not a general law enacted for the good of the whole people but was instead a special interest, cartel-creating law that protected politically influential established bakers from hard-working immigrant competitors. Neither Justice Harlan's dissent nor Justice Holmes dissent takes issue with this claim in Justice Peckham's opinion -- a claim that quite frankly seems to be more likely correct than not. I am therefore led to the conclusion that *Lochner* was correctly decided, that the liberty protected by the Privileges or Immunities Clause includes liberty of contract, and that the intrusion made on this liberty by the state of New York was unconstitutional. *Lochner v. New York* reached the correct outcome using the wrong constitutional clause and reasoning.

I turn next to *Meyer v. Nebraska*, which overturned a criminal conviction of Meyer who was fined for teaching German in violation [*941] of a Nebraska law, which in 1920, shortly after World War I, forbade the teaching of German or indeed of any foreign language to junior high school or elementary school students. Justice McReynolds wrote the opinion for the Supreme Court while Progressive icon Oliver Wendell Holmes again dissented in his usual statist way. Justice McReynolds said that the word "liberty" in the Due Process Clause of the Fourteenth Amendment:

> [w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (citations omitted) . . .
>
> Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment. n162

I again do not buy the majority's substantive due process view in this case for the reasons Judge Robert H. Bork expressed in *The* [*942] *Tempting of America* (1990), n163 but I do think that two Fourteenth Amendment privileges or immunities arguments support Justice McReynolds outcome and suggest that Justice Oliver Wendell Holmes was embarrassingly wrong in this case. First, I think that there is quite clearly a First Amendment freedom of speech right to communicate in and to educate children in whatever language one wants to use. Languages can be "translated", but as anyone who has studied even one foreign language knows all too well the translated word often carries different connotations from those carried by the original. Communication requires that one use *le mot juste* for every occasion. Freedom of communication quite simply requires the freedom to express oneself in the language of ones' choice as the Canadian Supreme Court explicitly held in *Ford v. Quebec* n164 when it held unconstitutional a Quebec law, which penalized shopkeepers in the Province of Quebec from advertising their shop with a sign written in French with an English translation below the French. The Quebecois wanted the public space of their Province to be free of English translations of signs. The Canadian Supreme Court found this to be an incredibly easy case on free speech grounds as did Justice McReynolds, but progressive icon Justice Oliver Wendell Holmes was too statist and cynical to realize that. Justice Holmes would have upheld a chilling ban on the teaching of foreign languages in elementary school and in junior high school for essentially no good reason at all.

Second, twenty-four states out of thirty-seven in 1868 had Lockean Natural Rights Clauses in their state constitutions which said in essence that all men are born free and equal and have an inherent natural, inalienable right to enjoy life and liberty by exercising, [*943] as Justice McReynolds put it, "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." n165 As with the *Case of the Monopolies* n166 and with *Somersett's Case*, n167 the baseline of the common law is one of protecting the orderly exercise of liberty. There

is, in addition, contrary to the *Slaughter-House Cases*, n168 a right to pursue an occupation subject to such just laws as may be enacted for the general good of the whole people. n169 *Meyer v. Nebraska* is an easy case. Justice McReynolds is right and Justice Holmes is wrong.

The next case to come along was *Pierce v. Society of Sisters* in 1925, which concerned an Oregon state law banning private school education and especially designed by anti-immigrant groups to shut down Catholic parochial schools. The Society of Sisters challenged the constitutionality of the Oregon ban on private schools and the Supreme Court ruled that the liberty protected by the Fourteenth Amendment's Due Process Clause protected the liberty to educate one's own children in a private school and especially in a private religious school. Justice McReynolds again wrote the opinion of the Court striking down the Oregon statute on substantive due process grounds. n170 Justice McReynolds remained of the view he expressed in *Meyer* that parents have a liberty right to direct the education and religious schooling of their children so long as they do not interfere with the public peace or good morals in the process, which clearly was not an issue here. This time even statist Justice Oliver Wendell Holmes signed Justice McReyonlds liberty-enhancing opinion.

[*944] I again do not buy the substantive due process argument of McReynold's opinion for the Court, but the case is clearly rightly decided for many different reasons. First, the Privileges or Immunities Clause plainly incorporate the free exercise of religion clause against the States, and Oregon's effort to ban parochial schools was a blatant violation of the free exercise clause. Second, one cannot enjoy one's inherent freedom and independence nor one's inherent natural Right to Enjoy Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety if the government can prevent you from controlling your children's education, including their religious education. This is a blatant violation of the inherent liberty which is presumed by the common law in such decisions as the *Case of the Monopolies* or *Somersett's Case*. There is simply no deeply rooted police power right at common law to control the education of other peoples' children. Professor Randy Barnett's presumption of liberty should carry the day.

I turn next to *Skinner v. Oklahoma* n171 which implicitly overruled Justice Oliver Wendell Holmes' paean to eugenics laws in *Buck v. Bell. Skinner v. Oklahoma* is written as a substantive equal protection case rather than as a substantive due process case because the New Deal justices in 1942--a mere five years after the New Deal Revolution of 1937--would have been justifiably embarrassed to decide an important case on substantive due process grounds. Substantive Due Process is an oxymoron like "Green pastel redness" as John Hart Ely said in *Democracy and Distrust: A Theory of Judicial Review* (1980), and I thoroughly agree with both Judge Robert Bork's book criticizing substantive due process and with Professor Bruce Ackerman's argument for such a doctrine under the Privileges or [*945] Immunities Clause--looking especially to liberties long recognized at common law.

