

# On the Origins of the Modern Libertarian Legal Movement

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The growing influence of the modern libertarian legal movement in America and beyond was no better illustrated recently than during the two-year run-up to the Supreme Court's "Obamacare" decision, which came down on the Court's final day last June.<sup>1</sup> Marginalized for years by many conservatives<sup>2</sup>—to say nothing of the long dominant liberal establishment that dismissed their arguments out of hand<sup>3</sup>—libertarians offered a principled vision<sup>4</sup> that resonated not only with judges who over that period decided several challenges to the Act's massive expansion of government,<sup>5</sup> but with a large part of the American public as well—and, in the end, with a majority on the High Court itself.<sup>6</sup> And why not: The vision was grounded in the nation's First Principles.

The movement did not come out of nowhere, however. Its roots are deep and often subtle, the product of decades of thought and work by philosophers, economists, lawyers, and others, all toward securing the legal foundations for liberty. An entire volume would be needed to adequately

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<sup>1</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>2</sup> For the most recent example, see J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012).

<sup>3</sup> Among countless examples, see Akhil Reed Amar, Op-Ed., *Constitutional Showdown*, L.A. TIMES, Feb. 6, 2011, at A17.

<sup>4</sup> See ROBERT A. LEVY, THE CASE AGAINST PRESIDENT OBAMA'S HEALTH CARE REFORM: A PRIMER FOR NONLAWYERS (2011); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT'L U. L. REV. 29 (2010).

<sup>5</sup> See, e.g., *Florida ex rel. Att'y. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (2011).

<sup>6</sup> See James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 CATO SUP. CT. REV. 67 (2012); David B. Rivkin Jr. et al., *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011–2012 CATO SUP. CT. REV. 31 (2012).

treat the origins and course of the movement.<sup>7</sup> In the limited compass I'm afforded here I will be able simply to scratch the surface, touching on some of the main themes, actors, and events—largely from my own perspective and experience as one who was there toward the beginning, seeing and living events that younger members of the movement today have only read or heard about, if that. My aim is to give those members at least a glimpse of that history, the better to appreciate the value of the work that lies before them.

#### I. BACKGROUND: THE RISE AND FALL OF CLASSICAL LIBERALISM

The place to begin, however, is with the context from which the movement arose. And for that we need to reach far back: to the natural law of antiquity, grounded in reason; to the Roman law, with its development of property and contract; to the English common law, especially, its judges drawing on reason and custom to craft the theory of rights, captured in the positive law of an evolving Magna Carta; to John Locke, who would conceptualize those rights as natural rights and order them systematically within a larger theory of moral and political legitimacy; and to America's Founders and Framers, including the Framers of the Civil War Amendments, who would institutionalize the principles that emerged from that long tradition.<sup>8</sup> Covering first private then public law, those principles and the regime the Framers secured over time spoke simply of individual liberty under limited constitutional government—the vision that inspired the modern libertarian movement, especially in its legal manifestations.

As with all human institutions, the regime that followed from those principles was far from perfect. But it enabled unprecedented liberty and prosperity for countless millions already living in America as well as those drawn here by the principles. With the rise of Progressivism, however, the vision faced a frontal assault, grounded in the idea that government planners could better order human affairs than could individuals pursuing their own ends as if guided by Adam Smith's invisible hand.<sup>9</sup> So attractive was that collectivist idea, especially among Western elites, that by the middle of the twentieth century there were few advocates of the older view to be found, at least among the elites who would come to run the affairs of nations. And that is where our story begins, first with the slow reemergence of the classical view, then with the more specifically legal cast of it.

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<sup>7</sup> On the broader conservative legal movement, see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); BRINGING JUSTICE TO THE PEOPLE: *THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT* (Lee Edwards ed., 2004).

