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2016

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#### Recommended Citation

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# The Refracted Constitution: Classical Liberalism and the Lessons of History

Samuel R. Olken\*

As a prism refracts light, bending its rays in different directions and revealing its many colors, the Constitution also refracts the myriad perceptions of its interpreters. The debate published last fall in the *Iowa Law Review* between Professors Herbert Hovenkamp<sup>1</sup> and Richard Epstein<sup>2</sup> over whether the Constitution is, in the words of Professor Epstein, “a classical liberal document,”<sup>3</sup> reveals divergent perspectives about the role of history in constitutional interpretation. Professor Epstein, who for much of his career has analyzed constitutional issues through the lens of law and economics, is primarily a legal theorist for whom history provides examples of how modern constitutional law has deviated from what he considers the classical liberal origins of the Constitution. In contrast, Professor Hovenkamp is a historian whose extensive research about nineteenth-century property law informs his understanding of constitutional development. Less concerned with devising a unified theory of constitutional interpretation than with detecting the patterns of change, he offers a nuanced and historically detailed rebuttal of the notion of a classical liberal constitution. Interestingly, although Professor Hovenkamp is also an expert on antitrust law,<sup>4</sup> he refrains from assessing the Constitution through the law and economics matrix, perhaps because the strength of his historical instincts outweighs the temptation to regard the Constitution from any singular theoretical viewpoint. Of the two perspectives, I find Professor Hovenkamp’s more persuasive, in large part because, notwithstanding Professor Epstein’s ambitious and intriguing thesis, both the limitations of constitutional theory in general and some specific historical

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\* Professor of Law and 2016–2017 Edward T. and Noble W. Lee Chair in Constitutional Law, The John Marshall Law School (Chicago, Ill.). I dedicate this essay in memory of my aunt, Sheila Rouslin Welt, whose unconditional love, profound wisdom, and deep compassion will always inspire me.

1. See generally Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1 (2015).
2. See generally Richard A. Epstein, *Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp*, 101 IOWA L. REV. 55 (2015).
3. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 53, 193 (2014).
4. See generally Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039 (2015).

problems raised by the classical liberal premise suggest its inherent flaws.

In essence, the Hovenkamp–Epstein debate over whether the Constitution is a classical liberal document is one at the intersection of two disparate yet complimentary disciplines, history and constitutional interpretation. From immersion in details, historians devise explanations for why events occurred based upon discernible patterns of behavior.<sup>5</sup> Context is an essential historical medium, and the principal task for a historian is to reconstruct the past through objective means. Constitutional theorists often use history in selective ways to support an overarching thesis about what they think the Constitution means and its proper mode of interpretation. Because they deal at various levels of abstraction, historical context is often less important than the theoretical construct they seek to advance. As such, they tend to use aspects of history in selective ways to buttress theoretical premises and either ignore or downplay those facets of history which do not fit within the parameters of their theory. In this regard, despite the often compelling theoretical narrative of Professor Epstein’s classical liberal analysis of the Constitution, it does not always comport with conventional understanding of American constitutional history.

Whereas historians have focused upon the patterns of change in constitutional doctrine to explain the transformation in constitutional jurisprudence from the height of legal classicism in the late nineteenth and early twentieth century to its decline during the 1930s and 1940s,<sup>6</sup> Professor Epstein prefers to criticize the rise of the New Deal modern administrative state at nearly every juncture of his analysis, both in his law review Article and in his book on this topic.<sup>7</sup> Through selective use of history and precedent, his argument that modern constitutional law erred in its departure from what he considers the classical origins of the Constitution elevates the form of his theory over the historical substance of constitutional evolution. His is a theory that rejects the notion of the Constitution as a living document, and instead seeks to restore what he believes are its original core principles. However, one problem with this approach is that it places more emphasis upon theoretical principles than on the way in which Supreme Court justices have often employed common law constitutional interpretation in their analysis and application of precedent. Common law constitutional interpretation is, in essence, a historicist approach, that looks to history in determining both the

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5. An excellent example of this historical approach appears in Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964).

6. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (discussing the shift in the Supreme Court’s jurisprudence of economic liberty from the post-Civil War era through the New Deal); Samuel R. Olken, *The Decline of Legal Classicism and the Evolution of New Deal Constitutionalism*, 89 NOTRE DAME L. REV. 2051 (2014) (analyzing the evolution in Supreme Court constitutional jurisprudence from 1870–1937).