English judges and laws imposed many barbaric punishments over the past 800 years including drawing and quartering, torture on the rack, garroting, cropping off of one's ears, branding, and whipping or beating as a corporal punishment. I am not aware of a single instance prior to the late Nineteenth Century of imposition of eugenics laws or of compulsory sterilization of both men and women either on grounds of imbecility or as a punishment for a crime. The global revulsion over the news of the holocaust confirms that eugenics and sterilization laws are now regarded as being crimes against humanity. Moreover, if the natural state of man at the common law was one of liberty, as the *Case of the Monopolies* and *Somersett's Case* suggest, than the imposition of this unprecedented sanction and burden on liberty is unconstitutional. Compulsory sterilization and eugenics laws are not by any stretch of the imagination just laws enacted for the general good of the whole people.

I turn next to *Griswold v. Connecticut*, n172 which concerned the constitutionality under the Fourteenth Amendment of a Connecticut law, which was almost never enforced, that banned the selling or provision of contraceptives to married couples. Almost no other state in the union had such a law on its statute books when the *Griswold* case was decided. Professor Epstein criticizes the decision in *Griswold v. Connecticut*, and he says somewhat loosely that laws against contraceptives can be upheld under the morals head of the state police power. I think Professor Epstein is insufficiently rigorous in his analysis of *Griswold* and that he is therefore wrong in criticizing the Supreme

Court's opinion.

The first issue is whether the right to use contraceptives by married couples is a privilege or immunity of state citizenship as [*946] those words were originally understood when the Fourteenth Amendment was originally adopted in 1868. As I have argued thus far, twenty-four States in 1868 had Lockean Provisos in their state constitutions and this Lockean Proviso language is thus itself a right that is deeply rooted in American history and tradition. Once again, George Mason's first draft of Virginia's Lockean Proviso, which is the draft that was the most widely copied, said:

> That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, derive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety. n173

Men and women who are married simply cannot be said to be born "free and independent" with an "inherent natural right" to "Enjoy Liberty" and with the means of "pursueing and obtaining Happiness and Safety" if they are denied access to contraceptives. Just as the common law presumption of liberty carried the day for Sir Edward Coke in the *Case of the Monopolies* and for Lord Mansfield in *Somersett's Case*, so too should the presumption of liberty have carried the day in *Griswold v. Connecticut*. Anyone who doubts this should read Randy Barnett's *Restoring the Lost Constitution*--a defense of libertarianism in reading the U.S. Constitution, which Professor Epstein does not cite and with which he wrongly refuses to engage. Professor Epstein counters that *Griswold* was wrongly decided because laws against contraception were valid under what he describes as the morals head of the police power . It is here that Professor Epstein's casual importation of concepts like the police [*947] power from the common law into U.S. constitutional law, however, fails. The framers never adopted the morals head of the police power as such, but they instead understood the police powers as trumping rights in Justice Bushrod Washington's terms because all constitutional rights are held "*subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole*." n174 This then raises the question of whether Connecticut's rarely enforced ban on married couples obtaining contraceptives was a "just" law enacted for "the good of the whole people." The stated purpose of the law was to protect marriage by making adultery risky for married persons who might end up conceiving a child.

At a minimum, it might be said of the law in *Griswold* that it failed any kind of sensible proportionality review of the kind conducted by Justice Byron White in his *Griswold* concurrence n175 because the means used were so burdensome and disproportionate to the ends that were sought to be achieved that the whole law could not possibly have been upheld by the courts. But, I think the flaw with the law in *Griswold* runs deeper than that. The law in question sought to impose the religious view of Puritan and Catholic Christians that all couples ought never to use contraceptives and should have as many children as they could have on many other Connecticut citizens who had different religious and philosophical views. In doing this, the Connecticut law in my opinion violated the religious freedom of mainline Protestants, many Jewish people, and of hedonists who might perfectly well think that sex within marriage for pleasure and without fear of conception is a good thing. The law in question was thus neither "just" nor was it enacted for "the general good of the whole" people. Its retention in 1965 reflected the political power of religious traditionalists, who were at best a special interest [*948] or faction that did not speak for the whole people of Connecticut. It is for precisely this reason that the law was never enforced.

One cannot as Professor Epstein does in *The Classical Liberal Constitution* just wave a wand and utter the words "the morals head of the police power" and thereby sanction the constitutionality of all morals laws under the Fourteenth Amendment. I agree with Professor Epstein that laws against, for example, dueling, prostitution, polygamy, and heroin use are "just" laws enacted for "the general good of the whole people" and are thus constitutional. But, I do not think the morals head of the police power could be used to forbid dancing, or playing music in public, or wearing brightly colored rather than black clothes, or celebrating Christmas with songs and dances even though the Puritans who settled Massachusetts and Connecticut absolutely believed that the morals head of the police power forbade all of those things. There is a morals head to the police power but under the Fourteenth Amendment it can only be enacted by a "just" law that promotes the general good of the whole people. The Connecticut birth control law fails this very simple test.

The next big unenumerated rights case is *Roe v. Wade* in which the Supreme Court struck down the abortion laws of all fifty States and created a rigid trimester scheme under which the States could only prohibit the availability of abortions during the third trimester of pregnancy, which is to say after 27 weeks. n176 *Roe* is one of the most criticized and debated judicial opinions of all time, and Professor Epstein, early in his scholarly career, wrote a powerful critique of Justice Blackmun's opinion. *Roe* was retrenched a bit in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, which got rid of the trimester test and instead allowed the States to forbid abortion from the time of viability at about 24 weeks on. n177 *Casey* [*949] also upheld state laws imposing a parental notification requirement when underage children seek an abortion and a twenty-four hour waiting period before obtaining an abortion after requesting one. Even Justice Ruth Bader Ginsburg, the pioneering legal advocate of women's rights, suggested in her confirmation hearings that *Roe* had tried to do too much, too fast, all in one case.

