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An Unapologetic Defense of the Classical Liberal Constitution

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AN UNAPOLOGETIC DEFENSE OF THE CLASSICAL
LIBERAL CONSTITUTION: A REPLY TO PROFESSOR
SHERRY

*Richard A. Epstein**

Professor Suzanna Sherry's spirited, if misguided, review of my book, *The Classical Liberal Constitution*, gets off on the wrong foot with its title: *Property is the New Privacy: The Coming Constitutional Revolution*.¹ Her choice of title is intended to telegraph her central thesis that it is dangerous to afford to private property and economic liberties the same level of protection that the law today affords to what she calls "non-economic or personal rights" on such hot-button issues as contraception, abortion, and gay rights.² In her view, my cardinal sin is taking the view that "economic and personal rights are equivalent."³ That statement is a good first approximation of my basic constitutional views, but is subject to qualifications that stem from the historical arc of constitutional interpretation. But for her these refinements do not soften her conclusion that any effort to create a parity of entitlement represents the unwise repudiation of all modern constitutional thinking, which accepts the two-tiered structure of economic and personal rights that requires higher levels of scrutiny on the latter than on the former.

Unfortunately, her thesis gets everything upside down. Textually, the Constitution does not contain a single explicit reference to the term privacy, but does offer broad and specific protections to private property through the Takings Clause ("nor shall private property be taken for public use without just compensation"⁴) and through the Due Processes Clauses of the Fifth and the Fourteenth Amendments (providing that neither the federal government nor the states may deprive any person of "life, liberty or property, without due process of law"⁵). Note that the last two clauses also offer explicit protection to

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¹ Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452 (2015).

² *Id.* at 1452.

³ *Id.*

⁴ U.S. CONST. amend. V.

⁵ *Id.*; *id.* amend. XIV.

individual liberty, as does the First Amendment when it protects the freedoms of speech and the press and the free exercise of religion. And all this is topped off with the protection for all citizens of privileges and immunities in Section 1 of the Fourteenth Amendment. It is a fair question to ask what becomes of constitutional law in the hands of a result-oriented critic who bandies about terms not found in the Constitution in order to take issue with someone who tries to make sense of the terms that are, indubitably, found in the Constitution.

It is the height of constitutional folly to speculate on an improvised unwritten constitution that has no textual warrant at all. Sherry's upside-down view of constitutional interpretation on individual rights ironically explains her panicky subtitle about some pending constitutional revolution. The subtitle gives voice to her fears that I may be in a vanguard of scholars and Supreme Court Justices who are working to roll back the clock on matters of economic liberties and private property to before the judicially wrought constitutional revolution of 1937. I hasten to add (although she does not raise the point) that this worldview most emphatically does not include any defense of the lamentably statist Supreme Court decision in *Plessy v. Ferguson*,⁶ which, in stark violation of classical liberal principles, was used to uphold antimiscegenation laws as well as state-segregated schools and common carriers. To be sure, the 1937 constitutional revolution involved not only matters of economic liberties and property rights but also issues of federalism. Yet as Professor Sherry does not address these issues in her review, I shall largely ignore them as well.⁷

Instead, in my response, I undertake three interrelated tasks. The first is to make clear my own view on these substantive issues, and the second is to critique the alternative vision that Sherry tries to advance. The third is to call attention to the inability of progressive constitutionalists like Sherry to develop an alternative theory of their own — an inability Sherry herself acknowledges. At the outset, let me flag a point that I shall elaborate on later. As a matter of first principle I do take the position that a unified conceptual framework should apply to what are called economic and personal liberties, even if it were possible to articulate some hard-edged separation between them. The analytical origin of this position is that voluntary contracting, whether for the transfer of goods and services or the formation of long-term associations, works as well in the one domain as in the other. In each case, there are gains from trade among the parties that the law should seek

⁶ 163 U.S. 537 (1896).