7. EPSTEIN, *supra* note 3, at 8, 39–40, 43–44, 168–82, 198–203, 223–25, 341; Epstein, *supra* note 2, at 55, 72, 78–80, 82.

scope and meaning of constitutional provisions.<sup>8</sup> Less concerned with theoretical purity, than with pragmatic application of precedent, it allows jurists to make careful distinctions between cases without slavish devotion to overarching principles or preconceived philosophical notions about the law.<sup>9</sup> Throughout the course of American constitutional law, its adherents have included eminent jurists such as Charles Evan Hughes,<sup>10</sup> Harlan F. Stone,<sup>11</sup> and most recently, David H. Souter,<sup>12</sup> to name just a few. Indeed, both Hughes and Stone were especially influential in the Court's shift towards the progressivism that Professor Epstein decries in his recent scholarship.<sup>13</sup>

Although Professor Epstein does not consider his views to be originalist, his theoretical premise belies this assertion. For insisting that the Framers infused the Constitution with classical liberal principles and that modern Supreme Court justices have deviated from these classical origins, he is in fact advancing a sophisticated type of originalism that reads classical liberal economic theory principles into the Constitution. Convinced that the New Deal Supreme Court corrupted constitutional law with its progressive and deferential views towards public regulation of private economic activity, Professor Epstein urges a restoration of what he would likely consider to be

8. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (discussing modern common law constitutional interpretation).

9. *Id.* at 932-34.

10. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) (employing a broad conception of commerce in assessing the relationship between intrastate industrial relations and interstate commerce); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390-400 (1937) (interpreting the Due Process Clause of the Fourteenth Amendment in light of changing economic conditions); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426-30, 434-35, 437-39, 442-44 (1934) (construing the Contracts Clause pragmatically and upholding a Minnesota mortgage moratorium as a reasonable exercise of state police powers).

11. See, e.g., *Yakus v. United States*, 321 U.S. 414, 423 (1944) (upholding a broad delegation of legislative authority to the Office of Price Administration during World War II); *United States v. Darby*, 312 U.S. 100, 125-26 (1941) (upholding Congressional power to regulate the hours and wages of intrastate employees of a private lumber company while supplanting the Court's more formalistic direct-indirect requirement that there be a direct relationship between intrastate activities and interstate commerce with a more deferential standard that the local activity bear a close and substantial relationship to interstate commerce); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 155 n.4 (1938) (suggesting that notwithstanding the Court's general deference to public regulation of economic affairs, it would be exercise more heightened scrutiny in cases involving either fundamental constitutional rights or suspect legislative classifications that adversely affect discreet and insular minorities inadequately protected by the political process).

12. See, e.g., *Alden v. Maine*, 527 U.S. 706, 760-814 (1999) (Souter, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 100-85 (1996) (Souter, J., dissenting) (criticizing, in both cases, the Court's broad application of sovereign immunity in cases involving federal question jurisdiction); see also *Washington v. Glucksberg*, 521 U.S. 702, 756-71 (1997) (Souter, J., concurring) (explaining the common law judicial method of ascertaining the substantive aspects of due process).

13. See EPSTEIN, *supra* note 3, at 163-64, 168-74, 223-24 233-34, 309, 341-42. See generally Epstein, *supra* note 2.

the seminal principles of a constitutional democracy: limited government that affords individuals protection of their inalienable rights to life, liberty, and property in a federal system averse to political factions and devoted to preservation of competition.<sup>14</sup> He sees a constitution of negative rights and liberties with fairly clear lines of demarcation between national and local authority designed to protect private economic activities and equal opportunity from illegitimate class legislation that is often the by-product of political factions that capture the legislative process. His view rejects the notion of a living constitution and its deference to the political process and instead favors a classical notion of constitutional restraints intended to minimize the tyranny of democratic majorities through continued fealty to classical liberal principles.