Is there a Fourteenth Amendment right for a woman to have an abortion when the government seeks to prohibit this? The test for the existence of such a right depends again on the first draft of George Mason's Lockean Proviso for the Virginia Declaration of Rights. Mason's draft talks of rights that vest at birth and not of rights that vest at conception, but it seems likely that this wording is inadvertent and due mainly to the limited medical knowledge about the facts of fetal development in 1776. William Blackstone explained in his *Commentaries on the Laws of England* that:

> Life begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is *quick* with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor. n178

Some five hundred years before Blackstone, Henry de Bracton explained the ancient law as providing that:

> If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the fetus is already formed or [*950] quickened, especially if it is quickened, he commits homicide. n179

Quickening occurs as early as the fifteenth week of pregnancy in some women, and so under the common law backdrop to the Lockean Provisos one could plausibly argue that the government's interest in an duty to protect fetal life begins as early as the fifteenth week of pregnancy and possibly even earlier.

On the other hand, as a general matter human liberty is understood under the common law as protecting a right to bodily integrity. The private non-consensual touching of another person's body is a tort while governmental intrusions on bodily integrity have quite rightly been held to violate the liberty secured by the Fourteenth Amendment in cases like *Rochin v. California*, n180 where compulsory stomach-pumping by the police was held to be unconstitutional because it shocked Justice Felix Frankfurter's conscience. *Rochin* is rightly decided in my opinion on Privileges or Immunities Clause/Lockean Proviso grounds. There is, in my opinion, an inherent liberty interest in bodily integrity that can only be trumped by just laws enacted for the general good of the whole people like compulsory vaccination laws. n181

Classical liberalism and libertarianism offer no answer to the question of whether laws against abortion are desirable and, if so, at what time in the process of fetal development. Laws against abortion do violate the bodily integrity of women and would be unconstitutional if it were not for the state's legitimate interest in and duty toward the developing fetal life. The question of when life begins is at bottom a religious and a philosophical question as well as being [*951] a scientific question, and many have thus concluded, as did Judge Robert H. Bork in *The Tempting of America*, that the abortion question is inherently a political question that the courts ought never to decide.

My own view is that life certainly does not begin until after conception and implantation of the conceived egg in the uterine wall. I therefore have no qualms at all about either the legality or the morality of stem cell research or about the legal availability of the morning after pill. Indeed, I would go so far as to say that there is a constitutional right to use the morning after pill. But, once a conceived egg has been implanted in the uterine wall that constitutional right

comes to an end. I would say that the government interest in protecting fetal life begins at least by the tenth week of pregnancy when fetal movement, unfelt by the mother, begins and possibly much sooner. At ten weeks of pregnancy, there is a fetal heartbeat, there is a fetal capacity to respond to external stimuli, which may mean an ability to feel pain, and there is fetal brain activity. Based on my own scientific, religious, and philosophical views, I think women have a constitutional right to use morning after pills, but I think the government can constitutionally regulate abortions at any time after implantation of the conceived egg has occurred. *Roe v. Wade* and *Casey* are thus wrongly way overbroad, although women do have a constitutionally protected interest in bodily integrity which ought to allow for use of the morning after pill. We should all take into account the caveat that, as science progresses, and as we learn more about the facts of fetal development, the window during which abortion is available should shrink. As a moral matter, I am opposed to all abortions, although not to stem cell research or the use of the morning after pill, because I think that where there is doubt as to whether life exists we should presume [*952] that life does exist rather than that it does not. We should err on the side of life.

The next major substantive due process case after *Roe* and *Casey* is *Washington v. Glucksberg*, n182 in which the Supreme Court found that a terminally ill patient had no Fourteenth Amendment right to physician assisted suicide. Suicide was a crime at common law and was traditionally punished by the government taking over all the property and ownership rights of the person who committed suicide. The taking of one's own life could, however, be justified under the theory that a person's right to bodily integrity might include a right to end his life, particularly in the face of a debilitating illness. There is therefore a liberty interest at stake in the assisted suicide cases decided by the Supreme Court.

That liberty interest is trumped, however, by the government's interest in protecting the life of the person who seeks to commit suicide, by the government's interest in protecting the family and friends of the person who wants to commit suicide, and by the government's interest in preventing the corruption of the medical profession from a group of people devoted to preserving life and health to a group of people with a financial interest in ending life. Suicidal thoughts are almost always due to the phenomenon of depression and low serotonin levels in the brain -- a fact that has only been fully appreciated in the last twenty years. Almost all suicidal people will decide that they really want to live if the serotonin levels in their brains are raised, even those with debilitating illnesses. Laws against assisted suicide are without a doubt "just" laws enacted for "the general good of the whole" people and are well within the morals head of the police power. *Washington v. Glucksberg* was thus correctly decided.

[*953] The next major substantive due process case was *Lawrence v. Texas*, n183 which concerned the constitutionality of laws against heterosexual and homosexual sodomy. The first issue raised by this case is again whether there is a Privileges or Immunities Clause or Lockean Proviso interest in having oral or anal sexual relations. Once again, the test for the existence of such a right depends again on the first draft of George Mason's Lockean Proviso for the Virginia Declaration of Rights where Mason said:

> That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, derive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety. n184

Do laws against sodomy interfere with an "inherent natural Right" to "Enjoy . . . Life and Liberty" and to pursue and obtain "Happiness and Safety?" The traditional answer under the common law was that there was no such right, and for much of our history both heterosexual and homosexual sodomy have been legally punishable, although the laws proscribing sodomy have been laxly and haphazardly enforced. Justice Scalia is of the view that only rights that are deeply rooted in history and tradition at the most specific level of generality available are constitutionally protected. Under this test, as he explains in his dissent in *Lawrence*, the criminal punishment of sodomy is constitutional.

