I am very grateful to the authors who have made contributions, both long and short, to this conference volume of the New York University Journal of Law and Liberty, dedicated to this issue on my recent book, The Classical Liberal Constitution: The Uncertain Quest for Limited Government,¹ and I take this occasion not only to thank them for the care and attention to which they have given my work, but for the incisiveness of their criticisms on the one hand and their own original insights on the other. In making this response, I shall follow the basic pattern that is found in the book itself, which is to begin the comments with a discussion of those articles that are directed to issues of textual interpretation. Second, I shall address many of the structural issues raised in the book. Finally, I conclude

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with a discussion of the claims about individual rights. My conclusion should surprise no one. I think that the case for the Classical Liberal Constitution is strengthened by the observation of its friends, and strengthened as well by the answers to pointed criticisms directed toward that theory.

In my view, the strongest influence of the classical liberal theory is toward the issue of interpretation as coupled with the delineation of substantive rights that individuals enjoy against the state, namely, the close connection between the first and third elements. The simplest explanation for this alignment relates to the extent that any legal or constitutional theory can aspire to some form of universalism. In dealing with language, it is clear to me (although not to most people) that there is a uniformity of grammar and structure that crosses time and culture, which is driven by the constant features of the external world and the universal need for individual self-preservation, as the ancients called it.² In all languages, the discussion starts with the concrete and physical, and moves to the general and conceptual, by a set of rules that are often dictated by such simple observation that power comes with holding the upper hand, such that no one wants to call a king “your lowness” when individuals in a low physical position lack power, itself a word with physical and legal meanings. Low position is easily and correctly correlated with low social status. By the same reason, no one wants to be the underdog, literally speaking, in any physical confrontation because the underdog has to fight gravity, which the top dog does not. Matters of force and position are universals that carry over from the physical to the social realm, often in ways that are more powerful than native speakers recognize about the grammar and usage of their own language. Just as one can lose their way in the

² For discussion, see NEAL WOOD, CICERO’S SOCIAL AND POLITICAL THOUGHT ch.4 (Law, Justice and Human Nature) (1991).
woods, so too one can lose his way in an argument. To bring the point home, I often ask my students, especially in Roman law where the issues of physicality are strong, whether they know the universal grammatical proposition that intransitive verbs cannot take the passive voice, to which the usual response is a puzzled look. But when I ask them whether it is grammatical to say, “I have been good,” they intuit that the rule has to be correct, even if they are missing an explanation as to how it operates. With some prompting and a little reflection, they come to realize that one cannot have the passive voice unless one actor has applied force to a second, so that it is perfectly correct and familiar to state “A has been pushed by B” as the passive transformation of the sentence B has pushed A, where the verb represents the same type of application of force that is found in ordinary trespass actions that are allowed under every system of law.

These binding substantive constraints on language make it easier to move across different legal systems, without losing sight of the fundamental issues that arise as much in the one system as in the other. Indeed, one point that bears a constant reminder is that there is indeed no such thing as a distinctive mode of interpretation that applies to constitutions as opposed to statutes, regulations or contracts, and indeed, ordinary speech. Any efforts to create ad hoc separations between these areas lead people to adopt certain presumptions such as “deference” or “contra proferentem” that undermine the overall soundness of any analysis by sticking an unwanted thumb on the scale—note the conscious physical image of the word “balancing” that leads all too often to destructive forms of interpretive ad hocery.³

The same approach holds for the third portion of the analysis, which uses the techniques of ordinary language to frame out the basic substantive rules. Indeed, it is very difficult to think of any legal system, primitive or modern, customary or formal, that allows the unbridled use of force by one person against the person or property of another. Now the direct application of force creates a prima facie form of liability for which various excuses and justifications are offered in all societies, including our own. This recurrent pattern of argumentation therefore influences constitutional interpretation in the abstract. It also explains why guarantees that protect liberty or property against the adverse actions of government can also aspire to universalist applications, as captured in such phrases as "the rights of man," full stop, no qualification. There is little question that historically this uniformity of the physical laws of nature influenced social judgments as well, so that any understanding of how the Constitution should be interpreted has to take into account the natural law substrate of the doctrine, which has often gotten lost in the pervasive legal realism of modern times.

Structural issues are hard to pin down, to say the least, and are therefore far more resistant to any universalist claims for at least two reasons. First, the choice of structure is heavily dependent on the nature of the polity over which any government can exercise the effective use of force. Size matters; ethnic divisions, if any, matter; population density matters; natural resources matter; climate matters; geography matters. To give but one simple example, larger entities with deep internal divisions will, ceteris paribus, find it easier to organize a government by recognizing some degree of institutional separation within a federation or confederation than if it is not. And it would not be possible to use any system of territorial representation where there are high densities of individuals gath-
ered in smallish countries, where the move to proportionate representation by slate may well take over.

The second point is that structural issues are never ends in themselves, but only means that are thought to be conducive, with greater or less reliability to achieve the ends of government set on by the polity. This point is easily raised against the Classical Liberal Constitution, for which at times too much is claimed, but this same constraint applies with equal force to the institutional arrangements under a social democratic or progressive state as well. All structures tolerate, indeed often create, some slip between cup and lip, so that an intelligent initial guess as to proper structure could well prove disastrous if there is a change in the composition or situation of the polity over which it is placed. In general, it is possible to have stronger commitments to the interpretive and individual rights issues than to any structural issues. With that framework firmly in mind, let me comment on each of these papers within this overall framework.

**Historical Context and Constitutional Interpretation** In virtually any modern discussion of constitutional interpretation, the discussion comes either sooner or later, usually sooner, to a discussion of the uses and limitations of the originalist position. The use of the singular term “position” is of course something of an amiable exaggeration. As originalism has gained traction in the general literature, fissures and refinements within the basic originalist position have become more pronounced. Today, the differences among judges and scholars in the originalist camp are often as important as those that separate originalists and living constitutionalists, who again come in multiple sizes and flavors. It is almost a matter of logical certainty that the *Living Originalism* of Jack Balkin fills one important square on the originalist chessboard. This conference volume, however, benefits from the contribution of three distinguished constitutional law theorists who work within the originalist camp, each of whom has some important exception to take to my own interpretive position. For Michael Rappaport, the element to stress is the dominance of the text. For Gary Lawson, the dispute is
between the classical liberal and the fiduciary background norms that help to inform textual interpretation. For Steven Calabresi, it is the importance of the natural law tradition as a source of understanding about the constitutional doctrine. And finally for Josh Blackman, writing on The Burden of Judging and Richard Wagner, addressing A Public Choice Refraction, the key to successful constitutional interpretation lies in the willingness to use the insights of public choice economics, with its pessimistic account of how factions operate in a political environment, to stick a stake through the heart of the modern rational basis test, especially as it applies to all issues associated with economic regulation at either the federal or the state level.

Rappaport and Textualism. One of the most insistent and text-driven originalists is Michael Rappaport, whose short comment shows much sympathy for my substantive position but nonetheless takes strong issue with my constitutional methodology. For Rappaport, the constitutional text is virtually the sole source of authority, so that it becomes a dangerous enterprise to “depart” from that text, by adding or subtracting from its meaning, which is a tactic that the most prominent originalist, Justice Antonin Scalia, would quickly pounce on.

But on this point, I think that both Rappaport and Scalia are profoundly misguided in their well-nigh exclusive reliance on text. As Rappaport notes, the position that I took in The Classical Liberal Constitution adopts those rules of construction “which w[ere] familiar to the Founders from their study of both Roman and common

law."8 Rappaport notes that there is significant disagreement over what those interpretive rules were, which, if true, would constitute as strong an objection to his form of textualism as it is to my more open-ended version of originalism. But in fact the level of agreement among modern commentators is far greater than the differences in approaches that are observable in classical writers, who saw much more continuity in textual interpretation across contracts, statutes and constitutions. The older phrase that a case comes within "the equity" of the contract or statute means in effect that if one situation is sufficiently close to matters that are covered, it too will be brought within the ambit of the rule. That principle applies in tort law to make sure that parties who set traps that kill the unwary do not get off scot-free because they have not applied force directly to the person of the plaintiff. The action on the case that applies to "similar situations" was invented to cover just those situations, as was the actio utilis at common law. It also means that if an individual is forbidden from buying the debt paper of a given company, he cannot evade that restriction by forming a wholly owned company that enters into these proscribed purchases for him. And if the statute taxes dividends at ordinary rates, that restriction cannot be evaded by a pro rata repurchase of shares as a way of getting retained earnings and profits out of the corporation, without altering in the slightest the shareholder control over corporate assets.

The mistake that Rappaport makes in dealing with these issues is to assume that the general rules involved in enforcing these various prohibitions were in some sense historically contingent on the particular sentiments of a political era. But as noted earlier, it is the fixed features of language that drive the adoption and use of these rules, which explains why they carry over so well from the Roman and the medieval common law to modern times. They have a level

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8 Epstein, supra, note 1, at 53.
of universality about problems that they address that cannot be gainsaid by looking at particular historical disputes as if they count as a refutation of the basic position. Ironically, I might add, this overall approach fits in quite nicely with Justice Antonin Scalia's general reluctance to look at legislative history. There is no legislative history in finding the "general part" of interpretive rules relating to such issues as assumption of risk, consent, necessity and self-defense and more. These background norms are intellectual and linguistic constants that play out in similar fashion over and over again across time and place. The early equation of natural law with uniform law that is found in the opening paragraph of Gaius's Institutes captures the point, which is as good today as it was then.\footnote{G. INST. 1.1 ("All peoples who are ruled by laws and customs partly make use of their own ius, and partly have recourse to the ius which are common to all men; for what every people establishes as ius is their own and is called the ius civile, just as the ius of their own city; and what natural reason establishes among all men and is observed by all peoples alike, is called the ius gentium, as being the ius which all nations employ.") The influence of Cicero should be evident, although it is unstated.}

The point here can be developed in connection with the Takings Clause of the Fifth Amendment—nor shall private property be taken for public use, without just compensation—which contains no hint of any police power. Rappaport is genuinely stunned to find the extensive elaboration of the police power, which is nowhere mentioned in the text, but which is a constant focal point in constitutional discourse, often packaged under the term compelling state interest, which likewise has no textual foundation. But it is not possible to do constitutional work unless one considers the justifications that would allow the government to override some of the explicit constitutional guarantees of liberty and property, two natural law stalwarts.