For Epstein, classical liberalism is, in essence, “a theory of rights” that relies upon constitutional text and structure to adumbrate the appropriate spheres of federal and state authority.<sup>15</sup> Constitutional limitations, therefore, exist in large part to protect individual rights, of which economic ones are of particular importance. Although Professor Epstein is critical of progressive constitutional interpretation, and especially the uncertainty he believes its more flexible interpretation creates, he is also critical of conservative originalism that begins and ends with constitutional text.<sup>16</sup>

Yet despite his claim to the contrary, Professor Epstein is certainly more of an originalist than he concedes, for his dogged insistence that the constitutional Framers created a classical liberal document and his criticism of progressive constitutionalism, with its emphasis upon constitutional adaptivity and deference towards economic regulation, advances originalist tenets such as judicial restraint and fealty to first principles.<sup>17</sup> Moreover, his narrow interpretation of the Commerce,<sup>18</sup> Tax and Spending,<sup>19</sup> and Necessary and Proper<sup>20</sup> Clauses resembles textualism in that both approaches focus upon the near literal meaning of constitutional phrases. Accordingly, Professor’s Epstein’s “uncertain quest”<sup>21</sup> for the classical liberal constitution

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14. EPSTEIN, *supra* note 3, at 12–13, 15, 37–44, 175–91, 303, 571–72, 578–81.

15. *Id.* at 293–94.

16. For criticism of progressive constitutional interpretation, see *id.* at 8–9, 52–56, 68–71, 175, 303–04, 311–12, 569, 575–83. For criticism of conservative originalism, see *id.* at 6, 45, 52–54, 569–70, 573–74, 576.

17. For Epstein’s fidelity to original principles and judicial restraint, see *id.* at 9, 12, 45–47, 52–54, 570–72, 580–81. For Epstein’s narrow construction of the Commerce Clause, see *id.* at 82–83, 147–93; the Tax and Spending Clause, see *id.* at 194–209; and the Necessary and Proper Clause see *id.* at 312, 571–75.

18. See *id.* at 82–83, 147–93.

19. See *id.* at 194–209.

20. See *id.* at 197–226.

21. Interestingly, these are the first two words of his book’s subtitle. It is somewhat ironic that they adorn the cover of a book that so forcefully asserts the existence of a classical liberal constitution. See generally EPSTEIN, *supra* note 3.

is really an endorsement of originalism, albeit not the libertarian version posited by Randy Barnett,<sup>22</sup> nor strict textualism, and, as, Professor Epstein is careful to remind us, certainly not the living originalism of Jack Balkin.<sup>23</sup> Though Professor Epstein departs from strict textualism when he construes constitutional phrases in a classical liberal context, he really is an originalist devoted to reading classical liberal ideals into the Constitution, ideals he believes not only informed its creation but also govern its interpretation.

One problem with this approach is that it is not altogether feasible to craft a unified theory of constitutional interpretation, given the complex nature of the Constitution and the problems of translating the intent of its late eighteenth-century Framers by modern minds.<sup>24</sup> Nor is it possible to ascertain the singular intent of the Framers at the 1787 Philadelphia Constitutional Convention or that of the hundreds of delegates at the state ratifying conventions, whose understanding of constitutional meaning is as essential as that of the original Framers; not all were present at the same time, and certainly not all were in agreement about all aspects of the document. In this regard, it appears as if Professor Epstein may be forcing the issue with his persistent point that the Framers infused the Constitution with classical liberalism. It is as if he is looking at the Constitution through the lens of classical liberalism and attributing characteristics to the constitutional Framers they may not necessarily have possessed. While historians agree that the Framers drew upon the ideas of John Locke,<sup>25</sup> Thomas Hobbes,<sup>26</sup> and Montesquieu,<sup>27</sup> and were influenced in no small measure by the Enlightenment, there is scant historical evidence that the Framers drew as well upon the political economy of Adam Smith, as Professor Epstein contends.<sup>28</sup> Smith published *The Wealth of Nations* a decade before the Constitutional Convention,<sup>29</sup> but neither the records of the federal

22. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014) (arguing that the Constitution reflects libertarian values).

23. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (interpreting the Constitution as a living document susceptible to adaptive interpretation over time). For Epstein's criticism of Balkin's living originalism, see EPSTEIN, *supra* note 3, at 54, 150–51, 176–79, 577.

24. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (criticizing the concept of original intent); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997) (noting the problems of ascertaining the Framers' original intent); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing problems with translation of the Framers' original intent); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (discussing the shift from original intent to original meaning).

25. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

26. See THOMAS HOBBS, *LEVIATHAN* (1651).

27. See BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., Robert Clarke & Co. vol. 2, 1873) (1748).

28. See EPSTEIN, *supra* note 3, at 37–39, 150, 337–42, 582–83; Epstein, *supra* note 2, at 58.

29. See 1–3 ADAM SMITH, *THE WEALTH OF NATIONS* (Andrew Skinner ed., Penguin Classics 1986) (1776).

convention nor the Federalist Papers, or even those of the anti-Federalists, appear to reflect Smith's *laissez-faire* economic views.<sup>30</sup> And so I agree with Professor Hovenkamp on this point.

Nor is it necessarily accurate to impute natural rights inclinations to the Framers simply because they created a constitution that limited governmental authority to protect individual rights and liberties, an assumption implicit in Professor Epstein's classical rendition. Although the Framers certainly believed in the inalienable rights of life, liberty, and property, as expressed in both the Declaration of Independence and in several contemporaneous state constitutions,<sup>31</sup> many historians regard such statements as more rhetorical than substantive and note that by the middle of the nineteenth century, a juncture at which legal classicism, an alternative name for the classical liberalism Epstein describes, really began to take root, jurists resisted using natural law principles as the sole basis of their decisions about the parameters of public power.<sup>32</sup> Indeed, even early Supreme Court justices such as James Iredell, a delegate to the 1788 North Carolina convention to ratify the proposed federal constitution, and one who was quite knowledgeable about the proceedings at the Philadelphia convention that framed the original constitution,<sup>33</sup> expressed skepticism about the utility of natural law in constitutional adjudication,<sup>34</sup> as did John Marshall himself in *Fletcher v. Peck* when he applied the Contract Clause to invalidate Georgia's rescission of a land grant.<sup>35</sup> Both Iredell and Marshall regarded natural law as too vague a basis upon which to assess public control of private economic rights. And

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30. Hovenkamp, *supra* note 1, at 7–8.

31. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Massachusetts and Vermont state constitutions also invoke the inalienable rights of life, liberty and property. See MASS. CONST. pmbl. (1780); *id.* art. I; *id.* art. VII; VT. CONST. pmbl (1776); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 271–73 (1969) (discussing the Virginia, Pennsylvania, Maryland, Delaware and North Carolina Constitutions). See generally *id.* at 125–291 (discussing state constitution-making during the 1780s).

32. See William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 558–60 (1974) (suggesting that jurists found natural law's immutable moral principles inappropriate for adjudicating legal issues arising in an increasingly industrialized society); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1540–44 (1990) (explaining that *Lochner* era jurists used historical consciousness, custom law, and common law interpretive techniques instead of natural law/rights principles in assessing the permissible exercise of local police powers).

33. Though Iredell was not in attendance at the Philadelphia constitutional convention, several delegates there kept him apprised of the constitutional debates. See FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 312 (Transaction Publishers 1992) (identifying James Iredell as a Federalist at the July 1788 North Carolina ratifying convention); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 31, 54–55, 60–61, 67–68 (Max Farrand ed., rev. ed. 1937).

34. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398–99 (1798) (Iredell, J., concurring in judgement) (questioning the use of natural law principles to decide cases).

35. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136–39 (1810) (invoking federalism and vested rights theory).

when classical liberalism exerted its most significant influence upon constitutional jurisprudence during the late nineteenth and early twentieth century, factional aversion, formalistic, categorical reasoning, and an abiding commitment to dual federalism and equal operation of the law suffused constitutional interpretation rather than what Professor Epstein's premise implies: *laissez-faire* economics and/or Social Darwinism.<sup>36</sup>

Professor Epstein's thesis also exaggerates the influence of classical liberal ideals on the Framers, who, though undoubtedly solicitous of private property rights and wary of democratic majorities, also committed to creating a federal union from which governmental authority emanated from the people. Though differences emerged in the federal and state ratifying conventions about the scope of national power, the structure and substance of the Constitution reflect classical views of both liberalism, with its emphasis upon individual liberty, and republicanism, with its concerns about public welfare and the need for separation of powers. As Gordon Wood,<sup>37</sup> Bernard Bailyn,<sup>38</sup> and Jack Rakove<sup>39</sup> have demonstrated in their exhaustive analyses of the early democratic republic, factional aversion, and civic virtue were the lynchpins of late eighteenth-century constitutional thought and its predominate concern with public welfare. Even Joyce Appleby, whose own study of this era highlights the emergence of liberalism, implies that the act of constitutional creation reflected both classical republican and liberal tendencies.<sup>40</sup> From this nuanced historical perspective, one can better understand the Framers' intent to devise a constitutional system that both created and limited governmental authority and struck a vague balance between state and federal powers through both structure and deliberately broad terms such as "commerce," "regulate," "necessary and proper," and many other phrases whose scope and meaning have generated considerable debate for over two centuries.