<sup>8</sup> For a learned overview of this history, see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-1929). For the Civil War Amendments, see Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

<sup>9</sup> See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

## II. FROM OUT OF THE ASHES: ANSWERING THE NEW DEAL

No event precisely marks the rebirth of modern libertarianism<sup>10</sup>—remnants of the classical view endured, to be sure—and its specifically legal aspect would emerge only in time from a mélange of writings by economists, philosophers, political theorists, lawyers, literary figures, journalists, and others, all part of a broadly “conservative” response to the modern liberalism that dominated the mid-century world of ideas. But a useful marker is of course the 1944 publication of F.A. Hayek’s *The Road to Serfdom*, a withering critique of central planning. An Austrian economist but in truth a polymath, Hayek would go on to publish broadly philosophical works—*The Constitution of Liberty* in 1960 and the three-volume *Law, Legislation, and Liberty* in the 1970s, among much else—but over that stretch a great deal more would unfold to bring into being the modern American conservative movement in which libertarianism could be found growing, if not always comfortably.

Here, let me simply list but a few of those developments as they underpinned and eventually led to the modern libertarian *legal* movement that began to emerge in the mid-1970s. The Austrian and Chicago economists such as Hayek and Milton Friedman were seminal libertarian influences, of course, as were the philosophical novels of Ayn Rand for many, and the variety of writers who found a sympathetic home after William F. Buckley Jr. established his *National Review* in 1955.<sup>11</sup> But as important as those and other such individuals were—too many to recount here—the institutions that emerged during those early years were perhaps even more important, starting with the Mount Pelerin Society that Hayek founded in 1947; the Foundation for Economic Education (FEE), founded a year earlier by Leonard Read, which in the mid-1950s would begin publishing *The Freeman* as we know it today; the Intercollegiate Society of Individualists, founded by Frank Chodorov in 1953, which would later become the rather more conservative Intercollegiate Studies Institute, but not before helping to launch the *New Individualist Review*<sup>12</sup> at the University of Chicago in 1961; the Philadelphia Society, established in

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<sup>10</sup> For the theory and history of libertarianism, see respectively, DAVID BOAZ, *LIBERTARIANISM: A PRIMER* (1997), and *THE LIBERTARIAN READER: CLASSIC AND CONTEMPORARY READINGS FROM LAO-TZU TO MILTON FRIEDMAN* (David Boaz ed., 1997). For the recent history, see BRIAN DOHERTY, *RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT* (2007).

<sup>11</sup> For a useful anthology of some twenty-four authors from this early period, see *AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY* (William F. Buckley Jr. ed., Transaction Publishers 2011), *originally published sub nom. DID YOU EVER SEE A DREAM WALKING? AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY* (William F. Buckley Jr. ed., 1970). For my introduction to the 2011 edition, which places the volume in a contemporary context, see Roger Pilon, *Introduction to the Transaction Edition* (2011), available at <http://www.cato.org/pubs/books/Pilon-Buckley-Book-Intro.pdf>.

<sup>12</sup> In 1981, in 991 pages, the Liberty Fund Press republished the entire run of the *New Individualist Review*, from April 1961 to Winter 1968. See *NEW INDIVIDUALIST REVIEW: VOLS. 1–5*, (Liberty Press ed., 1981).

1964, whose annual meetings drew together a variety of conservative and libertarian intellectuals for debate and discussion; and, most important for our purposes, the Institute for Humane Studies, founded by F.A. “Baldy” Harper in 1961, which in time would become a significant force in bringing the modern libertarian legal movement into being. Also to be noted of course is the establishment of several conservative and libertarian think tanks, most prominently the Heritage Foundation in 1973 and the Cato Institute in 1977.