Thus, the law protects the freedom of speech, but it would be indefensible to say that this freedom includes the right to threaten
the use of force, or to lie or defame with impunity. No one thinks that the basic freedom allows one to contravene the major libertarian norms that prohibit the use of force and fraud, and it is even worse to ignore these limitations in the name of promoting freedom, which is undermined by tolerating these mischievous behaviors. So once those limitations are built into the legal rules, we have the police power in all but name. The major constitutional innovation was to group all of those limitations on the protection of liberty and property into one coherent whole across the various individual rights that are secured under the constitution. Thus, the defense of the free exercise of religion would not include the right to murder individuals from a rival church or to engage in ritual slaughter of any human being in order to propitiate the gods above or below. It is quite impossible to read these provisions in any other way, so that the nontexual element becomes an essential portion over the entire range of constitutional materials, so much so that balancing tests, whether by category or case, are an indispensable portion of the whole system.

The same is true in dealing with whether the Takings Clause, which makes no mention of regulation, has to apply to some forms of regulation. Again, the argument here is not what the Framers thought, as it is very clear that they did not and could not have addressed the major forms of regulation that emerged in the generations after constitutional ratification. But the key interpretive question is whether there is anything in the logic of the prohibition against takings that allows any judge or analyst to cordon off regulations into their own box, separate from occupation or seizure.

Here is one such regulation: Mr. X may own his land, but by regulation he is now for the first time forbidden to enter it or use it

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10 See, e.g., Ernst Freund, The Police Power, Public Policy and Constitutional Right (1904); see also Epstein, supra note 1, at 49-50.
for any purpose. There is no taking by the government in the sense of physical occupation, and there is none in the sense of a formal seizure of title by the state. But the obvious risks here of massive government misconduct are so great that no other interpretation is sensible in light of the objectives that are apparent on the face of the text.

One of my favorite passages in this regard comes from Justice Samuel Miller in *Pumpelly v. Green Bay Co.*, written before the current outpouring of material on constitutional interpretation, where he gets the point exactly right in a case where a private party pursuant to government grant has permanently flooded the land of a private farmer:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.\(^{11}\)

Several points are worth noting. First the baseline for analysis is "the principles of common law" by which Miller does not mean

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\(^{11}\) *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 170-178 (1871).
only the law of Wisconsin, but the general set of common law principles that uniformly appeal to jurists, statesmen and commentators alike, both now and across the generations. In his view, no citation was needed for the point that was well understood. And from that premise comes the inexorable conclusion that it makes no sense to use in constitutional discourse the word "taken" "in the narrowest sense" given the structure and logic of the Takings Clause. It is not, moreover, that the justices have to impose some novel view on their subject matter by some quasi-legislative act of will. All substantive constitutional guarantees have this quality, which depends on our basic grasp of English (or indeed any other) language, not on the conventions or fads of this particular time.

To be sure, the originalist project necessarily contains a huge textual element, but in those cases where the text talks about prima facie substantive guarantees, reading in its extension to parallel cases is part of the game by what I have called the anticircumvention principle. Where, as will become evident, the discussion moves to structural provisions, the interplay of prima facie case and substantive justifications does not play nearly as large a role in the analysis, so that parsing text necessarily assumes a greater centrality in the overall analysis. It is therefore critical for any interpretivist’s theory to understand the nature of the problem it has to address before it comes up with some conclusion as to how it should be treated.

Gary Lawson and Fiduciary Obligations. Many of the objections that I have raised to Rappaport’s view of originalism do not carry over to Gary Lawson, who readily accepts the notion that background norms aid constitutional construction, but finds these in the eighteenth century theory of fiduciary obligations instead of the classical liberal tradition of which I write. In my view, there is a stronger overlap in our views on the sources of law than Lawson

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12 Epstein, supra note 1, at 48-54.
acknowledges. But it is first necessary to trace the path by which he has reached his own conclusions.

The initial portion of the Lawson article is somewhat of a mystery to me. For reasons that I do not fully understand, he seems to think that it is important to take a strong distinction between the interpretation of the various provisions of the Constitution and the construction of these provisions. As a matter of ordinary language, there seems to be a substantial overlap between the two conceptions. Indeed the third definition of construction that is given in my Funk & Wagnalls dictionary reads: “The act of construing, or the interpretation thereby arrived at.” The apparent difference between the two is that construction is the act by which the interpretation is reached, without any clear account as to who has made the construction in question. But in the Lawson terminology something larger is afoot: “interpretation is the ascertainment of the communicative signals contained in a text, while construction is the production of norms for real-world decision-making – i.e., adjudication – undertaken pursuant to (or in the name of) the text.” I would use slightly different terminology to distinguish between the activities of constitutional interpretation and constitutional adjudication.”

Note that under his account, the term interpretation has the meaning that is given to construction in the dictionary, while the distinction between interpretation and adjudication has no role in that discussion at all. I have to confess that notwithstanding the subtlety that marks this discussion, the payoff does not seem clear. The point to ask is what major question of constitutional interpretation takes a different coloration if this distinction is systematically followed rather than, as is the case, largely ignored in practice. In

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looking at this question, it is instructive to note that the term “construed” is found three places in the Constitution.

**Article IV, Section 3, cl. 2.** The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

**Amendment IX.** The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**Amendment XI.** The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In all of these cases, the term “construed” functions like a close synonym for “interpreted” or “read.” The basic reason for the use of the term construed is that it is intended to convey the cautionary notion that the constitutional provision involved does not actually function in an instance as a new source of law that overrides other unnamed provisions, but only as a reminder that certain implications should not be read into these other provisions. The point applies with respect to claims of the United States or the several states, with respect to the specific enumeration of rights, and with respect to the scope of diversity jurisdiction where the provision reads like a reminder that any one who has taken the opposite view, which
was done in *Chisholm v. Georgia*,\(^{14}\) has made a mistake that should now be disregarded as if it had never been decided.

That meaning certainly makes sense, and it also suggests why I am hard pressed to find any of the countless issues of constitutional interpretation that in concept or application turn on this distinction. Certainly none of the key decisions that led to the rise of progressivism and the decline of classical liberalism are explained in terms of this theory. I shall therefore put this point aside and turn to what I think is operationally a critical question. In dealing with the normative background for constitutional interpretation, Lawson stresses the importance of the tradition of fiduciary law as a source of inspiration for the interpretive structure of the Constitution. In large measure he derives this from thinking of the incorporated public—“we the people”—as the principals for which government turns out to be the agent.\(^{15}\) It is the public’s command that matters, notwithstanding the obvious complications that arise from the incontrovertible fact that the composition of the public varies over time, much as the set of shareholders bound by a corporate charter can switch as well in composition.

In this point, he is surely correct to note that the government should never, for example, be treated as the outright owner of moneys that are in the public bank accounts, or as the outright owner of land that it has within its power. The basic point here is that a theory of limited power only operates if the government is thought of as the agent who is supposed to serve the interests of the people who have placed their trust in these officials. In my view, Lawson is right to stress this element, which is especially acute because the agent in question is often someone for whom the citizen did not support, and may have strongly opposed, for that position, but has

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\(^{14}\) Chisholm v. Georgia, 2 U.S. 419 (1793).

\(^{15}\) Lawson, *supra* note 13, at 820-22.
to accept in the name of social order. Indeed, it is the clouded nature of that appointment that serves as a cautionary warning as to the limits of the trustee’s power.

By the same token, however, stressing this fiduciary theme is not something that stands outside the classical liberal tradition, but rather forms an essential part of it. Here are a couple of examples from my own work. In my essay The Public Trust Doctrine for example, I advanced the “givings” analogue to the Takings Clause: nor shall public property be given to private use, without just compensation.” The implicit logic behind this formulation is that government officials are similar to the officers and directors of private corporations. The former are no more allowed to give away government assets for free than the latter are allowed to give away corporate assets, because they hold their position of power as trustees for their citizens or shareholders, respectively. And the duty is especially exacting whenever self-dealing is involved, precisely as is the case within the corporate context, where the rule of entire fairness applies.

Entire fairness has two aspects: fair dealing and fair price. The Court must consider how the board of directors discharged all of its fiduciary duties with regard to each aspect of the non-bifurcated components of entire fairness . . . . In determining the transaction’s overall fairness, the Court will conduct a unified assessment that involves balancing the process and the price aspects of the disputed transaction.