⁷ She does, however, refer to Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014), as offering a refutation of my views on this issue, most notably in Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). I shall not address any elements of Professor Primus's highly debatable theory here.

to preserve. In each case, there is a risk that the transactions will be upset by problems of duress, fraud, or incompetence. In each case, there are dangers that the activities of the group members will impose some serious risk of loss on nonmembers from either the use of force, fraud, or the creation of monopoly power, all of which are fair targets of government action under a principled classical liberal constitution. Although the classical common lawyers thought in terms of justice, the basic outlines of their system correspond well to the dictates of economic efficiency that have gained such influence in the past half century.⁸

From these observations, two key points follow. First, to the extent that many key constitutional provisions start from classical liberal premises, the good news is that on most issues there is no yawning gulf between the normative positions found in *The Classical Liberal Constitution* and the explicit requirements of constitutional interpretation, many of which have survived and prospered through intelligent judicial interpretation. Just this state of affairs is found, by and large, with the First Amendment guarantees of freedom of speech⁹ and the judicial gloss on the dormant commerce clause.¹⁰ Second, it is clear that the defense that I have offered illustrates the tight link between the traditional natural law theory of the Framers and the modern views of social welfare theory that I believe offer the best analytical foundation for the traditional constitutional structure. Although there is no room here to develop the point at large, I do believe that the general measures of social welfare found (for all their differences) in both the Pareto and Kaldor-Hicks formulations show how traditional natural law conceptions naturally lead into modern social welfare theory.¹¹

⁸ See, for instance, the famous formulation of Judge Posner: “The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value . . . of the activities.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 98 (1st ed. 1973).

⁹ RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 383–461 (2014). One notable exception is much of the recent tangle on campaign finance law, which is often justified on explicit progressive principles:

More than a century ago the “sober-minded Elihu Root” advocated legislation that would prohibit political contributions by corporations in order to prevent “the great aggregations of wealth, from using their corporate funds, directly or indirectly,” to elect legislators who would “vote for their protection and the advancement of their interests as against those of the public.”

McCConnell v. FEC, 540 U.S. 93, 115 (2003) (quoting *United States v. UAW*, 352 U.S. 567, 571 (1957)) (internal quotation marks omitted).

¹⁰ EPSTEIN, *supra* note 9, at 227–44.

¹¹ See, for an earlier account, Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 *HARV. J.L. & PUB. POL’Y* 713 (1989). For a recent explication of this position, see Richard A. Epstein, *Levitt Lecture: From Natural Law to Social Welfare: Theoretical Principles and Practical Applications*, *IOWA L. REV.* (forthcoming 2015).

Yet, as I shall explain later, although the overlap between classical liberal theory and the U.S. Constitution is strong, it is far from perfect. In particular there are two problems to face. As a creature of political compromise, the U.S. Constitution offers greater scope for state regulation on matters of morals — chiefly sex and gambling — than a rigorous classical liberal theory would involve. Second, on a wide range of issues, dealing with both constitutional structures and individual rights, it is necessary to confront the difficult institutional challenge of dealing with past errors in constitutional interpretation that have worked themselves into the fabric of the law. Pure normative theory does not have to deal with these awkward questions of transition, but any institutionally grounded theory is required to do so. On this issue, Sherry chides me for being inconsistent and, worse, for “blinking” in an implied recognition of the moral strength of the opposition.¹² Thus she notes that I do acknowledge a place for nonoriginalist reasoning when I ask whether “the original version of the Constitution or its subsequent interpretation do a better job in advancing the ideas of a classical liberal constitution.”¹³ Indeed, she does not quarrel with the method, which she acknowledges “is a step forward from the usual claims of originalists and textualists that outcomes should not matter,”¹⁴ only to chide me for my substantive positions, to which she admits that she does not supply a consistent and complete alternative. But it is wrong to think that wrestling with this difficulty is a sign of intellectual weakness. To the contrary, it is a necessary part of any constitutional theory of interpretation, including those that rely on some undifferentiated notion of the “living constitution,” which magically always seems to favor progressive views that are never fully defended. The conclusion here is I think clear. *The Classical Liberal Constitution* tries candidly to deal with these conflicting threads. Yet, as Professor Sherry acknowledges in the last third of her review,¹⁵ her upside-down vision of constitutionalism has yet to receive a definitive exposition that she herself is willing to sign on to. No wonder: no theory, no principled opposition.

In order to deal with this full range of issues, I shall tackle these matters as follows. In Part I, I shall address the key issues of constitutional interpretation as a matter of first principle. In Part II, I shall add in the complications that arise in trying to reconcile the clarity of basic theory with the messiness of historical evolution. In Part III, I shall comment briefly on the lack of a coherent progressive alternative.

¹² Sherry, *supra* note 1, at 1462–67.

¹³ *Id.* at 1454 (quoting EPSTEIN, *supra* note 9, at 71).

¹⁴ *Id.* at 1455.

¹⁵ *See id.* at 1468–75.