I think there is clearly an inherent natural liberty interest which is implicated in *Lawrence* as well as an interest in pursuing and obtaining [*954] "Happiness and Safety." Just as common law liberty was held by Sir Edward Coke to

include a right to practice your trade in the *Case of the Monopolies*, and just as Lord Mansfield held that human slavery was a violation of the common law of England in *Somersett's Case*, so too is there an inherent natural liberty to have nonproceative sexual relations with other consenting adults. It is true that this right is not deeply rooted in history and tradition at the most specific level of generality available, but the same could well have been said of the rights to be free of monopolies or of slavery. Underlying the common law, there is what Professor Randy Barnett might call a presumption of liberty. We saw above that the Lockeian Provisos helped to inspire the writing of the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789; Article 4 of which reads as follows:

> Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law. n185

The Enlightenment philosophers who produced our Lockean Natural Rights Clauses and the French Declaration of Rights believed in John Stuart Mill's harm principle sixty years before *On Liberty* was published. At some level, it might even be said that the harm principle itself is deeply rooted in American history and tradition. Hence, Professor Barnett's presumption of liberty in *Restoring the Lost Constitution*.

If there is, as I have argued, a Fourteenth Amendment right to have non-procreative sexual relations with one other consenting [*955] adult who is not being paid to have sex, then does the moral head of the police power trump that right? Are sodomy laws "just" laws enacted for "the general good of the whole" people? No. Heterosexual sodomy laws have been enforced so sporadically and so arbitrarily and capriciously that no one can honestly believe today that such laws are just laws that promote the general good of the whole people. The overwhelming majority of Americans engage in nonprocreative sex at some point in their lives as do long married couples who because of their age can no longer have children. Outlawing something that everybody does to some degree is an invitation for prosecutorial abuse of power and arbitrary and capricious law-enforcement.

It could be and is argued that oral and anal sex being nonprocreative are unnatural and ought thus to be proscribed unlike the sexual relations of a long married couple who are too old to have children where non-procreative sex is seen as being completely natural in most religions. But the fact of the matter is that ideas about what sexual activity is are very culturally contingent, and in many cultures including our own non-procreative sexual relations and oral and anal sex are commonly practiced. The same point applies as to homosexual oral and anal sex. Again, the proscription on such sex has been very culturally contingent, and gay sexual relations were commonplace in Ancient Greece and Rome. I have no doubt that some people are born to be gays and lesbians and that other people are born bisexual and can choose whether or not to have homosexual relations, but I do not think it is "just" or in "the general interest of the whole" people for the government to outlaw sodomy or homosexuality. Many classical liberals have always agreed as, for example, did Milton Friedman.

This leaves me then with Justice Scalia's parade of horribles in his *Lawrence* dissent--that adoption of the harm principle leads to abortion, the legalization of suicide, prostitution, polygamy, and a constitutional right to take drugs. But the harm principle, properly conceived, does not prevent regulation of those activities. I have already dealt with the abortion and suicide horribles and have explained [*956] in both those cases why the government has an interest in criminalizing behavior there. I will now explain why I think laws against prostitution and polygamy are both desirable and constitutional. The fact of the matter is that prostitution and polygamy are not usually a victimless crimes. Usually, the victims of these crimes are women. Women are poorer and less powerful all over the world than are men, and they are much more likely therefore than are men to be induced to sell their bodies or to join a polygamous marriage with one man and multiple wives. Just as classical liberals ought to oppose contracts into slavery, so too should classical liberals should oppose contracts that demean the equal freedom and dignity of women. The morals head of the police power has always and should continue to criminally punish prostitution and polygamy. Laws that do this are just laws enacted for the general good of the whole people.

As to a constitutional right to take drugs, I think such a right exists but that it can be trumped constitutionally by

just laws enacted for the general good of the whole people. No-one has a right to commit suicide, or to get someone else's assistance in committing suicide, so it follows that no-one has a right to take life endangering drugs like heroin, opium, cocaine, or even to smoke or chew tobacco. There is no right to commit suicide either swiftly with a gun or slowly by poisoning yourself. Food and drug regulation involve complex scientific questions, quickly changing facts on the ground, and questions about what levels of regulation the culture can tolerate. As a practical matter, this means that while people may have a liberty interest in taking a drug the courts ought to defer to the political process in cases where the regulation of drugs can fairly be described as being just and as promoting the general good of the whole people. Drug regulations should be upheld wherever there is a rational basis for doing so. Drug use, like suicide, is not a victimless crime. The victims of drug abuse include not only the abuser but also his family and his friends. The harm principle is a valid principle, but only if one has both a broad and I think a realistic conception of what sorts of things cause harms.