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17 Ryan v. Tad’s Enters., Inc., 709 A.2d 682, 690 (Del. Ch. 1996) (internal citations and quotation remarks omitted).
The constitutional analogues are of course procedural due process and just compensation. The key entryway into this inquiry in the corporate context is the derivative lawsuit by which a shareholder on behalf of the firm can make both the procedural and substantive challenges. The key vice of the current constitutional doctrines on standing is that their constant emphasis on discrete injury unduly plays down the role that citizens should have to challenge decisions ultra vires the government. 18 It should be noted that trust law developed on the equity side of the English Courts, and that Article III, section 2 begins “The judicial power shall extend to all cases, in law and equity” which precisely covers this case. 19

The same trust element is conspicuous in connection with the doctrine of unconstitutional conditions: the basic point is that the government is not the absolute owner of the highways or the public buildings, which would give it the power to admit or to exclude at will. 20 Rather, it functions as a trustee for the public at large that has to give reasons why it excludes certain people from various kinds of facilities. It is one thing to keep someone off the highways because she does not know how to drive. It is another to keep someone off the highways because she will not make contributions to the dominant political party. The former condition is consistent with public fiduciary duties, while the latter is not. To be sure, the trust obligations are not the sole explanation of all constitutional

18 The initial source of confusion is found in Massachusetts v. Mellon, 262 U.S. 447 (1923) (denying citizen or taxpayer standing); Frothingham v. Mellon, 288 F. 252 (D.C. 1923) (denying state standing).

19 For discussion see Epstein, supra note 1, at 107-117. For a more detailed treatment of this neglected theme, see Richard A. Epstein, Standing and Spending – The Role of Legal and Equitable Principles, 4 CHAP. L. REV. 1 (2001); and for a shorter treatment, see Richard A. Epstein, Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits, 6 GREEN BAG 2d 17 (2002).

20 Richard A. Epstein, Bargaining with the State ch.11 (highways) & ch.12 (land use)(1993).
doctrine. The preference for competition over monopoly, which is inherent in the articulation of any coherent dormant Commerce Clause argument, is also a part of that tradition. Two key cases in this tradition include *HP Hood & Sons, Inc. v. Du Mond*, which in 1949 struck down as protectionist a New York state license requirement that blocked a Massachusetts dairy company from buying raw milk inside the state on the ground that its actions represented “destructive competition in a market already adequately served.”

Two years later the Court did the same thing in *Dean Milk Co. v. City of Madison*, with a Madison law that required all milk sold within the city to be pasteurized there, including Illinois milk, pasteurized in Illinois, which met all Wisconsin standards. Consistent with classical liberal theory, this body of law recognizes a narrow police power exception to the basic nondiscrimination norm as it relates to the health and safety of indigenous species that could come from the shipment of foreign baitfish into local waters. The reason this judicially created doctrine works so well is its high correspondence with first principles, just as Lawson acknowledges.

Last I want to comment briefly on Lawson’s views on the question of what should be done in those cases where the standard tools of textual interpretation do not yield a clear sense of what the appropriate answer should be. In my view, no court should renounce its duty of interpretation, but should do the best that it can with the limited and imperfect materials at its disposal, fully expecting to make some important errors along the way. Lawson takes a somewhat different view with the evocative statement: “Interpretative indeterminacy fully justifies adjudicators throwing up their hands and saying, ‘beats us what the Constitution means.’” Such a declara-

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tion does not prevent them from deciding cases, and it does not prevent them from deciding cases in accordance with the Constitution."24 The secret to this problem in his view lies in the burden of proof that one follows in these cases. Just as the burden of proof can decide cases where there is a gap in the factual evidence, so the baseline norm of noninterference unless the Constitution covers the case should apply as well.

I think that in practice there is more overlap between our two views than Lawson suspects. There is no doubt that the rule of law considerations militate against the creation of legal rights when none can be fairly inferred from the relevant legal materials. It is also the case that the process of implication is a necessary part of the overall system, as with the articulation of the police power, and further that the burden of proof does not solve the questions that often arise, as with the presumption of res ipsa loquitur which is allowed to overcome the initial burden of proof, subject of course to further evidence on the other side. Indeed, the legal system works the same way on doctrine. There may be a presumption against the creation of new rights out of whole cloth, but there remains the question of whether the presumption is strong enough to withstand the doubts raised by evidence introduced on the other side. Often the person entitled to rely on that presumption will become proactive once the new evidence is introduced, seeking to impeach or deny some of it, or to introduce new evidence that supports that initial presumption. In dealing with these issues, huge amounts of terrain can be covered because some of the constitutional guarantees, such as individual claims of the free exercise of religion (that covers more than worship) or freedom of speech (that covers more than talking) or life, liberty or property (that covers vast territories) leave relatively few areas where gaps can be identified. So in the

24 Lawson, supra note 13, at 832-33.
end, the interpretive enterprise will have to travel far and wide, and when it does, it is likely that the court will have to weigh materials to make its "definitive conclusion," knowing that errors will emerge no matter how well it does. This issue arises not only with the Classical Liberal Constitution, but with any world view. It is a proposition about language, which tends to abhor vacuums, i.e. areas that are left wholly untouched by explicit text and background norms.

*Calabresi and Natural Law.* Steven Calabresi has written such a massive tome with respect to the entire enterprise of my book that it is scarcely possible to respond to it, especially since I agree with his basic assessment of the historical record that I have not included, in part for reasons of space in my book.25 As should be evident from the earlier references to Cicero and Gaius, I quite agree with him that the influence of natural law thinking at the time of the founding was critical to how judges and writers of all political persuasions addressed their subject matter. The decline of natural law thought that came largely in the twentieth century should not be allowed to permit modern day scholars to indulge in "winner's history," such that the only elements of the jurisprudence of earlier periods that survive are those that remain congenial to the dominant political sentiments of our time.

Calabresi's emphasis on natural law ties in closely to the interpretive themes that I stressed in outlining my differences with Professor Rappaport. The key element of natural law thinking is that it posits relationships that exist among ordinary persons in a state of nature. One reason for this framing of the problem is that it precludes any resort to the state as an independent source of authority for any and all claims about individual rights or duties. It cannot be

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said that such-and-such propositions, be they about property or liberty, or anything else in between, derive from the exercise of state power. Quite the opposite, the initial position in a state of nature requires in good Lockean fashion that the state itself be justified as the least intrusive means to secure the natural rights (and enforce their correlative duties) among individuals. There is in this regime no place for insisting that all grants of property come from a state (that has yet to be created) which can keep some "implied right" to regulate private property in a way that advances its conception of the public good. This asserts a far broader conception of the police power than that which is derived from natural law principles, which does not grant the state that level of flexibility.

In dealing, for example, with the ownership of property, natural law theory uses the rule of first possession to determine the original owner of anything because that rule does not in any way depend upon the authority of the state for its own social validity. The state’s role under this version is to find ways to increase the security of title by means such as formalities demarcating the plots of land acquired or improving conveyancing by deeds and recordation— which were of course the subject of the Statute of Frauds of 1676,26 passed just years before John Locke wrote his Two Treatises of Government, which were completed, probably around 1682, but published only in 1689 or 1690, after the glorious revolution. For political purposes, the first possession rule, just like the famous Lockean claim for individual autonomy or self-ownership,27 is that neither is dependent upon state power for its validation, which is subversive, and intentionally so, of any divine right of kings.

This position ties in with the views of constitutional interpretation that I took above in connection with constitutional guarantees of individual rights. As these claims to both liberty and property are squarely within the natural law tradition, it helps explain why there is indeed a constant background set of interpretive norms that cut decisively against the Rappaport position that all debates over political theory are dominated by differences. In fact, the opposite is true. There are many debates between the Federalists and Anti-Federalists, over a full range of issues about such question of the ameliorating effects of local or national control, but none of these goes to the set of rights protected within the natural law framework. They all go to the question of which type of institutions are best able preserve these rights, which segues well into the structural issues. They do not go to the rights issue. Indeed, as Calabresi notes, the influence of the general statements on natural rights has had enormous influence outside the United States, including most obviously on the French Revolution.\textsuperscript{28} Indeed this general frame of mind survives in fact through the end of reconstruction in 1877,\textsuperscript{29} for the best way to understand the Civil War amendments is as an effort to shrink the size of government by putting additional limitations on what states could do both to citizens (under the Privileges or Immunities Clause) and to persons more generally under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. There is then ample reason to reject claims that some major diversity of views about the central set of desired guarantees renders the standard rules of interpretation unable to meet the challenge. These rules work and they explain the structure of constitutional interpretation, at least before the Progressive movement took over.

\textsuperscript{28} Calabresi, \textit{supra} note 25, at 866.
\textsuperscript{29} \textit{Id.}
Richard Wagner on Public Choice Readings. Unlike the other contributors to this symposium, Richard Wagner is not a lawyer, but a distinguished public choice economist, which in turn prompts him to look at the Classical Liberal Constitution through a very different lens. He spends little time talking about the particular provisions of the Constitution, and much time discussing the fierce challenges to government that arise from the powerful truth of public choice economics, which is that the constant pressures of self-interest pose a constant threat to any institutional arrangements that are intended to preserve a basic system of private property and contractual freedom within a state that is strong enough to protect against threats to internal and external threats to order and to provide the essential infrastructure and monopoly control needed for competition to thrive. In dealing with this process, Wagner is correct in my view to express at best guarded optimism on this question, with his simple but profound conclusion that “Good government is not a destination or final resting point. It is a continual, never ending process.”

The question therefore arises, exactly what are the forces that tend either to support or reduce that process. In dealing with this issue, Wagner is correct to note that Benjamin Franklin realized a large truth when, in answer to the question, what form of government was created by the Constitution, he answered, “a republic, if you can keep it.” The point is salient for two reasons. First, he said a republic and not a democracy, for the latter tends to work by simple majoritarian rules which in the end prove themselves powerless against the political forces that are all too willing to, in the words of the Scottish historian Alexander Tytler, “vote themselves

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30 Id. at 386.
31 Id. at 361.
largesse out of the public treasury.” The point here is that these tendencies may not manifest themselves immediately, but often it is just a matter of time before a winning coalition is able to put some such proposal through. It need not, of course, do so as an expression of some raw preferences. It can always find some rationale that apparently justifies the move in this particular case as an exception to some general principle. But once the dam is breached, it is easy to poke a second hole and then a third until the original presumption against these transfer systems is lost and the downward cycle begins.