I. POLITICAL THEORY AND CONSTITUTIONAL TEXT.

The first task of any theory of constitutional interpretation is to make peace with the written constitutional text. That task requires that the reader pay close attention to all nuances in ordinary language to see that judicial interpretation gives to constitutional terms meanings that are nowhere found in ordinary language. The most conspicuous version of this mistake is the massive expansion of the term “commerce” in Article I, Section 8, Clause 3 of the Constitution, “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁶ The effort to make commerce include agriculture, manufacture, and mining with that which they are normally contrasted represents the most audacious — if successful — effort to turn the Constitution upside down. No amount of fancy nontextualism of the sort that Sherry embraces is sufficient to justify the brazen efforts that fortified the constitutional underpinning of the New Deal.

It is equally important to note that no sound theory of constitutional interpretation rests exclusively on getting the right meaning to particular constitutional turns of phrase. A huge amount depends on how these terms fit into a larger theory of linguistic interpretation that embraces constitutional text but also applies to the interpretation of language that is found in contracts and statutes as well. It is of course true that the Constitution does *not* contain all the terms that are needed for its systematic explication. As I argue extensively in *The Classical Liberal Constitution*, it is imperative that key terms be read into the document to make sense of what it contains. The basic notion of the “police power” is so essential to constitutional explication that any effort to explain the document, as it relates to the protection of individual rights, that ignores this critical element should rightly be regarded as dead on arrival. But by the same token, any sensible theory of interpretation works better when it seeks to examine the unstated qualifications for the written document only after it explains the meaning and purpose of the written terms.

On this issue, Sherry’s opening gambit pays me the honor of comparing my approach to constitutional interpretation to that of the late Professor Ronald Dworkin¹⁷ when she writes: “Epstein’s constitution, like Dworkin’s, is constructed from substantive moral values.”¹⁸ I quite agree that Ronald Dworkin constructed his own moral constitu-

¹⁶ U.S. CONST. art. I, § 8, cl. 3.

¹⁷ See RONALD DWORKIN, *FREEDOM’S LAW* (1996). Of course, Dworkin and I endorse rather different substantive moral values and use different methods to identify the correct moral values.

¹⁸ Sherry, *supra* note 1, at 1453 (footnote omitted).

tion from first principles disconnected from the legal text. But in later claiming that I approach “moral values based on history,”¹⁹ she ignores a key difference between Dworkin and myself. I am not construing my own constitution. I am quite happy to construe the U.S. Constitution as originally written and subsequently amended, warts and all. Unlike Dworkin — and Sherry — I anchor my interpretation about constitutional meaning in both explicit textual provisions and, as all systems of interpretation must do, in the general political theory that animated those texts. Throughout the book I offer detailed explanations of its various provisions and close reading of the major Supreme Court cases that have charted the course of American constitutional law. Perhaps some of these treatments are wrong, but it is characteristic of both Sherry and other critics of the book, most notably Professor Cass Sunstein,²⁰ to flee to higher levels of abstraction rather than point out any specific textual mistakes. Anyone who thinks that either Sherry’s or Sunstein’s review gives an accurate rendition of my explicit modes of constitutional interpretation, all of which have powerful antecedents going back to both Roman and early English law, should read Chapter 3, “Constitutional Interpretation: The Original and Prescriptive Constitutions,” to get some sense of the method.

As I noted constantly in that chapter and elsewhere, some tension becomes inevitable when trying to piece together incomplete texts with contested political philosophy. But this difficulty is not one that any defender of New Deal constitutionalism, like Sherry, is in a position to escape. She has to go through the same exercise in order to defend her views of the Constitution. In this regard, it is unresponsive to list a large number of distinguished historians — Professors Bernard Bailyn, Forrest McDonald, and Jack Rakove²¹ — whose views on some matters differ from mine, because they never attempt to link their intellectual history to case-specific or clause-bound constitutional interpretation. Of course, there were many differences between the Federalists and Antifederalists, but anyone would be hard pressed to find a single point of contention that could be cashed out to support the hallmark legislation of the New Deal.²² The major difference between the two

¹⁹ *Id.*

²⁰ See Cass R. Sunstein, *The Man Who Made Libertarians Wrong About the Constitution: How Richard Epstein’s Highly Influential, Highly Politicized Scholarship Cemented Tea Party Dogma*, NEW REPUBLIC (May 18, 2014), <http://www.newrepublic.com/article/117619/classical-liberal-constitution-richard-epstein-reviewed> [http://perma.cc/RD56-NHS9]. Apart from this appalling title, Sunstein, characteristically, wishes not to “lose the forest for the trees,” *id.*, and thus ducks the discussion of all particular textual provisions or decided cases.