[*957] The final recent Fourteenth Amendment substantive due process case is *McDonald v. City of Chicago*, n186 in which the Supreme Court held that the Second Amendment right to keep and bear arms is incorporated by the Fourteenth Amendment to apply against the States. Oddly, Professor Epstein criticizes this decision while most American Classical Liberals and Libertarians tend to support it. Does the Privileges or Immunities Clause of the Fourteenth Amendment, as informed by the Lockean Natural Rights Clauses, create a Fourteenth Amendment right to keep and bear arms? Consider here the Pennsylvania Lockean Natural Rights Clause of 1776, which stated:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. n187

The property language of the Pennsylvania Lockean Natural Rights Clause is more representative of the Lockean Clauses in place in 1868 when the Fourteenth Amendment was ratified than was the property language of the George Mason draft I have hitherto used. Does the "natural, inherent and inalienable right" to "acquire[], possess[], and protect[] property" include an individual right to keep and bear arms? The answer is clearly yes. One of the chief ways by which Americans "protected" their property and their lives both in 1791 and in 1868 was by possessing a gun. The Lockean Provisos make it crystal clear that the Supreme Court reached the right result in *McDonald v. City of Chicago*, although only [*958] Justice Thomas arrived at that result under the correct clause of the Fourteenth Amendment.

Gun rights are regulable by both the federal and state governments, which can enact "just" laws for "the general good of the whole" people that curtail gun rights. I will not specify at this point on how broad the police power to regulate guns is. Bans on machine guns and privately owned tanks or nuclear bombs are clearly just laws enacted for the general good of the whole people.

Overall, the post New Deal Supreme Court gets a mixed report card from classical liberals like myself when it comes to substantive due process liberty cases. I have come to the conclusion over the last 35 years that *Griswold v. Connecticut; Washington v. Glucksberg; Lawrence v. Texas;* and *McDonald v. City of Chicago* are rightly decided. These cases are in my opinion very important victories for Enlightenment classical liberalism even though Professor Epstein seems mostly not to agree. On these cases, I agree with Professor Randy Barnett and disagree with Professor Richard Epstein. These triumphs of classical liberalism are, however, rendered tragic by their doctrinal association with *Roe v. Wade* and *Casey* both of which quite wrongly recognize a right to abortion after ten weeks of pregnancy. By one count, there have been over 56 million abortions conducted in the U.S. since *Roe v. Wade* was decided in 1973, many of them abortions of fetuses who were aborted after more than 10 weeks of pregnancy. By comparison, somewhere between 225,000 and 300,000 people died as a result of the dropping of the atomic bombs on Hiroshima and Nagasaki. It is clear to me as a classical liberal that the costs of the post-New Deal substantive due process caselaw have greatly exceeded the benefits.

* * *

This then concludes my discussion of the recent Neoliberal revival as it has manifested itself in the Supreme Court's Fourteenth Amendment substantive due process caselaw read in light of the Lockean Natural Rights Clauses discussed above in Part I. I hope I [*959] have made it clear that contrary to Professor Epstein's argument in *The Classical Liberal Constitution*, the United States is not today enamored either by Progressive cartels or by the evisceration of the written Constitution through the rational basis test. To the contrary, there has been a reawakening in the last sixty years of interest in and support for Classical Liberalism, which I have called the Neo-Liberal revival. Twentieth and Twenty-First Century neoliberalism differs in Hayekian ways from Nineteenth Century classical liberalism in that it endorses the existence of a welfare safety net and it bans discrimination in employment, but the forces of liberty have been in my opinion much stronger and more dominant since 1945 than they were between 1877 and 1945 during the Age of Jeremy Bentham and of Charles Darwin. Modern day ordinary Americans are seriously interested in Richard Epstein's ideas, in Randy Barnett's ideas, and in Michael McConnell's ideas, but they have no use for the crude utilitarianism and "pragmatism" of Richard Posner. The Holocaust led the world to a new appreciation for the Enlightenment values of the Eighteenth Century and which inspired the Fourteenth Amendment. Happily, America's original constitution embodies many of those Enlightenment values. For this reason alone we should celebrate it and revisit some of the non-originalist caselaw that departed from our classical liberal constitution between 1877 and 1945.

IV. CONCLUSION

The Classical Liberal Constitution is a splendid book by a splendid law professor and a magnificent friend and mentor. I have learned an immense amount over the years from Professor Richard Epstein and am sure I will learn more in the years to come. He is a wonderful and treasured friend.

In summary, I have reached three conclusions each of which is covered by a section of my book review. First, I think Professor Epstein's 583 page book if anything understates the depth of the [*960] American commitment to the classical liberal ideals of liberty and equality during the period from 1776 to 1877. I hope my readers will conclude that I have successfully documented the classical liberal zeitgeist in which the text of the Constitution and of the Reconstruction Amendment were written. Second, I think Professor Epstein's book fails to fully appreciate the global nature of the attack on Enlightenment ideals of liberty and of equality, which began to manifest themselves in U.S. law after 1877. The Progressive movement and its advocacy of cartels and of legal realism and nihilism were but the U.S. manifestation of a global crisis of faith, which reached a peak of destructiveness in the 1930s and 1940s. Ultimately, these ideas led to Nazism, the Holocaust, and the Second World War. Finally, I think Professor Epstein fails to appreciate the rise of what I have called Neo-Liberalism in the U.S. from the 1940s to the present day. The abolition of Jim Crow, the incorporation of the Bill of Rights, and the recent revival of interest in the original meaning of the Constitution and in federalism and the separation of powers is more consequential in a classically liberal way than Professor Epstein seems to think.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressGeneral OverviewConstitutional LawInvoluntary Servitude

FOOTNOTES:

n1 *See* Richard A. Epstein, *The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387 (1987).*

n2 RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

n3 *See Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).*

n4 *How Many of Our Presidents Owned Slaves*?, THE HAUENSTEIN CENTER (May 29, 2012) http://hauensteincenter.org/slaveholding/.

n5 MASS. CONST. of 1780, art. I, VI, VII (emphasis added).

n6 *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

n7 The English Bill of Rights of 1689, available at http://avalon.law.yale.edu/17th_century/england.asp, reads, in part, as follows:

"An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown

Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight [old style date] present unto their Majesties, then called and known by the names and style of William and Mary, prince and princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz.: ***

That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;

That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;

That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;

That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;

That election of members of Parliament ought to be free;

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;

And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.