The issue is then what countermeasures can be taken. On this score, I am inclined to agree with Wagner that it is a mistake to ignore the insights of the great economist Frank Knight, who saw that, especially in deliberative processes, individuals often did not act solely as homo economicus, whose behavior were taken solely in response to differences in the relative prices, for example, of market versus regulatory responses to a given problem. Instead, one of the possible bulwarks against the tendency to plunder through government rests on a sense of at least some portion of the population that allowing the first step down this path is a long term disaster even for the group that gains the initial round of benefits, so that it becomes wise to persuade the short-term winners of the folly of this practice.

Yet as Wagner also recognizes, it is quite clear that suasion will not do the job alone. Some institutional safeguards have to be put into place. Indeed, it is on this score that I do have at least one modest disagreement with Wagner, who does not, I think, fully appreciate the efforts that the Founders made to back moral suasion with sound institutional arrangements. Thus at one point he writes:

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32 Id. at 361.
33 Id. at 362-363.
"The requirement that appropriations from the federal treasury must be to promote the general welfare leaves gigantic space for creativity in interpretation." 34 Starting from that approach, matters "ended in the 1930s with recognition that the general welfare is what Congress declares it to be," 35 for which he quotes a source that I never knew, Charles Warren's Congress as Santa Claus, 36 written in 1932 before the major transformations of the mid 1930s, which proved Warren correct beyond his wildest dreams. But in this regard as at least, Wagner should be convicted of the charge of aiding and abetting this illicit constitutional transformation, for he, like so many defenders of large government, neither quotes, nor scrupulously interprets the full text of the "general welfare clause, which reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." 37 Two points here stand out. First, the phrase is the 'general Welfare of the United States," which refers to the entity and not to the position of individual citizens, much as the general welfare of a corporation refers to the well-being of the entity, not its individual shareholders. The payoff from this characterization is that the only way in which the entity can benefit is from measures that help all citizens or shareholders equally, which at the very least mean that the United States cannot introduce a regime of transfer payments among citizens either within or across states. Conceptually, this point is a direct response to the risk of explicit transfer payments that Wagner rightly puts at the top of his list. Indeed, it was only because the full  

34 Id. at 369
35 Id. at 377.
37 U.S. Const. art. I, § 8, cl. 1. For a more detailed exposition, see EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note 1, at 193-209.
force of this language was understood by such individuals as President Grover Cleveland that the prohibition against transfer payments lasted as long as it did, which once again shows how a combination of both political strength and individual wisdom is needed to answer Franklin’s challenge of how to hold a Republic together. Indeed, this short passage from Wagner leads to this tantalizing question: if one of the most articulate defenders of a system of private property and limited government misses one of the strongest arguments in his favor, what chance is there that those arguments will prevail in a progressive political environment that regards these payments as a source of good, and not of public concern? Strong political convictions must be matched by careful constitutional readings.

The Structural Constitution  The texture of argument takes on a different hue when the discussion turns to key structural issues under the Constitution. In this regard, it should be blindingly clear that there is no simple one-to-one correspondence between the classical liberal position and the choice of structural rules found in the United States Constitution. That result is made perfectly apparent in the American experience because both federalism—sometimes called vertical separation of powers—and the division of the federal government into three separate branches with mutual checks and balances—are in important ways novel experiments that build on, but differ from earlier systems of governance. In all these cases, the choice of institutional arrangements is best understood as a means toward the ultimate end of limited government, one that prevents tyranny while allowing for the maintenance of order.

Sherry on the Original Constitutional Synthesis. In her short and elegant essay on my book, Susanna Sherry exhibits the same kind of spunk that she showed as a first year tort student at the University of Chicago in 1976, always looking to push the envelope in order to
expose the weak spots in any argument. 38 She exhibits that commendable trait in connection with a range of structural issues, which I shall discuss at this juncture, and some pointed remarks on Roe v. Wade that I shall discuss later on. It is a compliment to her intellectual tenacity that she can pack so much information into a short space, in which she makes the powerful claim that the classical liberal constitution was never embedded in the historical constitution at all.

Her initial sally is to take me to task for being none too careful in dealing with claims of judicial supremacy in connection with the much contentious question of judicial review. 39 In some sense she is surely correct to say that the Supreme Court does not always have the last word on constitutional interpretation because each of the three branches should exercise their independent judgment on the constitutionality of any distinct statute. The Congress that thinks a statute unconstitutional need not pass it. The President who thinks that it is unconstitutional can veto it; just as the Court can strike it down. But the examples that she chooses are not the ones that give rise to the battle between judicial parity and judicial supremacy. Thus, suppose now that the President vetoes a bill that is overridden, and he now has to decide whether or not to enforce it. There is a serious clash of wills, given his obligation to take care that the law be faithfully executed, for him to put his view over that of the Congress or visa versa. One of the attributes of judicial supremacy is that neither political party gets to make that ultimate decision. Now it is left to the Courts to resolve that conflict at least when the executive seeks to enforce the statute that is unconstitutional. The situation is more difficult given the rules of standing if

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39 Id. at 992-95.
the President decides not to enforce the law, but even here it will often be the case that someone will be in a position to make the challenge, i.e. a person who does not get a deduction or rebate that the Congress says he is entitled to, and again the court decides. 40 Similarly, in those cases where both the President and the Congress believe that a law is constitutional, a system of judicial parity would allow for its executive enforcement, subject only to this huge caveat: can the judiciary refuse to render its aid to the President and Congress if the courts think that it is unconstitutional? Does anyone want to consciously create a split regime with such unstable political properties?

It is at this point that the weaknesses in the constitutional regime are apparent, but to look at the document shows no support for judicial supremacy. We know that the Supremacy Clause contemplates the judges in each state court system as final arbiters of the federal question. 41 We know that this power can only be magnified if Congress does not set up lower courts. We know that Congress can deny the Supreme Court has "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations

40 See Halbig v. Burwell, No. 14-5018, 2014 WL 3579745 (D.C. Cir. July 22, 2014) where the Court held that one plaintiff David Klemencic had standing because he did not wish to purchase the health care insurance on the individual exchanges established under the Affordable Care Act. Nonetheless, he would be required to do so if he were eligible for credits for participating in an exchange established by the federal government. The federal subsidy in effect forced him to pay the penalty or spend his own money, and he had standing to protest that claim. The far simpler ground is to let any citizen challenge the rebate on the ground that the program was not authorized as a matter of law.

41 U.S. CONST. art. VI, § 2:
This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
as the Congress shall make," which shows that the Supreme Court does not under the original constitutional plan lie outside the system of checks and balances that drives the overall decision, a move which is perfectly consistent with the small place that judicial power has in the separation of powers schemes of both Locke and Montesquieu. The decision in Marbury v. Madison does not, moreover, require judicial supremacy in the sense stated above. It need only stand for the proposition that Congress cannot force on the Court an appellate case that does not fall within the ambit of its powers under Article III, Section 2. The textual case against judicial supremacy is, I think, strong, just as I argued in The Classical Liberal Constitution.

A moment's reflection should indicate that however clear the text, those legal arrangements cannot last under the American system. The courts can be left to the protection of individual rights under writs of habeas corpus in a parliamentary system. That remains true under the American system, in principle, even though the question of where habeas should be brought is a far harder question in the United States with multiple state courts and the prospect that the lower federal courts, even if formed, might not receive from Congress authorization to cover these cases.

The two larger problems, however, stem from the profound differences between the American constitutional system and the English parliamentary system. Since the prime minister is in parliament, the questions conflicting between the executive and the legislative branch can be resolved within the Parliament itself, if need be by a simple vote of no confidence. There is no need for the courts to adjudicate what is now an internal dispute. Similarly, since there

42 U.S. CONST. art. III, § 2, cl. 2.
43 U.S. CONST. art. I, § 9, cl. 2: The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
are no states, the courts are not needed to police any boundary between federal and state power. Both these issues arise in endless permutations within the American system, so that the original design with a pallid judicial presence quickly unraveled.

I do not think that this change can be defended on originalist grounds, but this is, as I argued, a strong case for the use of the prescriptive constitution to take over. None of the shortfalls of the original Constitution can be cured with time. Indeed these issues are likely more acute today than before. So it is best to stick with programs that have worked well for 200 years. On this issue, it is best to let sleeping dogs lie.

The situation takes on a different form, however, in dealing with the various issues under the commerce power. Sherry takes the view that the entire notion of enumerated powers was cooked up at the last moment, and therefore does not deserve much weight. I regard that as a dangerous notion for multiple reasons.

First, it is not possible to interpret an integrated document by positing different levels of respect to different portions, based on the number of drafts circulated before the final provision is reached. No one has ever made this argument before, starting with Gibbons v. Ogden and moving forward through Wickard v. Filburn to the present time. Nor should they make it now, here or on any other clause.