²¹ Sherry, *supra* note 1, at 1458 n.21.

²² Although somewhat dated, see HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981), for some sense of the substantive differences between the two camps, which were based largely on structural matters rather than their basic theories of governance.

camp was not over the theory of substantive rights, but whether these rights were better protected by national or state governments. On this score, it is instructive to note that to the extent that the original Constitution addressed this issue, it was through the Contracts Clause, which states that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”²³ I have long argued that the Contracts Clause imposes limitations on how the state could regulate not only existing contracts, but also those contracts that had not yet been made.²⁴ And whatever doubts that existed were largely removed by the adoption of the Fourteenth Amendment, where the correct reading of the Privileges or Immunities, Due Process, and Equal Protection Clauses all place powerful limitation on the scope of state power to regulate economic and noneconomic matters alike.

It takes no close reading of multiple historical sources to show that neither the Federalists nor the Antifederalists in the ratification debates supported such massive federal schemes as the National Labor Relations Act, the Fair Labor Standards Act, or Title VII of the Civil Rights Act of 1964 insofar as it imposes an antidiscrimination law on employers operating in competitive markets. On individual liberties, the protection of property and contract from state interference was very much on the minds of the Framers. Sherry sows needless confusion into the narrative by overreading some words from James Wilson: “Again he could not agree that property was the sole or the primary object of Government and society. The cultivation and improvement of the human mind was the most noble object.”²⁵ In her view, this passage supports her thesis that personal rights occupy a higher plane than property rights. But one swallow does not make a summer. There is much textual evidence that the Framers regarded personal and property rights as compatible, even conceptually compelled by one another. James Madison’s general view, for example, was precisely the opposite of the one championed by Sherry: one broad conception of what he called property rights covered both areas. Thus Madison wrote in *Federalist 10* that:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From

²³ U.S. CONST. art. I, § 10, cl. 1.

²⁴ See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 729–37 (1984) (defending, with modification, the dissenting position of Chief Justice Marshall and Justice Joseph Story in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827)). For a general discussion of this matter, see generally *THE STATE AND FREEDOM OF CONTRACT* (Harry N. Scheiber ed., 1998) (collecting essays).

²⁵ Sherry, *supra* note 1, at 1459 (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 287 (Adrienne Koch ed., 1966) (Friday, July 13, 1787) (James Wilson)) (internal quotation marks omitted).

the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results²⁶

Madison echoes the same theme in his brief 1792 essay “Property”:

This term in its particular application means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which *leaves to every one else the like advantage*.

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has property in his opinions and the free communication of them.²⁷

Madison’s first sentence is lifted straight from Blackstone.²⁸ The second and fourth show the extensions that he is prepared to make. There is no effort to break the world into separate domains of property and personal rights. To the contrary, Madison well understands that law cannot cultivate or improve the human mind. But law can protect the background institutions of liberty and property that make such cultivation and improvement possible. His position is an advance rejection of the very position that Sherry seeks to defend.

Sherry next casts aspersions on the common law framework that plays such a large role in *The Classical Liberal Constitution* when she writes:

[A]s . . . Cass Sunstein put it, “the common law is itself a regulatory system, embodying a series of controversial social choices.” Once we understand that the distribution resulting from the common law is not natural or immutable, we can view Epstein’s preference for current distributions with the skepticism it deserves.²⁹

It is critical to identify at least some of the manifold intellectual confusions contained in this short passage. First, it is a wild exaggeration to say that the common law — no qualifications here — involves “a series of controversial social choices.” Its core protections are that no one may kill or injure another person or take his property. It is not credible to think that the basic law that bans murder or the forcible

²⁶ THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 2003).

²⁷ James Madison, *Property*, in THE PAPERS OF JAMES MADISON DIGITAL EDITION (J.C.A. Stagg ed., 2010), <http://rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0238> [<http://perma.cc/C8BF-BSV9>].

²⁸ See 2 WILLIAM BLACKSTONE, COMMENTARIES *1 (“[T]hose rights which a man may acquire in, and to, such external things as are unconnected with his person. These are what the writers on natural law [style] the rights of dominion, or property, concerning the nature . . .”).