The importance of those and similar institutions cannot be overstated: They served to stimulate the debate that would eventually change the climate of ideas, bringing the classical liberal vision back to the fore. In those early years, however, to oversimplify considerably in the interest of economy, the domestic policy debate on the Right tended to involve cultural conservatives and economic libertarians more than the focused legal and constitutional debates we think of today. Conservatives and libertarians, sometimes at loggerheads, more often together, were working out responses to the liberalism that had dominated public discourse since the Progressive Era, overwhelmingly since the New Deal. But insofar as law was at issue, the early debate eventually took two main tracks. First, economic consequentialists sought to show that the liberals’ programs, far from achieving their purported ends of helping the poor and the like, accomplished just the opposite results. From that effort emerged the law and economics movement, emanating from the University of Chicago under such early proponents as Aaron Director, Ronald Coase, Henry Manne, Richard Posner, and many others. But second, quite apart from that effort there arose another critique of the liberal legal order, a conservative attack on the “rights revolution” of the Warren Court and the “judicial activism” that many conservatives thought they saw being practiced by that Court and, later, by the Burger Court as well.<sup>13</sup>

That brings us closer to our main subject. But before reaching it we should note that, in an important sense, both the libertarian law and economics consequentialists and the conservative critics urging judicial deference to the political branches were operating *within* the political confines instituted by the New Deal’s “constitutional revolution”—a Congress, freed from the doctrine of enumerated powers, exercising effectively unlimited power; an executive branch increasingly infused with “legislative” powers delegated to it by Congress; and courts unwilling to engage in checking the vast redistributive and regulatory schemes that were flowing from the political branches and the states (except, later on, when those schemes implicated certain “fundamental” rights).<sup>14</sup> For their part in

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<sup>13</sup> This latter strain was captured much later and most prominently by Robert H. Bork in his book, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). For a critique, see Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39, and Roger Pilon, Op-Ed., *Rethinking Judicial Restraint*, WALL ST. J., Feb. 1, 1991, at A10.

<sup>14</sup> I discussed this revolution more fully in ROGER PILON, *THE UNITED STATES CONSTITUTION*:

that post-New Deal constitutional milieu, the law and economics people sought to show legislators not that their efforts were without constitutional authority but, as noted just above, that they were counterproductive or perhaps inefficient; but insofar as those consequentialists brought their arguments to the courts, as they increasingly did, they were often seen as urging judges to make *policy* calls concerning economic efficiency, which judges have no authority to do. By contrast, conservatives were criticizing the Court not for invoking economic values like efficiency but for invoking social values, especially “evolving” liberal social values, thus to make *policy* judgments that should be left to the legislative branch, they said.<sup>15</sup> Yet in neither case did either camp come to grips with the challenge posed by the New Deal constitutional revolution itself. Both camps railed, mostly, against the Leviathan that the revolution had enabled; but neither seemed willing to tackle it at its core.

### III. THE MODERN LIBERTARIAN LEGAL MOVEMENT EMERGES

Enter, therefore, the modern libertarian legal movement, animated by liberty and hence by the need to revive the constitutional principles that had secured it, which the New Deal Court had ignored as it opened the constitutional floodgates, allowing the modern welfare state to pour through. Not that the new movement did not draw from the two legal strains just outlined: law and economics consequentialism has a role to play in adjudication, of course, especially in line-drawing contexts involving nuisance, risk, and the like; and the conservatives were often right in critiquing the Court’s activism, even if they often misidentified or overstated the problem. But they were surely wrong in calling for far-reaching judicial deference to the political branches.<sup>16</sup>

In fact, it was precisely that conservative call for judicial restraint and, even more, the underlying criticism of the Court’s “rights-revolution” that sparked my own interest in pursuing the issues more deeply. After all, I thought, wasn’t the nation founded in the name of rights—*natural* rights, which conservatives dismissed as no business for the courts? And wasn’t it the duty of the courts, in the name of such rights, to protect individuals against majoritarian tyranny? Still, I paused, because the conservative critique and those questions were arising in the context of a galloping

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FROM LIMITED GOVERNMENT TO LEVIATHAN (2005), available at <http://www.cato.org/pubs/articles/CT05.pdf>.