In his "uncertain quest" for a classical liberal constitution, Professor Epstein adopts a theoretical approach, which he admits is distinct from a historical one.<sup>41</sup> Since constitutional law is public law, its interpretation over

36. See generally WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998) (chronicling the rise and fall of legal classicism). For a more specific analysis, see Olken, *supra* note 6, at 2053–69 (discussing the characteristics of legal classicism).

37. See generally WOOD, *supra* note 31 (discussing the influence of republicanism on the creation of the state and federal constitutions).

38. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160–230* (1967) (discussing republicanism and revolutionary ideology).

39. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

40. See JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 277–90* (1992) (asserting that the American Revolution reflected both liberal economic thought and classical republicanism).

41. As Professor Epstein explains:



time has reflected both socio-economic and technological changes. Political forces, often in conflict with one another, shaped the contours of the Constitution in 1787, informed its ratification during the critical period of 1787–1789, and have ineluctably influenced its judicial construction. As Professor Hovenkamp astutely notes, the classical liberalism Professor Epstein attributes to the Framers more accurately belongs to late nineteenth- and early twentieth-century jurists, whom historians often refer to as legal classicists.<sup>42</sup> These jurists' *laissez-faire* constitutionalism and concerns about dual federalism emerged in response to increased governmental intervention into private economic affairs.<sup>43</sup> Intent upon reading into the Constitution a set of principles and values meant to curb what they considered unnecessarily broad governmental authority, theirs was a conservatism that reflected longstanding aversion to political factions, which they believed captured the legislative process in reforms that threatened the security of private rights.<sup>44</sup>

From a historical perspective, rather than merely a theoretical one, the emergence of what Professor Epstein calls “progressive constitutional interpretation” occurred neither suddenly—as suggested by his largely ahistorical, stasis view of constitutionalism—nor did it necessarily deviate from the Framers’ understanding of the Constitution. In this regard, consider that at least two of the most prominent members of the Framers’ generation, Alexander Hamilton, a member of the 1787 Constitutional Convention and the New York ratifying convention,<sup>45</sup> and John Marshall, a member of the Virginia ratifying convention,<sup>46</sup> both endorsed the concept of constitutional adaptivity and broad interpretation of key constitutional provisions such as the Commerce and Necessary and Proper Clauses.<sup>47</sup>

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Hovenkamp and I look at legal materials through a different lens. He starts as a historian and rejoices in the ebbs and flows of doctrine and cases and politics. I start as a legal theorist, determined to isolate the common features that organize how legal systems operate, and why they are capable of success. The only tradition that has both the flexibility and durability to structure society properly is one of classical liberal origins.

Epstein, *supra* note 2, at 90.

42. Hovenkamp, *supra* note 1, at 3–5.

43. *Id.* at 3–7.

44. *Id.* at 22–23.

45. See RON CHERNOW, ALEXANDER HAMILTON 219–42, 261–68 (2004) (discussing Hamilton’s participation at the Philadelphia federal constitutional convention). See generally FRED RODELL, FIFTY-FIVE MEN 275 (1st ed. 1936) (identifying Hamilton as signing the federal constitution).

46. See I THE PAPERS OF JOHN MARSHALL 275–85 (Herbert Johnson ed., 1974) (containing John Marshall’s June 2, 1788 speech about the proposed federal judiciary at the Virginia Ratifying convention); see also R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 28, 171 (2001) (discussing John Marshall’s participation at the Virginia Ratifying convention).