²⁹ Sherry, *supra* note 1, at 1460–61 (quoting Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 451 (1987)) (footnote omitted).

dispossession from real property is controversial. The same is true with respect to the protection of land and chattels against deliberate destruction by other individuals. Of course, there are difficulties in setting the right balance with the fine points of adverse possession, the reach of strict liability and negligence in a common law system, and the role of promissory estoppel in contracts. But so what? The Constitution does not seek to arbitrate those doctrinal disputes when it seeks to insulate all individuals from the depredations of government actions. Does anyone really believe that the constitutional cases that announce that there is a per se ban against the outright confiscation of private property represents some highly disputed social choice?³⁰ No way. Not detail of the common law is immutable, but its basic protections are found in more or less the same form in every civilized society that condemns murder, rape, theft, and pillage.

Sherry's casual form of social relativism should be condemned as the dangerous diversion from the fundamental norms of social order that it is. Perhaps there is some alternative constitutional framework on which Sherry might wish to rely, but if so it is incumbent on her to state what it is. Even privacy does not quite do the job for a number of reasons. First, much of the protection of privacy comes from the common law tort of trespass and the general law of trade secrets, so it is far from clear just how much of that body of law survives as a stand-alone structure once the basic rules of personal liberty and private property are disregarded. There is also little doubt that privacy receives constitutional protection under the Fourth Amendment's protection against unreasonable searches and seizures as it applies to "persons, houses, papers and effects."³¹ That protection is extensive even if *Boyd v. United States*³² is wrong, as I believe, in trying to make a disembodied privacy interest central to the interpretation of the Fourth Amendment.³³ Instead, it is far easier to note that some searches need not involve trespasses: think of the use of a searchlight from a distance. Yet these are caught by the Amendment under conventional modes of interpretation.³⁴

Additionally, there is the simple question of proportion. There is a good reason why privacy as a separate interest did not emerge in its modern form until the famous article by Samuel Warren and Louis D.

³⁰ See, e.g., *Loretto v. TelePrompeter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³¹ U.S. CONST. amend. IV.

³² 116 U.S. 616 (1886).

³³ For a recent statement of my views, see Richard A. Epstein, *Entick v. Carrington and Boyd v. United States: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. (forthcoming 2015).

³⁴ For my views, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 713-17 (1992).

Brandeis, *The Right to Privacy*, appeared in the *Harvard Law Review* in 1890.³⁵ Most of the important work was already done by the law of trespass and by the rules governing confidentiality. It is also worth noting that the peculiar form of privacy that Warren and Brandeis sought to protect — the privacy of a wedding from the prying eyes of reporters — has been long regarded as unconstitutional; the supposed right to privacy is swallowed by a broad and pervasive “newsworthiness” exception.³⁶ The bricks and mortar for a major constitutional revolution are just not there.

Second, no one denies Sunstein’s well-known conceit that the common law is a regulatory system of sorts. After all, the common law (like every other known legal system) imposes liability for torts and breaches of contract among many other things. All systems are regulatory in this broad but imprecise sense. The common law, however, is not a regulatory system insofar as it relies on extensive government administrative structures. Instead, it involves a narrow set of remedies, such as damages and equitable remedies such as specific performance and injunctive relief. But integrating common law suits with administrative oversight has been a constant theme for nearly five hundred years, if not longer, as in an astute discussion of the relationship between public and private nuisance found in 1535.³⁷ Yes, of course, the common law system is controversial by virtue of the simple fact that Professors Sunstein and Sherry choose to contest it, but neither identifies any deep and systematic flaw. Many people believe that the common law flows from the natural law tradition insofar as it protects autonomous choices, enforces contract, and blocks aggression; none of these principles are ad hoc contrivances in speaking about property or privacy.³⁸ But no serious lawyer has ever thought that the common law was immutable or impervious to internal development or legislative modification, least of all me. What is critical is to test such alterations against some normative theory that explains whether and how these variations produce social improvements over the common law baseline. The chief normative theory by which to judge this involves showing how these common law rules, often defended on natural law grounds, dovetail with modern conceptions of overall social welfare, as noted earlier. For example, the development of takings

³⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³⁶ See Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 335–39 (1966).

³⁷ Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535), reprinted in RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 706 (7th ed. 2000).