*** Having therefore an entire confidence that his said Highness the prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights which they have here asserted, and from all other attempts upon their religion, rights and liberties, the said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve that William and Mary, prince and princess of Orange, be and be declared king and queen of England, France and Ireland and the dominions thereunto belonging, ***."

n8 Donald S. Lutz, *The States and the U.S. Bill of Rights, 16 S. Ill. U. L.J. 251, 251-258 (1992)* [hereinafter *The States and the Bill of Rights*].

n9 Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 PUBLIUS, Spring 1992, at 19-20, 27-29 [hereinafter *The State Constitutional Pedigree*].

n10 *See* Calabresi & Leibowitz, *Monopolies & The Constitution, 36 HARV. J.L. & PUB. POL'Y 983, 996-1003 (2013).*

n11 DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 23 (2007).

n12 *Id*. at 22.

n13 *Id*. at 23-24.

n14 J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1987).

n15 ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 11 (1975).

n16 *Id*. at 12.

n17 *Id*. at 14 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS).

n18 *Id*. at 11.

n19 *Id*. at 15.

n20 *Somerset v. Stewart, (1772) 98 Eng. Rep. 499* (K.B.).

n21 *See e.g.*, GEORG JELLINEK. THE DECLARATION OF THE RIGHTS OF MAN AND OF THE

CITIZEN: A CONTRIBUTION TO MODERN HISTORY (Max Farrand trans., 1901) (1895); Steven G. Calabresi, Sarah E. Agudo, & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?, 85 S. CAL. L. R. 1544-1547 (2012).*

n22 VIRGINIA DECLARATION OF RIGHTS, 1776 (emphasis added).

n23 Section 5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part, of the former members, to be again eligible, or ineligible, as the laws shall direct.

Section 6. That elections of members to serve as representatives of the people, in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

Section 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

Section 8. That in all capital or criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers.

Section 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

Section 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

Section 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

Section 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Section 14. That the people have a right to uniform government; and, therefore, that no government separate

from or independent of the government of Virginia ought to be erected or established within the limits thereof.

Section 15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity toward each other.

n24 In the discussion below in the next several pages, I draw directly from my forthcoming law review article with Sofia M. Vickery, which discusses this topic, entitled *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Provisos,* TEX. L.REV. (forthcoming Fall 2014).

n25 BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 67 (1992).

n26 Cover, *supra* note 15, at 43.

n27 Cover, *supra* note 15, at 69.

n28 George Mason, *Remarks on Annual Elections for the Fairfax Independent Company, in* 1 THE PAPERS OF GEORGE MASON 1725-1792, 229 (Robert A. Rutland ed., 1775). As the editor notes: "Because of the exactness of the language used, it could be argued (but not proved) that GM had a copy of these remarks before him while drafting the 1776 [Virginia Constitution]."

n29 First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 277.

n30 First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 275 (Editorial Note on the First Draft of the Virginia Declaration of Rights).

n31 *Id*.

n32 *Id*. at 289. At the time these changes were made, Lord Mansfield had declared in *Somersett's Case* in Great Britain that slavery was abhorrent under natural law and that only positive law could suffice to authorize it. Since positive law did not explicitly authorize slavery in England, Lord Mansfield held that a slave brought to London became free upon his arrival in England. *See Somersett's Case (1772) 98 Eng. Rep. 499* (K.B.).

n33 Brent Tarter, *The Virginia Declaration of Rights*, *in* TO SECURE THE BLESSINGS OF LIBERTY: RIGHTS IN AMERICAN HISTORY 37, 46 (Josephine F. Pacheco ed., 1993).

n34 *Id. See also* THOMAS B. MCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY, 18 (2000).

n35 *See infra* Part III.

n36 George Mason, *Final Draft of the Virginia Declaration of Rights* (June 1776), *in* PAPERS, *supra* note 28, at 287.

n37 A.E. Dick Howard, *From Mason to Modern Times: 200 Years of American Rights*, in THE LEGACY OF GEORGE MASON 95, 98 (Josephine F. Pacheco ed. 1983).

n38 HELEN HILL, GEORGE MASON: CONSTITUTIONALIST 140 (1938).

n39 JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. VI § 54, ch. VII, § 87 (1690).

n40 George Mason, *Editorial Note on First Draft of the Virginia Declaration of Rights* (May 1776), *in* PAPERS, *supra* note 28, at 279.

n41 *See* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 128-29 (2000) (discussing the literature available in the colonies in 1776 on the right of happiness).

n42 SCHWARTZ, *supra* note 25, at 72-74.

n43 SCHWARTZ, *supra* note 25, at 72-74.

n44 George Mason, Editorial Note on First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 276.

n45 George Mason, Editorial Note on First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 276.

n46 George Mason, Editorial Note on First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 276.

n47 PA. CONST., art I, §§ 1-28 (1776).

n48 *See* Calabresi & Agudo, *supra* note 24.

n49 PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 104 (1997).

n50 *Id*. at 133-34.

n51 *Id*. at 165.

n52 One scholar has even argued that Virginia's Lockean Rights Clause influenced the modern Universal Declaration of Human Rights adopted by the United Nations in 1948. David Little, National Rights and Human Rights: The International Imperative, *in* NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON 67 (Robert P. Davidow ed., 1986).

n53 George Mason, Editorial Note on First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 286.

n54 *Id*.

n55 Jellinek, *supra* note 21, at 18.

n56 Jellinek, *supra* note 21, at 18; Maier, *supra* note 49, at 168.

n57 Jellinek, *supra* note 21, at 18, 19.

n58 Jellinek, *supra* note 21, at 20, 21.

n59 FRENCH DECLARATION OF THE RIGHTS OF MAN, art. I (1789).

n60 *Id*. at art. II.

n61 GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 20 (Max Farrand trans. 1901).

n62 *The States and the Bill of Rights*, *supra* note 8; *The State Constitutional Pedigree*, *supra* note 9.

n63 Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense.