47. Compare ALEXANDER HAMILTON, OPINION AS TO THE CONSTITUTIONALITY OF THE BANK OF THE UNITED STATES (Createspace Indep. Publ’g 2006) (1791), with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 330–33 (1819) (arguing that pursuant to Congress’s enumerated powers in Article I, Section 8 of the Constitution, Congress has the implied and incidental authority to

For example, in *Gibbons v. Ogden*, when Marshall construed the term “commerce” to encompass navigation and traffic he established the precedent for interpreting commerce as a practical conception, broadening it from its conventional meaning of barter and sale.<sup>48</sup> Moreover, Marshall’s recognition that commerce among the states extended to within state borders,<sup>49</sup> and his recognition that the term “regulate” conferred broad powers upon the federal government to establish rules for the conduct of interstate commerce, demonstrated his intuition about the need for pragmatic and flexible constitutional interpretation in a changing society, one whose technology and economic infrastructure was already vastly different from the Nation’s founding era.<sup>50</sup>

In this regard, Professor Epstein’s praise for late nineteenth- and early twentieth-century cases that constrained both the scope of commerce so that it could not encompass productive activity and the power of the federal government to regulate intrastate activities unless they directly caused adverse effects upon interstate commerce, reflects his penchant for classical liberalism and its emphasis upon dual federalism and private economic competition.<sup>51</sup>

From Professor Epstein’s preconceived notion of the classical liberal constitution—which downplays the potential in *Gibbons* and other cases from the Marshall Court for adaptive constitutional interpretation of the Commerce Clause—the New Deal court abruptly abandoned the classical vision of limited government in favor of constitutional progressivism deferential to increased governmental intervention into private economic activity.<sup>52</sup> However, this largely ahistorical approach does not consider the parallels between the New Deal conception of the Commerce Clause and those of the Marshall Court. Nor does it consider the incremental manner in which the New Deal court replaced the direct–indirect test with the close and substantial relationship test and its less stringent requirement that there be a strong nexus between intrastate activity, commercial or otherwise.<sup>53</sup> That

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create a bank, and that the Necessary and Proper Clause affords Congress the discretion to create a bank to facilitate its execution of enumerated and implied constitutional powers).

48. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–91 (1824).

49. *See id.* at 194; *see also* *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–49 (1827) (noting a state import tax on goods sold in interstate commerce in their original package violated the Commerce Clause as well as the constitutional prohibition in Article 1, Section 10 against state taxes on imports and exports without congressional consent).

50. *See Gibbons*, 22 U.S. (9 Wheat.) at 196–97.

51. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–08 (1936) (ruling that hours and wages of coal producers exerted an indirect effect upon interstate commerce); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–43 (1935) (finding that interstate commerce had ended once the poultry reached the slaughterhouse); *Hammer v. Dagenhart*, 247 U.S. 251, 253 (1918) (distinguishing between manufacturing and commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–17 (1895) (finding that since manufacturing precedes commerce, the monopolist practices of sugar manufacturers produced an indirect effect upon interstate commerce).

52. *See* EPSTEIN, *supra* note 3, at 6–39, 154–82; *see also* Epstein, *supra* note 2, at 65–72.

53. *See* *United States v. Darby*, 312 U.S. 100, 119–21, 124–26 (1941) (upholding the

Court eventually adopted the even more deferential substantial effects test to account for the aggregate effects of seemingly isolated economic activities upon interstate commerce.<sup>54</sup> Both tests reflected a growing judicial recognition of the inadequacies of classical views of commerce and the need for judicial restraint.

Further historical discrepancies detract from the premise that the Constitution is a classical liberal document whose timeless meaning progressive jurists have distorted in a jurisprudence of economic liberty largely deferential to public regulation of private economic affairs. For example, from Professor Epstein's perspective, the New Deal Court erred when it upheld a Minnesota mortgage moratorium law that extended the equitable period of redemption during an economic emergency and thus weakened the constitutional prohibition against state impairment of contractual obligations.<sup>55</sup> Yet what the Court did in *Home Building & Loan Association v. Blaisdell* was quite the contrary: it actually balanced public power and private rights in such a way as to preserve the underlying mortgage indebtedness while affording the mortgagor a way to remain in possession of foreclosed property during the Depression.<sup>56</sup> Throughout his opinion for a divided Court, Chief Justice Hughes emphasized the importance of balancing public power and private rights in order to preserve contract rights, which might otherwise become worthless during an economic emergency.<sup>57</sup> In a passage that illustrates Hughes' pragmatic constitutional interpretation, the Chief Justice at the center of the New Deal revolution, of which Professor Epstein is so critical, commented: "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society."<sup>58</sup> Hughes's remark underscores the importance of constitutional adaptivity as a means of preserving constitutional values, and thus provides a poignant retort to scholars who consider with skepticism judicial deference towards increased public regulation of private economic affairs.