³⁸ Of my many articles on privacy, see generally Richard A. Epstein, *Deconstructing Privacy: And Putting it Back Together Again*, 17 SOC. PHIL. & POL’Y 1 (2000); and Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000).

laws for just compensation is an indispensable element for the improvement of overall social welfare even though eminent domain is at root a legislative power.³⁹

Nor is this intellectual heritage undermined by the broadside claim that laissez faire is an ad hoc invention that I bring to my interpretation of the Constitution. Not so. This French phrase was well established by the 1750s, and was certainly in evidence in such works as Adam Smith's *The Wealth of Nations* and William Blackstone's *Commentaries on the Law of England*, which do not even make a cameo appearance in Sherry's review of the intellectual history leading up to the Founding Period.⁴⁰ There is of course no doubt that this general conceptual commitment did not resolve the particular issues that arose with the massive industrialization of the United States, particularly in the post-Civil War period. But nineteenth-century judges were broadly consistent in applying the classical liberal framework, with adjustments appropriate to these developments, including protection for wild animals⁴¹ and other common pool assets such as oil and gas,⁴² safety regulation,⁴³ rate regulation,⁴⁴ and antitrust laws.⁴⁵

Sherry shows no awareness of these developments when she claims that my discussion of the police power ranks as "perhaps the weakest part of the book."⁴⁶ She then attacks my views on the "morals" head of the police power,⁴⁷ which I shall address later. But most tellingly she offers no support for her blanket condemnation of my views in connection with matters of the police power for health and safety. On these matters she does not offer any reason against my position that government regulation should not be allowed when purported police power regulation is just a veil for the creation and preservation of monopoly power that is inimical to overall social welfare. The system that I defend does not impose any untoward limitations on the power of the state to engage in rate regulation and antitrust enforcement. Both these exercises of the police power were perhaps at the top of the

³⁹ See generally RICHARD A. EPSTEIN, *TAKINGS* (1985). The reference to social welfare theory opens the book. See *id.* at 3–6.

⁴⁰ Sherry cites in behalf of her position the very learned arguments of Herbert Hovenkamp, *Inventing the Classical Constitution* (Dec. 27, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2486612> [<http://perma.cc/XKS8-Q8S6>]. See Sherry, *supra* note 1, at 1458–59, 1459 n.24. But we are as ships passing in the night, as he never goes through the case analysis by which I document the rise of progressivism.

⁴¹ See *Geer v. Connecticut*, 161 U.S. 519 (1896).

⁴² See *Ohio Oil Co. v. Indiana* (No. 1), 177 U.S. 190 (1900).

⁴³ See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917).

⁴⁴ See Richard A. Epstein, *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345 (2013).

⁴⁵ See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

⁴⁶ Sherry, *supra* note 1, at 1463.

⁴⁷ See *id.*

Supreme Court's agenda during the pre-1937 period, during which the Court gave rise to some serious challenges on such questions as what it meant to impose price regulation on firms "affected with a public interest."⁴⁸ Yet, as I argue, none of the positions taken at that time could have justified the 1934 decision in *Nebbia v. New York*,⁴⁹ which used a rational basis test to allow New York to criminally enforce its minimum milk prices in a highly competitive industry,⁵⁰ and thus paved the way for the inexcusable system of marketing orders under the various Agricultural Adjustment Acts. On these questions, Sherry displays a surprising indifference and acquiescence, for she just refuses to let the reader know whether she accepts or rejects *Nebbia* and its progeny.

Instead, Sherry criticizes my uncompromising attitude toward collective bargaining and other forms of labor market regulation.⁵¹ How can one not believe in these, she notes, when "[i]n the real world, high unemployment rates, lack of skills, prejudice, and the stickiness of existing arrangements limit employees' options"?⁵² Easy: because her brief passage gets the causation backwards. The reason our unemployment rates are high and employment markets are sticky sits on the doorstep of the misguided New Deal decisions that joyously sustained these interferences with labor markets.⁵³ Heavily regulated markets allowed even more prejudice to flourish because union leaders could use their political power to snuff out the rights of black employees — even after the Supreme Court sought, largely unsuccessfully, to limit the huge bargaining rights and state-conferred monopoly power that it gave to unions in *J.I. Case Co. v. NLRB*⁵⁴ with a duty of fair representation in *Steele v. Louisville & Nashville Railroad Co.*⁵⁵ Many well-intentioned legislative reforms can easily go awry.

II. "BLINKING" ON PERSONAL LIBERTIES

In light of this history, I hope it is clear why I remain adamantly opposed to a set of legal relationships that have proved socially harmful over the last seventy-five years. Nonetheless, Sherry is right to ask

⁴⁸ *Munn v. Illinois*, 94 U.S. 113, 127 (1876); see also *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923).

⁴⁹ 291 U.S. 502 (1934).

⁵⁰ See *id.* at 515, 537.

⁵¹ Sherry, *supra* note 1, at 1468–69.