Second, the arguments that speak in favor of the prescriptive incorporation of the modern view of judicial supremacy are strictly needed to make this system work. There is no similar need in any way shape or form for a commerce power jurisprudence that creates insuperable difficulties for at least two reasons. First, the bloat-

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44 Sherry, supra note 38, at 994.
45 22 U.S. 1 (1824).
46 317 U.S. 111 (1942).
ed federal jurisdiction requires the constant adjustment through such doctrines as preemption on the two-overlapping jurisdictions, which create the serious risk that the jurisdiction that wants to regulate the most will have the dominant hand. Second, the major importance of federal commerce power in cases like *Wickard* is for the creation and perpetuation of a cartel-like arrangement, of which the crop allocation provision in that case were one. Much of the history of the progressive movement is an effort to make the country safe for mandatory collective bargaining and price supports of various kinds for agricultural doctrine. The union will not be riven with huge internal conflicts if that exercise of federal power were pruned back to its original levels. In sum, I do not think that any of Sherry's pointed criticism undermines the positions on the structural constitution taken in *The Classical Liberal Constitution*.

*Huq on the Separation Power.* In his thoughtful essay on *The Classical Liberal Constitution*, my Chicago colleague Professor Aziz Huq goes to great pains to note the gap that necessarily arises in tracing a single line between the basic theory and the particular constitutional rules crafted to deal with the separation of powers. I fully agree with that basic point. But my position is not quite as open-ended or agnostic as is Huq's. The principle of separation of powers may not offer a unique solution to the issue of divided power, but by the same token it surely does rule out some positions as unacceptable. The first of these constraints is the danger of creating strong veto-stops within the system. There is no question that the Presidential veto makes sense as a check on the Congress. But that veto would be too strong if it could not be overridden at the very least by some supermajority of both Houses of Congress. It is also

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the case that the conditions for override cannot be so stringent that it could never happen in practice regardless of general public sentiment. In the U.S. Constitution, the line is set at two-thirds of each House of Congress, an obstacle that is harder to overcome as the size of both Houses increases. Perhaps that number is now too high, but it is surely the case that any higher number like three-fourths will not do because that consensus could never be achieved with respect to any controversial piece of legislation.

It would also be the case that separation of powers would not work well if the structure of each House of Congress tracked the other on all particulars of institutional design. That high level of correlation would reduce the chances that either House could be a check on the activities of the other. The different terms for the Senate and the House, the use of districts for House seats and (originally) the selection of members of the Senate by the state legislators offer yet another illustration of a structural choice that really matters. In similar fashion, the historical distrust of independent administrative agencies that concentrate powers in unelected officials, which is the darling of progressive thinkers, is the bane of classical liberal thinkers for two reasons.

First, the system of administrative oversight is intended to speed up the pace and scope of government activities. The presumption of the classical liberal, sight unseen, is against legislation, which is why a universal set of procedural safeguards is generally thought to be an ideal way to slow down the political process, without having to make a case-by-case analysis of each particular piece of legislation.

Second, the administrative state, with its emphasis on delegation to unified bodies, starts with the assumption that expertise can translate complex policy prescriptions into serviceable legal rules that somehow reflect a sound cost-benefit judgment that could not be reached by other means. That commitment to particularistic review of given proposals cuts against the grain of classical liberal theory, which in general favors the use of state power to implement and fortify the common law rules of contract, property and tort.
That slimmed down version helps explain the operation of the Statute of Frauds and similar legislation. And with some care, it can explain the need for a more expansive administrative apparatus to deal with railroad interconnections and rate regulation through administrative bodies, subject of course to extensive procedural and substantive requirements. The procedural issues deal with matters such as the right to be heard before an impartial panel whose activities were, at least on questions of law, subject to serious, indeed, de novo, judicial review. On this score, moreover, it is proper to condemn the current institutional arrangements of allowing expert agencies like the Federal Communications Commission, the Securities and Exchange Commission, and the National Labor Relations Act to act as the initial adjudicative body in these cases.

The substantive standards guard against not only the risk of overuse of monopoly power, but also the risk of confiscation through regulation that can easily express itself by restricting railroad and utility rates to cover only variable costs, so that the front-end investment could never be recovered over the life of the project. It is no accident that the rise of rate regulation gave rise to a demand for judicial oversight that is far more consistent with classical liberal principles than with the progressive world view, which offers a wide berth to agencies in the way in which they construe and expand their own authority, that pays relatively little weight to the prohibition against retroactivity, and that is comfortable with administrative agencies shifting positions without real explanation.48

Recall that Chevron USA Inc. v. Natural Resources Defense Council, Inc.,49 involved just that sort of agency flip-flop between the very different policies toward point-source pollution between the Carter and Reagan administrations—a gulf that is most troublesome to

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people who view government administration as a threat to the rule of law. There is no hard and fast division between the classical liberals who regard all legislation under a presumption of error and the progressives who take the opposite view. But there is a systematic fault line between the two worldviews on these separation of powers issues.

The question then is how to read the particular provisions of the Constitution that address these issues. Here, the initial problem is that these provisions are not all directed to the same kind of textual or structural issue. Huq, in his critique of my work on separation of powers, is sensitive to the multiplicity of attitudes on different types of questions. But I think that he does not spend sufficient time asking the question of whether there is something in the nature of the particular dispute that makes one technique of interpretation more sensible than its rivals.

Thus in dealing with the distribution of powers between Congress that makes the law and either the President or the administrative agencies that enforce it, I cautioned against "excessive literalism" in setting the appropriate lines. But there is good reason for taking that approach. In dealing with matters of political governance, I take the view that much can be learned by looking at the distribution of powers that are found in voluntary associations, whether for business or charitable purposes. These organizations have to divide power between their shareholders or members, their boards of directors, and their executive officers. It is very clear that no hard and fast line works in these business contexts, so that informal negotiations and adjustments within the basic framework

50 PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW ch. 3 (2005) [hereinafter DESIGN FOR LIBERTY].
52 EPSTEIN, supra note 1, at 268.
are a built-in part of the political economy within the firm. The paucity of any dominant voluntary solutions makes it highly unlikely that such a line could be drawn in the political context where even trickier governance questions arise—trickier because there is no voluntary selection of co-venturers, and no exit rights in the event of disagreement. It is equally clear that legislation can come in all shapes. Some statutes, borne of distrust, will contain very detailed rules to prevent runaway activities by either the President or some administrative agency. In other cases, such as foreign affairs, it may be well appreciated on all sides that executive power has to dominate, so that broader discretion is granted, perhaps for a shorter period of time.

Given that no direct line runs from the concern with separation of powers to a unique solution, this endemic and unavoidable line-drawing problem literally calls out for a bit of cautious deference. That approach seems correct in the case that I discussed in The Classical Liberal Constitution, namely, how does one divide the control over the placement of Post Offices, given the power of Congress to "establish Post Offices and Post Roads."

That same attitude does not work in my view on the question of the creation of independent agencies. On this issue Huq notes that I take "a fairly mechanical inference on the Vesting Clauses" to the status of independent agencies, given that "[t]he Constitution does not contain any mention of one, let alone two, quasi branches." Yet that is precisely the point. The division of power between Congress and the Executive, just reviewed, has to be settled in ways that require at least some judgment on where to draw the line. But the creation of these "quasi" bodies is not an inevitable line-drawing problem, but the entirely distinct structural question of whether

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53 Huq, supra note 51, at 1006.
54 Epstein, supra note 1, at 276.
there is any warrant to read into the Constitution some "quasi" branch of government to supplement or detract from the legislative, executive and judicial branches. The categorical lines of distinction drawn in the document may blur at the edges, but they do not admit the creation of new entities. Indeed, the case for this strict reading has "functional grounds" precisely because these quasi bodies manifest a dubious amalgamation of legislative, executive and judicial functions that work at cross purposes with the basic theory of separation of powers. It may be too late to put an end to independent agencies on the administrative side, no matter how dubious their structure under the original Constitution. But that similar hesitation should not carry over to the judicial functions of these independent agencies. Instead, they should be returned to independent courts forthwith.

Huq then notes that I regard myself as a "restrained functionalist" on Article I courts, which is indeed the case.\textsuperscript{55} But again there are reasons to adopt this approach. There is no question that Article I courts, on which judges serve for long but limited terms, are a constitutional oxymoron, given that the judicial power vests only in Article III courts. But here there is an interaction with what I term the prescriptive constitution, which gives its blessing to those constitutional structures that are at variation with the original structure, so long as they do not cause undue offense to it.\textsuperscript{56} Article I courts meet that standard. Their limited terms are long but limited. There is much to be said against the Article III provision that lets judges serve so long as they are on good behavior. That protection of the independent judiciary goes much further than is needed to cope with the problem, and the sensible change in the judicial power would impose either term or age limits on all judges, especially

\begin{footnotes}
\item[55] Epstein, supra note 1, at 278.
\item[56] Epstein, supra note 1, at 68-71.
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on the Supreme Court. The threat to judicial independence here is virtually nonexistent, so the restrained acceptance of the measure is justified in a way it is not for quasi judicial bodies that sit inside the administrative agencies.

Finally, Huq notes that I adopt a somewhat "formalist approach" to matters of appointments and removals. Those provisions present a major set of difficulties because they are drafted with an eye to a far simpler administrative structure and a far smaller government than we have today. The particular dispute that Huq references is Free Enterprise Fund v. Public Company Accounting Oversight Board,52 which asked whether the president’s removal power could be twice constrained. That novel institutional design happened when members of the PCAOB could only be removed by the SEC for cause, narrowly defined, while the SEC members could be removed only for cause by the President. The SEC is indubitably an independent agency, and so the question is what the second layer of insulation adds to the first.

Huq writes as if I have endorsed a "formalist analysis" here. That proposition does not strike me as correct with respect to PCAOB. Rather, my position is simply this: the first level of insulation does all the heavy lifting. The second level of insulation has no real bite with respect to what the President can do, since the PCAOB members are already protected from the President by the SEC. That said, I do not see any reason why Chief Justice Roberts should have rewritten the statute to eliminate the second for cause requirement in order to save it from the added constitutional difficulty of the dual restraints on the power of removal. I am at a loss as to whether this analysis should be classified as formalist or functionalist. I do not care, because the key question is whether it makes sense to draw a constitutional line in the sand on the second

52 130 S. Ct. 3138 (2010), discussed in EISEN, supra note 1, at 282-84.
limitation given what the first-level for-cause requirement accomplishes.