Professor Epstein views *Blaisdell* and subsequent twentieth-century decisions as erroneous departures from classical liberalism that sanctioned

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application of the Fair Labor Standards Act to a Georgia lumber company because its productive activities had a close and substantial relationship to interstate commerce); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37–43 (1937) (using the close and substantial relationships test to uphold the application of the National Labor Relations Act to industrial relations at a steel manufacturing plant).

54. See *Wickard v. Filburn*, 317 U.S. 111, 122–25, 128–29 (1942) (upholding a federal quota of wheat production applied to a local farmer under the substantial effects test); see also CUSHMAN, *supra* note 6, at 141–225 (tracing this incremental development).

55. See Epstein, *supra* note 2, at 78–79.

56. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444–48 (1934).

57. See *id.* at 425–34.

58. *Id.* at 435.

illegitimate class legislation detrimental to the security of private property rights.<sup>59</sup> However, this perspective, largely influenced by classical notions of law and economics, does not comport with the historical development of Contracts Clause jurisprudence from John Marshall's era through the 1930s, wherein the Supreme Court gradually recognized a distinction between contract rights and remedies which permitted states to modify contract remedies through their police powers.<sup>60</sup> Once again, the vague Contracts Clause language and structural constitutional reasoning demonstrate the relatively myopic view of classical liberal constitutional interpretation.

As Professor Hovenkamp aptly demonstrates in his Article, the notion of a classical liberal constitution was largely a late nineteenth- and early twentieth-century jurisprudential construct devised by jurists steeped in Jacksonian democracy, which emphasized the equal operation of the law and factional aversion.<sup>61</sup> Indeed, the leading proponent of substantive due process in the latter half of the nineteenth century, Thomas Cooley, perceived in judicial review the means for curbing political factions,<sup>62</sup> an attitude earlier articulated by constitutional framers such as Alexander Hamilton.<sup>63</sup> Yet the classical liberalism Professor Epstein attributes to the Framers did not really flourish until the aftermath of the Civil War when Cooley and others built upon the vested rights theory of John Marshall and Joseph Story, as well as the aversion to political factions expressed by federal and state Jacksonian jurists, to construct a jurisprudence of economic liberty that protected private contract and property rights from illegitimate class legislation.<sup>64</sup> Though the *Lochner* decision<sup>65</sup> marked the height of substantive due process, in many cases, both before and after 1905, jurists often broadly interpreted the Due Process Clause of the Fourteenth Amendment in creative ways to constrain public regulation of economic affairs, which they considered to be suspicious means for intervening on behalf of some economic groups at the expense of others.<sup>66</sup>

However, by the 1930s, cracks surfaced in the edifice of legal classicism,

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59. See Epstein, *supra* note 2, at 78–80.

60. See Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 522–52 (1993) (discussing pre-New Deal Contract Clause jurisprudence).

61. See Hovenkamp, *supra* note 1, 4–5, 9–12, 22–27, 52–53.

62. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 355–57, 389–94 (Da Capo Press ed. 1972) (1868) (linking judicial review and factional aversion).

63. See THE FEDERALIST NO. 78 (Alexander Hamilton).

64. See Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 14–20 (1997) (discussing the evolution of factional aversion in nineteenth-century judicial review).

65. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating maximum hours legislation as a violation of liberty of contract protected by Fourteenth Amendment substantive due process).

66. See Olken, *supra* note 6, at 2060–69 (discussing liberty of contract as a component of substantive due process).

as it became increasingly ill-suited as a means for assessing the limits of governmental authority during the Depression. Its formalistic appraisal of the distinction between public power and private economic activity and its assumptions about the virtues of dual federalism and the need for judicial solicitude for individual property and contract rights from intrusive government regulation grew increasingly untenable.<sup>67</sup> Throughout the 1930s, the Hughes Court incrementally, though fitfully at first, eroded the classical liberal jurisprudence of economic liberty and replaced it with a more progressive view that balanced public power and private rights and regarded governmental intervention into economic affairs with increased deference.<sup>68</sup>