⁵² *Id.* at 1461–62.

⁵³ See, e.g., *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁵⁴ 321 U.S. 332 (1944).

⁵⁵ 323 U.S. 192 (1944). For a critique of the case, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 121–25 (1992).

why I am so uncompromising in my denunciation of these arrangements, while I “blink” (to use her term) in dealing with the various forms of personal rights that historically were subject to the morals dictated by the police power.⁵⁶ As she notes at the outset, I flag at least two deep cleavages in the theory of constitutional law. The first is the tension between the general implications of a classical liberal theory and the particulars of constitutional text, which for these purposes include the traditional and uniform construction of the police power — the famous quartet of “health, safety, morals, and general welfare.” The morality of the police power has a decidedly and consciously antilibertarian stance, which is hard to overlook or ignore, as it concedes to the states large regulation over marriage and sexual practices, and authorizes extensive “sin taxes” on gambling and other similar activities.

The second deals with the key question of what should be done in the event of constitutional mistake — that is, where a decision seems in clear tension with the originalist modes of interpretation. I chose the term “prescriptive constitution” to highlight the immense difficulties that arise whenever long practices are in tension with the original constitutional design.⁵⁷ After all, one of the central questions in property law is to explain why, after some magic point, a continued trespass can protect title by prescription and adverse possession. In some instances, it seems clear that we should accept such practices, and even strict originalists should not be so foolish as to seek to undo those institutions that have allowed the nation to flourish.⁵⁸ This is why I am quite explicit that for all their conceptual missteps, *Marbury v. Madison*,⁵⁹ *Martin v. Hunter’s Lessee*,⁶⁰ and the dormant commerce clause cases should stand,⁶¹ while *Plessy* should be struck down without so much as a second thought, as was done by *Brown v. Board of Education*,⁶² itself an analytically highly flawed decision.⁶³

So the question is: why my somewhat different attitudes toward the two classes of rights? As to private property and economic liberties, the text and the classical liberal theory are in congruence, and the damage to the social fabric by the combination of bad constitutional law and bad political theory offers good reasons to overturn these mistakes. Let’s displace it root and branch, tempered only by the need to

⁵⁶ Sherry, *supra* note 1, at 1462.

⁵⁷ EPSTEIN, *supra* note 9, at 68–71.

⁵⁸ Sherry, *supra* note 1, at 1462.

⁵⁹ 5 U.S. (1 Cranch) 137 (1803).

⁶⁰ 14 U.S. (1 Wheat.) 304 (1816).

⁶¹ EPSTEIN, *supra* note 9, at 97–100, 243–44.

⁶² 347 U.S. 483 (1954).

⁶³ EPSTEIN, *supra* note 9, at 530–35.

avoid massive dislocations in the effort to unseat so entrenched a system.⁶⁴ For example, the massive system of transfer payments, which while impossible to jettison midstream, should not have been extended under the Patient Protection and Affordable Care Act.⁶⁵

The moral decisions start with a very different pedigree. Sherry underestimates the gravity of the problem when she writes: “Once Epstein defines the police power to include morals”⁶⁶ Whoa! It is not my definition, but rather the content of the police power that has been established by a consistent line of nineteenth-century decisions that are, as I recognize, often inconsistent with any classical liberal theory. The morals head of the police power includes, “activities that were thought to be sinful, most notably sexual practices such as adultery, prostitution, homosexuality, abortion, and contraception.”⁶⁷ It also covered “activities like gambling, cockfighting and perhaps even bowling.”⁶⁸ The most egregious version of the nineteenth-century worldview on morals is *Reynolds v. United States*,⁶⁹ with its vicious attack on polygamy that conveniently resulted in massive forfeiture of Mormon goods to the United States. The same argument applies to gay marriage, where as a matter of first principle, I am very hard pressed to see any justification for the state to limit the parties to whom it will extend a marriage license.

In my view, the operative doctrine is that of unconstitutional conditions, which identifies key cases where the state may either grant or withhold a privilege, but nonetheless is not allowed to grant the privilege subject to conditions that some meet but others do not. The doctrine of unconstitutional conditions is a counterweight to the view that the greater power — withholding all licenses — necessarily encompasses the lesser power — withholding the licenses from some. In one canonical formulation: “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”⁷⁰ This power of selection is a real plus in competitive markets where those who are kept out of the system have multiple options. But that absolute power to refuse to deal is dangerous whenever there is a single supplier of goods or services, which is the unique position that the government holds when it has the sole power to issue or

⁶⁴ On which, see EPSTEIN, *supra* note 39, at 326–29.