At this juncture, there is little reason to generalize dealing with other key limitations on such matters as the appointments of inferior officers or recess appointments, where the formal requirements are intended to offer some protection to the system of separation of powers. Article II, Section 2 of the Constitution reads:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The limits of that Clause received an exhaustive review in two opinions in the recent Supreme Court decision in NLRB v. Noel Canning,58 which struck down the recess appointments that President Obama made in 2010. That decision enjoys my support59 because its key point—the President cannot make recess appointments while the Congress is in pro forma session—was struck down unanimously, an outcome that was needed to prevent the president from circumventing the Senate’s power to grant or withhold consent by determining for himself how the Senate conducts its own business. I have also taken the position that the President should not be able to make recess appointments during the recesses between sessions for openings that have arisen in the previous term. The argument to the contrary, pushed hard by Justice Steven Breyer, exhibits that most dangerous of constitutional vices—the insinuation of ambigu-


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ty into constitutional text where none exists, which is what happens when the words "that may happen during the recess of the Senate" is said to refer to vacancies that started during the previous term, before the recess began. Those words do not bear that meaning, even though the common practice has allowed for that interpretation.

It is a fair question as to whether a custom inconsistent with the text should prevail on the strength of long usage, but that hard choice should not be made easier by pretending that some supposed textual ambiguity rids us of the need to make the hard choice between custom and text. In this context, at least, my own view is that the text should prevail. There is no danger of major historical dislocation that comes from righting the system, so long as previous appointments are not undone. Indeed, there is at least as much risk of gaming by the President who could use this power to appoint principal officers for over a year, even after it is clear that they could never have received Senate approval.

There is, of course, no automatic answer to this question, but an awareness of the objectives of the separation of powers doctrine is amenable to guidance from classical liberal principles, which on these points do differ systematically from those endorsed by modern progressives. It is just that split that is reflected in the two opinions in *Noel Canning*. Both groups accepted that the president had to respect the pro forma sessions of the Senate. But it was the progressive bloc led by Justice Breyer who refused to go the extra distance urged by Justice Kennedy for four conservative justices. The division of opinion was not, to say the least, random.

**Substantive Guarantees of Individual Rights**  
*Neuborne and Preferred Values*. The basic framework for this area is well stated in the initial remarks that Burt Neuborne made as moderator of the panel dedicated to constitutional methodology. In his remarks, Neuborne draws a parallel between our two approaches to legal work. As someone who played a distinguished and active litigation role for the American Civil Liberties Union, including eleven years as its National Legal Director during the Reagan years, Neuborne is
no reflexive fan of judicial restraint. Indeed in the course of his remarks, he notes how he pushed hard on what he called the "Kantian" approach that allows him to put strong protection for "freedom of conscience, free speech, and equality," which he describes as "my preferred values." In dealing with those, he notes that of course that there must be "some ill-defined dollop of government" that has to be protected. In making this argument, he treats as his general point of departure the famous Footnote 4 in the Carolene Products case, calling for heightened judicial protection of key fundamental rights.60

Neuborne then shifts gears, to pay me the compliment of taking the same view toward the set of economic liberties that received extensive protection before the constitutional revolution of 1937, but which only receive low-level rational basis scrutiny today. Similar to his view on civil liberties, he notes that I recognize that a "necessarily vaguely-defined degree of government regulatory power" has to be added into the mix to secure the appropriate balance.

I have no doubt that Neuborne gives an accurate rendition of his own position. But he does not get it quite right with my own. For starters, I do not have a set of "preferred values" that I seek to instantiate through litigation. The reason I chose the title "The Classical Liberal Constitution" for my book is that I am quite content to work off the entire set of individual rights that are found there, which include not only his preferred values, but also the protections of property and contract that lie at the core of the classical liberal system, and without which any protection of Neuborne's preferred values becomes far more difficult. Quite simply, the state that has extensive economic powers of regulation will pose threats to religious liberty that could not happen where the government's powers of economic regulation were more limited. The current debacle

60 United States v. Carolene Products, 304 U.S. 144, 152, n.4 (1938).
over the contraceptive mandate under the Affordable Care Act, which came to a head in the five-to-four decision in *Burwell v. Hobby Lobby*, could not have arisen in a legal universe that offered strong protections for freedom of contract, under which the entire ACA would have been stillborn at birth.

In addition, I do not embrace some vague limitation on either economic liberties or property rights. The entire system that is spelled out first in *Takings* and then in *The Classical Liberal Constitution* articulates a comprehensive set of principled reasons which justify limitations on personal autonomy and private property, which are far more extensive than those that might be allowed under some simple, absolutist version of Kantian rights. Kant’s emphasis on autonomy renders him largely oblivious to social improvements that could be obtained by collective action, all of which become so critical for dealing with common defense, infrastructure, nuisances, natural monopolies, common pool assets and a whole lot more. In all cases, state coercion is justified either as a means to protect against common law wrongs or to overcome some coordination problem that cannot be handled by other means. Indeed, it is just this framework that helps to evaluate the next two contributions to this volume from Ilya Somin on public use, and two contributions on economic liberties, the first by Douglas Ginsburg & Steven Menashi, and the second by Josh Blackman. I conclude with a discussion of the provocative contribution of Suzanna Sherry on the newer version of substantive due process that comes alive in connection with *Roe v. Wade*.

**Ilya Somin and Public Use.** One useful example of how the classical liberal position differs from the more stringent libertarian view involves the proper construction of the phrase “for public use” in the takings clause. All sides agree that takings for public use in-

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clude all cases where the property taken is used by the public, whether for a road, fort, hospital, or school. Nor does any particular government activity lose its status as a public use because it is not open for use by all members of the public at all times, which cannot be the case with forts, schools, and hospitals. In addition, the public use requirement does not preclude private ownership of the facility in question. Railroads that operate on common carrier basis, subject to rate regulation and subject to a duty to take all comers, are public uses, even if the railroad itself is privately owned. It would indeed be a social disaster of major proportions if no private business could enter either the transportation or the power industry because of their need to use the state’s eminent domain power to assemble a viable economic network.

The key dispute which Somin allots much of his short essay to is how far beyond these core cases can the notion of public use go. As a straight textual matter, it is indeed awkward to conclude that a private party can take for public use when that taking is necessary to block a serious holdout problem that arises when a single person is in a position to block a cooperative venture that supplies benefits worth many multiples of the original inputs. The cases in which this problem arises are legion. Among the most common of these cases are the Mill Act cases, where it was held that the owner of a mill can flooded the farmland of nearby neighbors in order to collect sufficient water to run a mill. The leading Supreme Court case on this point, Head v. Amoskeag Mfg. Co.,62 took the position that such flooding counted for a public use, even though the mill was privately owned and operated. The ruling in Head was not limited to grist mills, which operated like common carriers, obliged to take all comers at reasonable rates subject to government review. But, it also extended to manufacturing facilities that had no common carrier

62 113 U.S. 9 (1885).
obligations, on the simple ground that it would be impossible to assemble the needed land in voluntary transactions, even when the assembled land was worth far more as a unit than as separate farm-

land.

The system used in New Hampshire was in fact highly sophis-
ticated. The compensation required there was set at 150 percent of market value to ease the sting of the forced taking, and to obviate the risk that the combined activity was only marginally better than the private uses of the unassembled land. It was also the case that a local board reviewed the application to erect a mill, and limited the land that could be so flooded, which in no occasion could include permanent structures.

In dealing with these cases Somin concedes the net social gains, but fears the abuse that could arise if the notion of a holdout problem were extended beyond its proper scope, which is surely a risk with any doctrine anywhere. But by the same token it is hard to identify any case in which the older tests were used where that kind of abuse took place. Here are two key cases. The first, _Clark v. Nash_,65 involved a miner who was allowed to use an enlarged ditch that ran across the plaintiff’s land for transferring water to the plaintiff’s land where it was to be used in mining. Justice Rufus Peckham sustained that use in light of the obvious “necessity and occasion for the irrigation of the lands” and noted the importance of deferring to local courts about the conditions of his land. Likewise one year later in _Strickley v. Highland Boy Gold Mining Company_,64 the Court, speaking through Justice Oliver Wendell Holmes, followed _Clark_ and upheld a Utah statute that allowed for the operation of tramline over the plaintiff’s land in order to carry ore “in suspend-

65 198 U.S. 361 (1905).
64 200 U.S. 527 (1906).
ed buckets, down to the railway station, two miles distant and twelve hundred feet below." 65

As stated, in this form, the doctrine looks perfectly stable. Somin objects to it on the grounds that it could open the door to further extensions, to which the best reply is that any effort to rely on the purely libertarian version of public use has to undo all the Mill Act cases in the post-Civil War period, which offers some serious evidence that the passage of the Fourteenth Amendment in 1868 should not be read to narrow whatever reading the public use language had in regulating the activities of local governments.