<sup>15</sup> I discussed this strain more fully in Roger Pilon, *Lawless Judging: Refocusing the Issue for Conservatives*, 2 GEO. J.L. & PUB. POL’Y. 5 (2001), available at [http://www.cato.org/pubs/articles/pilon\\_gtwfnfs\\_lawlessjudging.pdf](http://www.cato.org/pubs/articles/pilon_gtwfnfs_lawlessjudging.pdf).

<sup>16</sup> See, e.g., Lino A. Graglia, *Judicial Activism of the Right: A Mistaken and Futile Hope*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 65, 66–67 (Ellen Frankel Paul & Howard Dickman eds., 1990) (“The Constitution places very few restrictions on the exercise of the federal government’s enumerated powers . . . . As a result, examples of enacted law clearly in violation of the Constitution are extremely difficult to find.”). For a much earlier version of this view, see L. Brent Bozell, *The Unwritten Constitution*, in AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY, *supra* note 11, at 52–75.

welfare state at home—Lyndon Johnson’s Great Society—and an intellectual climate that called for greater protection for “social and economic rights”—welfare rights—both at home and abroad,<sup>17</sup> which hardly seemed consistent with the Framers’ plan for *limited* government.

And so I, and others too who at the time were studying philosophy, dove more deeply into the theory of the matter, especially the theory of rights. And as luck would have it, long dormant normative theory was just then starting to reemerge in Anglo-American analytical philosophy. Two books in particular, both by Harvard philosophers, animated our thinking: John Rawls’ *A Theory of Justice*, which arrived in 1971 and was generally understood as an apology for the modern welfare state, and Robert Nozick’s *Anarchy, State, and Utopia*, which appeared in 1974 as a critique of Rawls and, more fully, as a sophisticated defense of libertarianism and limited government. But Nozick had erected his argument on the assumption that people had rights, which meant that there was a good deal of more fundamental work to be done—a project that I and others were only too willing to take on. In my case, it culminated finally in 1979 in a doctoral dissertation at Chicago entitled *A Theory of Rights: Toward Limited Government*, which drew on everything from Aristotle’s *Metaphysics* to Isaiah Berlin’s “Two Concepts of Liberty” to my mentor Alan Gewirth’s *Reason and Morality*. Others, too, from the mid-1970s and beyond were at work establishing the philosophical foundations for liberty and limited government—through the Liberty Fund in Indianapolis, at the Reason Foundation in Los Angeles, the Pacific Institute for Public Policy Research and the Cato Institute (at that time) in San Francisco, the Social Philosophy and Policy Center in Bowling Green, Ohio, and elsewhere.

But the lawyers also were at work at their end of the project, and none more productive or insightful than the man who arrived across the Midway a year after I got to Chicago, Richard Epstein. No stranger to philosophy—his undergraduate major at Columbia, my own alma mater—Epstein was at the time developing his theory of strict liability in torts, which dovetailed nicely with the Lockean understanding of rights, even as it contrasted with his colleague Richard Posner’s negligence approach to torts. We struck up a collaborative relationship that has continued to this day,<sup>18</sup> beginning with my 1976 review<sup>19</sup> of his first four tort essays,<sup>20</sup> placing them in a Hayekian and Nozickian context. The Institute for Humane Studies (IHS) had commissioned the piece for their *Law & Liberty*, which reached some

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<sup>17</sup> See Maurice Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 47 (D. D. Raphael ed., 1967); Inga Markovits, *Socialist vs. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612 (1978).

<sup>18</sup> See, e.g., EPSTEIN, *supra* note 9.

<sup>19</sup> Roger Pilon, *Liberty and the Law of Tort*, 2 L. & LIBERTY 1 (1976).

<sup>20</sup> Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

8,000 lawyers, judges, and scholars, I was told. And right there is a crucial piece of the story.