⁶⁵ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

⁶⁶ Sherry, *supra* note 1, at 1464.

⁶⁷ EPSTEIN, *supra* note 9, at 367.

⁶⁸ *Id.*

⁶⁹ 98 U.S. 145 (1878).

⁷⁰ *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897), *abrogated by* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

deny permits or licenses of any sort. It is for just this reason that the duty to take all customers is imposed on common carriers and public utilities, which is intended to impose sharp limits on the state's exercise of its monopoly power.

As a matter of first principle, this limitation carries over perfectly to permits — at least if the government's activity is subject to the same level of scrutiny as that of the common carrier. But on matters of morals, traditionally, the state did exercise strong monopoly powers over marriage, which precluded the operation of that doctrine. So there is the difficult split between the normative and the constitutional positions. Accordingly, there is much force, textually, in Judge Sutton's recent decision in *DeBoer v. Snyder*,⁷¹ which stressed the incongruity in striking down the traditional definition of marriage as a union between one man and one woman (including in some places polygamy), which “until recently had been adopted by all governments and major religions of the world.”⁷² Indeed, historically there is not one shred of evidence that the parties who drafted either the 1787 Constitution, the 1791 Bill of Rights, or the 1868 Fourteenth Amendment wished in the slightest to curb the state's power to criminalize homosexual relationships, along with all sorts of other sexual behavior. So there is a real tension between these two areas that is *not* found with economic liberties. I do not “blink” in the sense that I am wobbly on the basic conceptual framework. I simply point out that it is a lot easier to reach a decision of constitutional dimensions when both of the basic indicators — doctrine and theory — point in the same direction than when they point in opposite directions.

Finally, we all blink in some cases. The Justices who decided *Brown* fretted a lot more about the legitimacy of their decision than do its modern defenders so many years later. Indeed, Sherry should take some comfort in my views on race relations. After all it is easier to sustain affirmative action programs without having to contend with the strict color-blind rule, so applicable to imposition of criminal punishment. Instead, as I urge, when the government is engaged in essential management functions it should normally have the benefit of the business judgment rule. In our second-best world, the state role in education has grown far too great, so now local governments must figure out in difficult circumstances whether, and if so how, to implement an affirmative action educational program.⁷³ Sherry does not, however, disaggregate various government functions in stating her opposition to

⁷¹ 772 F.3d 388 (6th Cir. 2014).

⁷² *Id.* at 396.

⁷³ EPSTEIN, *supra* note 9, at 535–36.

the central thesis of the book, and thus misses all the difficult dynamics of the situation.

III. THE FAILURE OF MODERN THEORY

Once Professor Sherry has finished her attack on my position, she turns her attention to the challenging task of articulating an alternative constitutional position. In this regard, her most telling weakness is her failure to anchor the modern progressive regime in any textual, structural, or functional examination of the constitutional text. To her great credit, the last third of her review chides her liberal friends for their failure to develop a comprehensive vision that takes into account both the basic constitutional structure and its many historical twists and turns.⁷⁴ Ironically, she is unhappy with their efforts for the same reason I am unhappy with the utter lack of any reasoned defense of her position in her review. Sherry and the writers she criticizes — a distinguished list that in different ways includes Professors Edwin Baker, Walter Dellinger, Ronald Dworkin, Richard Fallon, Larry Kramer, and Laurence Tribe — are both unsystematic and unpersuasive in their defense of the modern two-tier synthesis that subordinates private property and economic liberty to personal liberties. What Sherry should have concluded is that in spite of their efforts, her upside-down thesis is ultimately indefensible.

There is a deep lesson here. One sign of intellectual wisdom in the academic business is not to pretend that matters are simple when most assuredly they are not. But by the same token, it is critical in examining economic liberties and property rights, not to introduce unnecessary complications in areas that are in fact amenable to simple solutions in this all too complex world. So on the matter of first principle, I revert back to one of my favorite passages in political theory from *The Edinburgh Review* of 1843: “Be assured that freedom of trade, freedom of thought, freedom of speech, and freedom of action, are but modifications of one great fundamental truth, and that all must be maintained or all risked: they stand or fall together.”⁷⁵ Excellent political theory, and excellent constitutional law.

⁷⁴ Sherry, *supra* note 1, at 1468–75.

⁷⁵ *Article VII*, 77 *EDINBURGH REV.* 190, 224 (1843).