What is striking about this is what happens to cases like Head, Clark and Strickley in Kelo v. City of New London. 66 Kelo is a dead loser for the government under these precedents. The condemnation in New London was of a home residence, not ordinary farmland, and it was done without the slightest evidence of any holdout problem. But that was before Justice Stevens got his hands on Strickley. He writes in Strickley of "the inadequacy of use by the general public as a universal test. We have repeatedly and consistently rejected that narrow test ever since." What Justice Stevens forgot to quote was the passage from Strickley that followed the one sentence he lifted out of context from Justice Holmes, who in describing the impact of Clark wrote:

While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in

65 Id. at 529.
the Fourteenth Amendment which prevents a State from requiring such concessions.67

The term holdout is not used, but the concept is clearly implicit in the passage. Justice Stevens' disingenuous truncation of the quoted passage is a deliberate effort to confuse the matter. Once we have gone beyond the narrow libertarian account of public use, to Justice Stevens, the sky is the limit and any indirect form of public benefit will suffice wholly without regard to "great caution" or "exceptional times and places." Justice Holmes wrote to leave the door ajar to these necessity and holdout cases, without swinging it wide open. Unfortunately, Holmes, long dead, lay defenseless against the conscious distortion of his written meaning one-hundred years later. This lesson should not be lost on Somin. There is no point in trying to find ways to use some narrow doctrine to restrain a court that is bent on turning constitutional language inside-out. The simple point is that everyone who has looked at the matter recognizes that on the merits, the hard line libertarian position cannot do justice to the problem. The major difference between that position and the classical liberal position is that the latter recognizes the importance of holdout and coordination problems, and allows state force to overcome them. Taking an unduly narrow position immediately renders the government impotent against certain real problems that are everywhere recognized. At the same time, the hard-line libertarian view affords zero protection against the progressive manipulations of Justice Stevens who distorts the precedents beyond recognition. And so, Susette Kelo's house has been carted away to 36 Franklin Street, near downtown New London.68 The original building site remains a total wasteland, as after 2005 all

67 Strickley, 200 U.S. at 531.
plans for its development fell through. No doctrine can prevent such foolishness. It is therefore best to argue the strongest intellectual case, and not to try to figure out how to game the justices, who are always one step ahead of the professors.

**Menashi & Ginsburg.** Steven Menashi and Douglas Ginsburg assert that the appropriate standard of constitutional review applicable should be brought to the challenge of regulation on economic grounds only. The title of their paper states their thesis with sufficient accuracy by calling for “Rational Basis with Economic Bite.” The first two words of this thesis refer to the spongy rational basis test, which for many years took the form in which it was announced in *Nebbia v. New York,* which states “[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.” On their face, these words do not carry with them the necessary implication that virtually any form of economic regulation will pass muster in part because the Supreme Court will not sit as a “superlegislature” passing on the wisdom of state statutes. Yet, that is the result in practice. Recall that *Nebbia* imposed a minimum price fixing law that made it a criminal offense to sell two quarts of milk and a loaf of bread for 18 cents when the minimum price for milk was set 9 cents per quart. The decision literally turned upside down the classical liberal tradition that looks to rate regulation to control monopoly rates, not to set them. Yet the rational basis of price protection from competition implicit in *Nebbia*

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69 See Alec Torres, *Nine Years After Kelo, the Seized Land is Empty,* NATIONAL REVIEW ONLINE (Feb. 5, 2014, 6:00 PM), http://www.nationalreview.com/article/370441/nine-years-after-kelo-seized-land-empty-alec-torres.

70 291 U.S. 502 (1934).


justifies just about any form of market interference, even those that by design are meant to throttle competition.

The Supreme Court position on economic liberties sits in dramatic tension with the federalism decisions under the dormant commerce clause. In particular, note the instructive contrast between Nebbia on the one side, and HP Hood and Dean Milk, both discussed above, both of which used classical liberal principles to knock down protectionist regulation in activities that crossed state lines. The same result took place a year later than Nebbia, in Baldwin v. GAF Seelig, Inc., which in 1935 brushed aside the earlier decision in Nebbia to strike down a New York regulatory scheme that taxed Vermont milk at a rate calculated to eliminate its entire competitive advantage against New York products. A different standard of review was in play with respect to this disguised barrier to interstate trade, one which ran afoul of the constitutional prohibition against these imposts and duties, "except what may be absolutely necessary for executing its inspection laws." It seems clear that there is a stronger textual hook for striking down interstate protectionist activities than there is for striking down local activities, such as the minimum price regulation. But by the same token, there is no substantive or institutional reason for why the protections of the Fourteenth Amendment should not extend to forms of economic mischief that take place within the state, which are every bit as easy to identify as those that take place across state lines. The earlier tradition that struck down anticompetitive laws had been established before Nebbia. Why wreck it by equating minimum prices for a competitive industry with maximum prices for a public utility?

It is against this background that the results reported by Menashi and Ginsburg bring some degree of optimism in what has

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73 294 U.S. 511 (1935).
74 Id. at 521-22.
long been a judicial wasteland dominated by constant appeals to the rational basis test to allow the worst sort of anticompetitive programs to survive. The one bright spot here is that with each victory, state legislators in response to local pressures become ever more daring, so that it becomes still easier to sense the reservoirs of abuse inside the system. Menashi and Ginsburg are right to point out that the pre-New Deal versions of the rational basis test had a lot more bite than do the modern versions of the same test, and are right as well to point their attention to such decisions as in Craigmiles v. Giles,\textsuperscript{75} in which the Sixth Circuit knocked down under the Due Process and Equal Protection Clauses the Tennessee’s Funeral Directors and Embalmers Act that let only a state-licensed “funeral director” sell caskets as a naked restraint on competition. The same fate awaited an overbroad pest control ordinance that was struck down as a naked restraint on competition by the Ninth Circuit in Merrifield v. Lockyer.\textsuperscript{76} Finally, St. Joseph Abbey v. Castille knocked down a casket regulation statute that bore a striking resemblance to the Sixth Circuit’s earlier decision in Craigmiles.\textsuperscript{77}

I have nothing to add to their detailed and meticulous examination of these cases, except to ask whether the trend will continue or fizzle out. The cases that are involved here are so naked in their impact on competition that once the evil of protectionist legislation is recognized, no choice is left but to strike down the law. But the hard question is what happens when the protectionist restrictions are clad in some dubious rationale that hearkens to health and safety. It is worth noting that the New York State legislature made just such a finding in Nebbia,\textsuperscript{78} and is easy for states to add in such find-

\textsuperscript{75} Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002) (discussed in Menashi & Ginsburg, supra note 71, at 1060).
\textsuperscript{76} Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).
\textsuperscript{77} St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).
\textsuperscript{78} Nebbia v. People of New York, 291 U.S. 502, 517 (1934).
ings gratuitously. To deal with this real circumvention risk, it is necessary to actually look to see whether the stated rational is pretext for some illicit behavior. That kind of inquiry was in fact at issue in *Lochner*, where a supposed safety regulation was largely intended to protect union bakers from their nonunion rivals.⁷⁹ Hopefully, courts will realize that the balancing tests that are needed here are not all that different from those that are used in dealing with dormant commerce and the First Amendment. A little increase in judicial scrutiny can go a long way.

Blackman on Clark Neily and Economic Liberties

Many of the themes that are developed by Ginsburg and Menasi are taken up by Josh Blackman in his extensive review of the precarious constitutional position of the rational basis test. In dealing with this issue, Blackman spends much of his time developing the position taken in *Terms of Engagement* by Clark Neily of the Institute of Justice, who has litigated many key cases that involved the spurious use of the rational basis test to save legislation that has no genuine public purpose to defend it. In dealing with this issue, the position of Neily is one of simplicity itself. He does not spend his time working out the constitutional rationales that might apply in some difficult cases. Rather, in line with the general approach of the Institute for Justice, his subsample of cases consists of egregious situations where the government cannot articulate any rationale at all to defeat the obvious implication that the legislation in question, such as that in *Meadows v. Odom*⁶⁰ where the federal District Court worked overtime to manufacture out of whole cloth a legitimate state interest that would allow existing florists to use their regulatory power to pass on the sophistication and suitability of the design of their

⁷⁹ For the exhaustive discussion, see DAVID BERNSTEIN, REHABILITATING LUCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).
potential competitors. In so doing, Neily, and by implication Blackman, develop a much needed level of moral outrage to fuel an inquiry that also embraces such well-known decisions as *Kelo v. City of New London*\(^{81}\) where Justice Stevens worked overtime to find some legitimate state purpose to transfer a lot from its private owner to the City of New London, which as of the date of transfer could not identify the purpose to which it would put her house, or offer any explanation as to why it had to be taken then, rather than at some later time.

At this point, many of the reservations that I expressed about Ilya Somin’s account of public use,\(^{82}\) carry over to both Neily and Blackman’s work. It is not only necessary to explain why *Kelo* is wrong, but also to develop a theory which explains why many late nineteenth-century and early twentieth-century cases that allowed for the taking of private property for private use were in fact correct. Those cases in my view are easily distinguished from *Kelo* in that the former cases all involved cases in which the resisting private landowner had high holdout value but little or no subjective value in the land. In *Kelo*, the situation was the opposite. There was high subjective value in a private home, and zero holdout value against any known public use. Indeed it is that stark contrast that makes *Kelo* so egregious in the eyes of most of the public, and which offers a way in which to sort out most public use cases that are more difficult.

This issue of sorting out the possible justifications for dealing with government action thus requires a more systematic account of the police power justifications that I develop, and indeed, a more systematic account of how to overcome the presumption of liberty that Randy Barnett rightly stresses in his masterful 2005 treatment

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\(^{82}\) See *EPSTEIN, supra* note 1.
of the subject, Restoring The Lost Constitution: The Presumption of Liberty. Indeed, one of the central purposes of The Classical Liberal Constitution is to take on just that account by dealing with the various ends (force, fraud, monopoly) that legitimate state intervention, and the choice of proper means to achieve those ends. The point here is important, moreover, in connection with Cass Sunstein’s highly influential article Naked Preferences and the Constitution which I think that can be attacked on precisely this ground. As Blackman rightly notes “where Sunstein and Epstein part company focuses on what a court is willing to accept as a naked preference, as opposed to a legitimate preference. If courts require “something other than a naked preference be shown to justify differential treatment” Sunstein contends, this will ensure, albeit “imperfect[ly],” that “government action [will] result[] from a legitimate effort to promote the public good rather than from a factional takeover.”