The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.

As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.

No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be entrusted.

A general tax is indispensable for the maintenance of the public force and for the expenses of administration; it ought to be equally apportioned among all citizens according to their means.

All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the

public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.

Society has the right to require of every public agent an account of his administration.

A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.

Property being an inviolable and sacred right, no one can be deprived of it, unless demanded by public necessity, legally constituted, explicitly demands it, and under the condition of a just and prior indemnity.

n64 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

n65 THOMAS PAINE, RIGHTS OF MAN (1791).

n66 Jeremy Bentham, *Anarchical Fallacies: Being An Examination of the Declaration of Rights Issued During the French Revolution, in* 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., 1843).

n67 JOHN STUART MILL, ON LIBERTY (1859).

n68 *Id.*

n69 FRENCH DECLARATION OF THE RIGHTS OF MAN, art. IV (1789).

n70 *Michael H. v. Gerald D., 491 U.S. 110 (1989).*

n71 The Pennsylvania, Indiana, and Ohio constitutional conventions deleted natural rights language from their Lockean Rights Clauses at some point before 1868. The following text compares their Lockean Rights Clauses as existing in 1868 with the prior version of their Provisos that included natural rights. The italicized bracketed

text represents the deleted language. The Pennsylvania constitutional convention of 1790 was the first convention to delete the natural rights reference.

> That all men are born equally free and independent, and have certain [natural] inherent and [inalienable] indefeasible rights, [amongst] among which are those of [the] enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing [and obtaining] their own happiness [and safety].

Compare PA. DECLARATION OF RIGHTS, art. I (1776), *with* PA. CONST., art. IX (1790).

More than fifty years later, in 1851, both the Indiana and Ohio constitutional conventions removed natural rights from their Rights Clauses.

> We declare that all men are created equal [born equally free and independent]; that they are endowed by their Creator with certain unalienable rights [and have certain natural inherent, and unalienable rights]; that among these [which] are [the enjoying and defending] life, [and] liberty, and [of acquiring, possessing and protecting property and] the [pursuing and obtaining] pursuit of happiness [and safety] . . ."

Compare IND. CONST. art. I (1851), *with* IND. CONST. art. I (1816).

The Ohio Constitutional Convention made very similar revisions to its Lockean Rights Clauses.

> All men are, [born equally] by nature, free and independent, and have certain [natural, inherent, and] unalienable rights, [amongst] among which are those of [the] enjoying and defending [of] life and liberty, acquiring, possessing, and protecting property, and [pursuing] seeking and obtaining happiness and safety."

Compare OHIO CONST. art. I, § 1, *with* OHIO CONST. art. VIII, § 1 (1802).

The legislative history and records of these conventions, if available, might yield interesting evidence on the rationale of these revisions. This may be one area for further study in understanding how the Lockean Rights Clauses were interpreted before 1868.

n72 Cover, *supra* note 15, at 25.

n73 Farber, *supra* note 11, at 49.

n74 Farber, *supra* note 11, at 56-58.

n75 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 72 (1971).

n76 John Milton, *The Tenure of Kings and Magistrates* (1649), *reprinted in* THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 72, 74 (Douglas W. Kmiec & Stephen B. Presser eds.) (1998).

n77 *Id*. at 77-78.

n78 *Id*. at 102.

n79 VIRGINIA DECLARATION OF RIGHTS, § 4 (1776) (emphasis added).

n80 NORTH CAROLINA DECLARATION OF RIGHTS, (1776) (emphasis added).

n81 RHODE ISLAND COLONIAL CHARTER OF 1663.

n82 CHARLES RAPPLEYE, SONS OF PROVIDENCE: THE BROWN BROTHERS, THE SLAVE TRADE, AND THE AMERICAN REVOLUTION (2006).

n83 THE CONTINENTAL ASSOCIATION, art. II (1774).

n84 MATTHEW SPALDING, HOW TO UNDERSTAND SLAVERY AND THE AMERICAN FOUNDING, THE HERITAGE FOUNDATION WHITE PAPER # 138 *available at* http://www.heritage.org/research/reports/2002/08/how-to-understand-slavery-and-americas.

n85 THE CONSTITUTION OF THE UNITED STATES 74 (Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, & Samuel L. Bray eds.) (2d ed. 2013).

n86 Rappleye, *supra* note 82, at 295.

n87 Slave Act of 1794, ch. 11, *1 Stat. 348.*

n88 An Act Prohibiting Importation of Slaves, ch. 22, *2 Stat. 426 (1807).*

n89 CONG. GLOBE, 39th Cong., 1st Sess. 674 (1867).

n90 *Id*. at 686.

n91 CONG. GLOBE, 36th Cong., 2d Sess., 120 (1861).

n92 CONG. GLOBE, 32d Cong., 1st Sess. 713 (1852).

n93 *Adamson v. California, 332 U.S. 46 (1947)* (Black, J., dissenting).