Located at the time in Menlo Park, California, next door to Stanford, and led by Leonard Liggio, a historian, and Davis Keeler, a lawyer who headed up their Law & Liberty project, IHS and its people had an exceptionally keen appreciation of the need to establish not simply the economic arguments for liberty, including economic liberty, but the moral and legal arguments as well. Thus, even before I'd finished my dissertation they put me and many others on the speaking circuit, spreading the ideas that were the beginnings of what in time would constitute "the movement." One such effort stands out: it was a 1979 conference in San Diego on the theory of rights, underwritten by the Liberty Fund, which I organized through IHS at a time when I was teaching at the Emory University Law School. The conference, examining the theory of rights systematically, drew together some of the leading scholars on the subject. Its proceedings and more were published that year in a special edition of the *Georgia Law Review*,<sup>21</sup> copies of which were then used for years thereafter by IHS in its teaching and training programs for budding and newly minted libertarian academics, including law professors, who needed all the help they could get to penetrate the too often hostile academic walls. Those kinds of multiplier effects were crucial for building a movement.

But others, too, were engaged in the same kinds of efforts. Thus a young Harvard Law student, Randy Barnett, himself a philosophy undergraduate major at Northwestern, was exploring the criminal law side of things with a conference he organized on the subject and an important essay on restitution that followed in 1977 in *Ethics*, published by the University of Chicago.<sup>22</sup> And on the constitutional side, the late Bernard Siegan, another Chicago product who taught for years at the University of San Diego School of Law and attended that 1979 IHS rights conference, was at work at that time on his much needed *Economic Liberties and the Constitution*, published in 1980, also by Chicago. The mid- to late-'70s was a fertile period for developing the foundations for what would become the modern libertarian legal movement.

But it would take sustained effort to become a true movement, to say nothing of a successful one. Fortunately, that effort was forthcoming, although the events that went into it are so varied and numerous that I can mention only a few—and again, only those with which I am most familiar. They begin, in the 1980s, with the election of Ronald Reagan and the subsequent appointment to the bench of numerous judges and justices, many of whom came from the legal academy or were otherwise conversant with the developing intellectual currents as they pertained to the law. But

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<sup>21</sup> Symposium, *Perspectives on Rights*, 13 GA. L. REV. 1117 (1979).

<sup>22</sup> Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977). But see Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348 (1978).

the differences between conservatives and libertarians were lying just below the surface, so for those of us in the libertarian camp, especially on the question of the proper role of the courts, it was a matter of charting a slow but methodical course aimed at changing the climate of ideas to one that would be more sympathetic to the idea that judges should be more engaged in defending constitutional liberties than most conservatives at the time, fearing judicial activism, were inclined to support. To accomplish that, quite simply, we got involved—with our fellow conservatives, and with the Left as well, where doing so would advance our ideas.

Thus, just after the 1980 elections I worked with George Pearson, at that time with Koch Industries, to help plan the agenda for the annual meeting of the Philadelphia Society, which took place in early April 1981 near the start of the Reagan administration that I would be joining only weeks later. The subject of the meeting was the philosophy of law. By design, my own address at the meeting, subsequently published by the then quite conservative Intercollegiate Studies Institute,<sup>23</sup> gently called into question the conservatives' approach to the courts. Those efforts to work with people of different views continued, but so did efforts to refine our work among ourselves while at the same time promoting it to others. A good example was Cato's 1984 conference on "Economic Liberties and the Judiciary," the outline for which I had sketched on a paper napkin a year earlier over lunch with Ed Crane, Cato's president, and Jim Dorn, editor of the *Cato Journal*. At that conference we reached across the aisle in at least one instance, with the spirited opening debate between then-Judge Antonin Scalia and Richard Epstein, whose response to Scalia's defense of judicial restraint was somewhat short of gentle.