There is little doubt that Sunstein has the right objective, yet by the same token his means are too flaccid to ensure that these are achieved. There has to be a rigorous account of “public good” and that cannot work well if all sorts of transfer payments are allowed to pass muster against charges that they are factional attack. In addition, the notion of a “naked” preference leaves open the question of whether a partially clad taking, for example, can pass muster. This point often happens as certain land use restrictions again new construction, for example, impose small losses on people who have already constructed homes on their property, but large losses on those who have not. There is formal equality in the nature of the restriction, but a consciously disparate impact on how it is supposed to work. There may well be some legitimate objective, such

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84 Blackman, supra note 5, at 1189.
as reducing pollution from new development, or controlling excessive pollution damages. Yet there is no care taken to make sure that the scheme in question does not tilt the balance in one way or the other. It is precisely for this reason that in such cases as Maine v. Taylor\textsuperscript{85} far heavier burden was imposed on the state when it sought to keep out fish from local waters in a way that disadvantaged out of state interests. I tried at great length in The Classical Liberal Constitution to indicate those cases in which the government should get the benefit of a business judgment rule, as with its use of affirmative action programs in public universities, and those in which strict scrutiny should be required, as when it imposes differential restrictions on real estate development rights. A full constitutional theory cannot in my judgment rely solely on the generalized burden of proof devise that is championed with such effectiveness by Neily and Blackman. Yet by the same token, they have both performed yeoman service insofar as they remind us of a truth all too common, namely the truly egregious cases that are shielded from rational review by the misnamed rational basis test. Terms of Engagement by its very title reminds us of the immense amount of judicial undergrowth that has to be cleared in order to get even to decide some of the easiest cases correctly.

Sherry on Abortion. The question of individual rights is, of course, not only confined to economic affairs, but also involves the most difficult of situations, abortions. My own position on this subject dates back to 1973 when I attacked the decision in Roe v. Wade. As I explained in The Classical Liberal Constitution, the Title of the article "Substantive Due Process By Any Other Name: The Abortion Cases,"\textsuperscript{86} was the brainchild of my editor, the late Philip Kurland, to whom the doctrine, which brought forth shades of Lochner

\textsuperscript{85} Epstein, supra note 1, at 236.
\textsuperscript{86} Epstein, supra note 1, at 372.
v. New York, should be consigned to the lowest circles of constitutional hell. My own substantive position was quite different in that I thought that a liberty interest was involved in both Lochner and Roe, but that the police power justification that ultimately proves unsustainable in Lochner is in fact quite defensible in the abortion cases, where matters of health and safety are obviously involved in any abortion procedure, not only for the mother but for—and here terminology matters—the fertilized egg, the fetus or the unborn child. The point of this position was to distinguish Roe from Lochner, rather than to tar them with the same brush. On this view, the entire rickety structure of the trimesters seems to be a stretch at best, and that the earlier view that life begins at conception means that the policy attaches at the latest at that time, which means that the standard view on criminalization, while not obligatory on the state, is certainly within the scope of its police power.

However, Professor Sherry will have none of this. Her first move is to offer a quick tour in developmental biology, which claims that I am wrong to think that fertilization is the only “sharp break” in the process. She points to four possible stages in the development cycle: “fertilization, gastrulation (after which twinning is no longer possible), EEG activation (human brainwave pattern), and viability.” None of these stages correlate to Roe’s trimesters, and, in any event, the issue here is of course not whether these stages take place, but whether any of these really counts as dispositive. The twinning situation seems completely irrelevant and is in any event difficult to pinpoint. Viability is obviously wrong given the huge amount of fetal development that takes place before that time, and depends as much on the advances in neonatology as it does on

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87 Sherry, supra note 38, at 1001.
the intrinsic condition of the unborn child. Brain wave patterns have, as best I tell, never been thought to be a turning point worth considering. The dominance of conception, with the complete genetic code, is a discontinuous and momentous occasion. Those women who want children think that pregnancy is the big step, and so should anyone who worries about abortion in a serious way. One might be able to justify the termination of pregnancy, whether to protect the life of the mother, or to deal with problems of rape, incest or seriously defective children. But those discussions concede the importance of conception and then seek, quite properly, to move beyond them. But caviling about the role of conception does nothing to advance the normative inquiry. Quite the contrary, it trivializes it.

Sherry’s second move is historically provocative, but irrelevant to the moral issues raised by abortion.89 As she nicely illustrates, many of the restrictions on abortion that were introduced during the nineteenth century were in the form of naked protectionism, and were intended to shield certain physician groups from competition elsewhere. That practice is not an uncommon one. Indeed, it was one of the powerful motivations for drafting of the famous Flexner report,90 which “sounded the death knell for the for-profit proprietary medical schools in America.”91 Clearly, that report carried with it obvious anticompetitive implications, especially for cheaper schools that did not meet the German standards of univer-

89 Sherry, supra note 38, at 1002-05.
sity excellence that Flexner, a Johns Hopkins professor, regarded as the appropriate standard.

There is no doubt that if the question were whether to let high-class providers in to the exclusion of others, we should have a standard licensing issue, where, as Sherry suggests, I would indeed be inclined to strike down such selective restrictions unless manifestly justified on health grounds. But unfortunately, in this context, Sherry offers the right answer to the wrong question. The criminalization of abortion starting in the late nineteenth century did not give a pass to high price performers of that act. Instead, it shut down the entire business for all suppliers, regardless of quality. The anticompetitive motivation is not there in this case. What is there is a resurgence of moral sentiment on the question that drove the position that gained widespread acceptance not only in the United States but elsewhere as well, including England, where abortions were illegal under section 58 The Offences against the Person Act of 1861, unless done with the purpose of saving the life of the women or girl on whom it was performed.92 There is a good reason then why this entire episode never figured in these abortion cases: the anticompetitive impulse between rival providers was just not present in the battle over criminalization. The initial status of Roe is then highly problematic, even if I conclude, uneasily, that there is enough support for the status quo ante that it would be unwise at this point to turn the matter back to the states, many of which would promptly legalize the practice in any event.93

Conclusion The point of The Classical Liberal Constitution is to put forward a third alternative to the usual positions of conservative judicial restraint and progressive constitutionalism. The central premise of this book is, as it were, that Oliver Wendell Holmes was

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93 Epstein, supra note 1, at 375.
profoundly wrong when he cautioned in *Lochner v. New York* that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire."94 No document that exhibited that level of internal incoherence could survive as long as the United States Constitution, which did precisely because it sought to address systematically the challenge of how to make a government strong enough to maintain order, but was not so powerful as to reduce its citizens to a servile state. The doctrine of freedom of contract is one of the tools that keeps the state at bay unless, and until, the state can come forward with a credible reason as to why certain limits should be imposed. Holmes does not (nor does anyone else) point to a single shred of evidence that points to the Constitution as dealing with some "organic relation" of individuals to the state. Indeed most of the references to the "people" are put in to protect their individual rights from government, on such matters as the right to peaceably assemble and to be free of unreasonable searches and seizures.

Throughout *The Classical Liberal Constitution*, I have sought to make good on that key constitutional premise. Accordingly, I pushed hard to explore and draw out the implications of that philosophy, and I have done so against the constant drumbeat that the complexity of the modern world is such that no one could rely on the propositions that may have commanded widespread assent during the Founding Period. But again, the claim of changed circumstances is almost always overwrought, as sound principles migrate easily from area to area.95 I believe that the same basic approach that I took to law in my 1995 book *Simple Rules for a Complex World* on ordinary private law disputes also has a strong, if latent,

constitutional dimension. When there are permanent principles for running sound social organizations, it becomes possible textually and structurally to embody those propositions in a constitution.

Paradoxically, with the added complexity of the world, and the greater heterogeneity of its population, the stronger the case for these entrenched constitutional rights, and the weaker the need for comprehensive federal regulation over the economy as a whole.\textsuperscript{96} As numbers become larger the basic norms of property and contract do not have to struggle to become more complex as well.\textsuperscript{97} The usual rules of universal forbearance from force and fraud work well in large societies as in small ones, as people have easy notice of the basic rules, which they can comply with regardless of their individual levels of wealth. Once the background norms are in place, voluntary contracts, whether for two individuals selling wheat or many people forming a business organization, can allow for cooperative arrangements that allow for gains for the parties and create greater opportunities for everyone else. This basic model, which lies at the core of limited government, is even more powerful in heterogeneous societies, for the more ambitious the government tasks, the greater the risks that in any political setting these warring factions will have knock-down/drag-out fights over who controls the destiny of the public at large. We have witnessed those conflicts today, just as we have witnessed a slowness of growth, which in my view is made all the more worse by the constant unwillingness of the courts to impose appropriate constitutional limits on political actors. Privatization allows for a modicum of decentralization that softens these conflicts by allowing people of fundamentally different views to go their separate ways. These themes are among the many that I have developed in this reply to the articles written on

\textsuperscript{96} Epstein, supra note 1.
\textsuperscript{97} For fuller discussion, see Design for Liberty, supra note 50.
this book. Where I have agreed, I have said so. Where I think that the critics have gone astray, I have sought to give their comments the serious responses that they richly deserve.