n94 *McDonald v. City of Chicago, 561 U.S. 742 (2010).*

n95 *Darcy v. Allein, (1599) 74 Eng. Rep. 1131* (Q.B.).

n96 *Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D.Pa. 1823).*

n97 *A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).*

n98 WOLFGANG SCHIUELBUSCH, THREE NEW DEALS: REFLECTIONS ON ROOSEVELT'S AMERICA, MUSSOLINI'S ITALY, AND HITLER'S GERMANY, 1933-1939 13-14 (2006).

n99 *Id*. at 17-18.

n100 *Id*. at 30-31.

n101 *Id*. at 34-35.

n102 Cover, *supra* note 15, at 25.

n103 EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE 11 (2012).

n104 *Id*. at 11-12.

n105 *Id*. at 12.

n106 *Id*.

n107 *Id*. at 12-13.

n108 HARRY BRUINIUS, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY 11, 15 (2007).

n109 BLACK, *supra* note 103, at 7-8.

n110 BLACK, *supra* note 103, at 275.

n111 BRUINIUS, *supra* note 108, at 6.

n112 BRUINIUS, *supra* note 108, at 6.

n113 BRUINIUS, *supra* note 108, at 6.

n114 BRUINIUS, *supra* note 108, at 9-10.

n115 BRUINIUS, *supra* note 108, at 122.

n116 BRUINIUS, *supra* note 108, at 122.

n117 BLACK, *supra* note 103, at 123.

n118 BRUINIUS, *supra* note 108, at 9.

n119 *Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823)* (emphasis added).

n120 BRUINIUS, *supra* note 108, at 10.

n121 BRUINIUS, *supra* note 108, at 17.

n122 BRUINIUS, *supra* note 108, at 17-18.

n123 BLACK, *supra* note 103, at 127

n124 Immigration Act of 1924, Pub.L. 68-139, *43 Stat. 153* (repealed 1965).

n125 *304 U.S. 144 (1938).*

n126 *Id. at 152.*

n127 *Id. at 153, n.4.*

n128 *268 U.S. 652 (1925).*

n129 *283 U.S. 697 (1931).*

n130 *166 U.S. 226 (1897).*

n131 *310 U.S. 296 (1940).*

n132 *330 U.S. 1 (1947).*

n133 *333 U.S. 257 (1948).*

n134 *338 U.S. 25 (1949).*

n135 *332 U.S. 46 (1947)* (Black, J., dissenting).

n136 *561 U.S. 3025 (2010).*

n137 *319 U.S. 624 (1943).*

n138 *Id. at 642.*

n139 Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

n140 *See* JOHN TOMASI, FREEMARKET FAIRNESS (2012).

n141 *15 U.S.C. §§ 1011-1015* (1945).

n142 Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court, 81 U. CIN. L.REV. 1447 (2013).*

n143 GA. CONST. OF 1777, art. LIV; MASS. CONST. OF 1780, ch. V, section 2; N.C. CONST. OF 1776, art. XLI; VA. CONST. OF 1790, art. VII.

n144 CONG. GLOBE, 39th Cong., 1st Sess. 674 (1867).

n145 *381 U.S. 479 (1965).*

n146 *410 U.S. 113 (1973).*

n147 *539 U.S. 558 (2003).*

n148 *198 U.S. 45 (1905).*

n149 *262 U.S. 390 (1923).*

n150 *268 U.S. 510 (1925).*

n151 *316 U.S. 535 (1942).*

n152 *198 U.S. at 61-62.*

n153 *Id. at 65-74* (Harlan, J., dissenting).

n154 Robert H. Bork, *The Judge's Role in Law and Culture, 1 AVE MARIA L. REV. 19, 21 (2003).*

n155 Bruce Ackerman, *Constitutional Politics/Constitutional Law, 99 YALE L.J. 453 (1989).*

n156 First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 24, at 277.

n157 *Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823)* (emphasis added).

n158 *521 U.S. 702 (1997).*

n159 *6 F. Cas. at 552.*

n160 *Lochner, 198 U.S. at 63.*

n161 *Id. at 65.*

n162 *262 U.S. 390, 399-400 (1923).*

n163 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE SEDUCTION OF THE LAW BY POLITICS (Free Press 1990).

n164 Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 (Can.).

n165 *Meyer, 262 U.S. at 399.*

n166 *Darcy v. Allein, (1599) 74 Eng. Rep. 1131.*

n167 *Somerset v. Stewart, (1772) 98 Eng. Rep. 499.*

n168 *Slaughter-House Cases, 83 U.S. 36 (1872).*

n169 *198 U.S. 45 at 67.*

n170 *Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).*

n171 *316 U.S. 535 (1942).*

n172 *381 U.S. 479 (1965).*

n173 First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 28, at 277.

n174 *Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D.Pa. 1823).*

n175 *381 U.S. 479 (1965)* (White, J., concurring).

n176 *410 U.S. 113 (1973).*

n177 *505 U.S. 833 (1992).*

n178 1 WILLIAM BLACKSTONE, COMMENTARIES *125-26.

n179 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (George E. Woodbine ed., Samuel Edmund Thorn trans. Belknap Press 1968) (c. 1250).

n180 *342 U.S. 165 (1952).*

n181 *Jacobson v. Massachusetts, 197 U.S. 11 (1905).*

n182 *521 U.S. 702 (1997).*

n183 *539 U.S. 558 (2003).*

n184 George Mason, First Draft of the Virginia Declaration of Rights (May 1776), *in* PAPERS, *supra* note 24, at 277.

n185 FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. IV (1789).

n186 *561 U.S. 742 (2010).*

n187 PA CONST. art I, § 1 (1776).