From Professor Epstein's perspective, progressive New Deal constitutionalism has facilitated political factions rather than inhibited them and has fostered the creation of public monopolies that thwart economic competition at the expense of individual rights and liberties.<sup>69</sup> The problem with this largely ahistorical view of the New Deal is that it both ignores the reasons why the New Deal court supplanted classical liberal constitutional doctrines such as liberty of contract and the formalistic distinction between commerce and productivity activity and the pace of change. Initially, only five members of the New Deal court—Hughes, Cardozo, Brandeis, Stone, and to some extent, Roberts, though not without some fits and starts—realized that the mechanical jurisprudence of the classical era, with its rigid notion of dual federalism and cramped conception of governmental power, could not apply the Constitution in a feasible manner to the socio-economic problems of the Depression.<sup>70</sup> By the 1940s, however, virtually all of the justices had come to the same realization.<sup>71</sup> In its pragmatic and flexible application of the Constitution to a society much different in many respects from that of the Framers—and even that of the post-Civil War era in which classical liberal constitutional interpretation flourished—the New Deal court followed an interpretive tradition of instrumental constitutional construction. This was the same tradition espoused by constitutional Framers such as John Marshall

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67. *See id.* at 2069–74 (discussing the decline of legal classicism).

68. *See id.* at 2074–88 (analyzing the pattern and pace of this change).

69. Note that while Professor Epstein's Article implies this, it is in many respects, a principal theme of his book. *See* EPSTEIN, *supra* note 3, at 21–23, 121–22, 251–53, 263–64, 309–11, 468, 517, 581–83. *See generally* Epstein, *supra* note 2.

70. *See* Olken, *supra* note 6, at 2051, 2069–91 (analyzing the advent of Supreme Court deference towards economic regulation during the 1930s).

71. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding unanimously a Congressional regulation of wheat production under the deferential rational basis standard of review). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 155 n.4 (1938) (indicating the Court adopted bifurcated judicial review in which the Court would use heightened scrutiny in cases involving either fundamental constitutional rights or when a breakdown in the political process adversely affected “discrete and insular minorities,” while applying a more deferential standard of review for issues involving economic regulation).

and Alexander Hamilton<sup>72</sup> and practiced by subsequent classical jurists such as Field, Peckham, Taft, and Sutherland, whose broad interpretations of substantive due process and narrow views of commerce imbued the Constitution with classical liberal principles.<sup>73</sup> The only difference in this respect between the New Deal jurists and their classical predecessors was the way in which they applied the Constitution. In this regard, the classical liberal and progressive constitutions may be two sides of the same coin, albeit with different points of emphasis made possible by the structure and text of the Constitution itself.

Ultimately, the weakness of the classical liberal thesis is how it conflates theory with history in the service of criticism of the modern administrative state and the New Deal era progressivism that has influenced constitutional law since the 1930s. In its intriguing attempt to offer a coherent theoretical synthesis of constitutional intent, meaning, and construction, the classical liberal model does not seem to consider the very nature of the document it deconstructs, nor does it necessarily take into account the historical circumstances of its creation. The Constitution is the law of the land and the fundamental charter of American government, but it was also the product of political and regional compromise. Its provisions reflect differences of opinion and values within the Framers' generation about the tension between public control and private rights. That the Constitution has spawned so many theories of interpretation attests to its potential for conflicting perceptions of its meaning, and most importantly, its application in a society of diverse interests and opinions. Indeed, the multi-faceted characteristics of the Constitution not only generate a plethora of interpretive theories, but also enable it to endure as an adaptable macro-legal framework for a changing America. Chief Justice John Marshall's astute reminder that "we must never forget, that it is *a constitution* we are expounding" remains a poignant reminder that no one theory can fully explain the Constitution or cabin the intentions of its framers.<sup>74</sup>

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72. See *McCulloch v. Maryland*, 17 U.S. 316 (1819) (upholding the federal bank as a legitimate exercise of Congress's implied and incidental powers under Article 1, Section 8 of the Constitution). See generally ALEXANDER HAMILTON, *supra* note 47.

73. See Olken, *supra* note 6, at 2065–69 (2014) (noting the policymaking of *Lochner* era jurists).

74. *McCulloch*, 17 U.S. at 407 (emphasis in original).