Here too there were multiplier effects. The Scalia-Epstein debate was soon published as a pamphlet by the conservative American Enterprise Institute, while the entire conference proceedings were published in the *Cato Journal* a year later<sup>24</sup>—and republished two years after that by the George Mason University Press with a foreword, "The Judiciary and the Constitution," by Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.<sup>25</sup> Meanwhile, the *Cato Journal* edition garnered invitations to Bernie Siegan and me to speak on the subject of economic liberties and the judiciary at the ABA convention's 1987 showcase program celebrating the Bicentennial of the Constitution. And to top it all off, my ABA speech, published subsequently in *The Freeman*,<sup>26</sup> received the Bicentennial Commission's Benjamin Franklin Award, presented to me in 1989 by recently retired Chief Justice Warren Burger—all this from that paper napkin! Multiplier effects indeed!

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23 Roger Pilon, *On the Foundations of Justice*, 17 INTERCOLLEGIATE REV. 3 (1981).

24 Symposium, *Economic Liberties and the Judiciary*, 4 CATO J. 661 (1985).

25 ECONOMIC LIBERTIES AND THE JUDICIARY (James A. Dorn & Henry G. Manne eds., 1987).

26 Roger Pilon, *On the Foundations of Economic Liberty*, 38 THE FREEMAN 338 (1988).

There were many other such events during the 1980s, of course, but doubtless none was more important than the 1982 creation of the Federalist Society, which has grown exponentially since then. For three decades, first through law school student chapters, then through lawyers chapters and practice groups, and over time through several other means, not least its annual student and lawyer conventions, the society has encouraged and facilitated a robust exchange of ideas through which libertarians have been able to present their views to an increasingly receptive audience. Considerably more conservative than libertarian at its inception, the society and its officers were nonetheless admirably open to a variety of ideas, the central one being that truth will eventually prevail. Thus it has hosted countless events featuring libertarian themes—such as its own symposium on “Constitutional Protections of Economic Liberty,” held at the George Mason University School of Law in 1987.<sup>27</sup> And numerous books setting out various aspects of the libertarian legal vision, books by Richard Epstein, Randy Barnett, Gary Lawson, Chip Mellor, Clint Bolick, Robert A. Levy, David Bernstein, Walter Olson, and others, have enjoyed a warm reception at Federalist Society events, as a result of which the society is considerably more libertarian today, especially in its younger ranks, than it was in its early years.

Again, therefore, it is the institutions that have been so crucial for advancing the ideas of the individuals who have worked in and through them. For that reason, when I left the Reagan administration toward its conclusion in 1988 it was to establish Cato’s Center for Constitutional Studies, the purpose of which was to help change the climate of ideas to one more conducive to liberty under limited constitutional government. For nearly twenty-five years now, through books, monographs, op-eds, conferences, forums, lectures, amicus briefs, media appearances, and, especially, the annual *Cato Supreme Court Review*, we have worked to bring that change about—mostly with others, such as with our friends at the Institute for Justice,<sup>28</sup> which came on the scene a few years after we arrived. And we have seen that change come about—slowly and haltingly, to be sure, but clearly too, as in the Court’s last Term. When judges finding Obamacare “a bridge too far” cite James Madison, assuring skeptics, in *Federalist 45*, that the powers of the new government would be “few and defined,” that is a change worth noting, and worth celebrating as well.

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<sup>27</sup> Symposium, *Constitutional Protections of Economic Activity*, 11 GEO. MASON L. REV. 1 (1988).

<sup>28</sup> The Institute for Justice now has a Center for Judicial Engagement, under the direction of senior attorney Clark Neily, dedicated to encouraging courts to enforce constitutional limits on government. *Center for Judicial Engagement*, INSTITUTE FOR JUSTICE, <http://www.ij.org/cje> (last visited Nov. 7, 2012).

## CONCLUSION

Twenty-five years and more ago, most conservatives had made their peace with the New Deal Court's rejection of the very centerpiece of the Constitution, the doctrine of enumerated powers, from which the document derives such legitimacy as it can have as positive law. "A lost cause," they said. Their concern instead, from fears about judicial activism, was that courts might recognize rights not enumerated in the document. Yet the plain text of the Constitution, together with its structure, should make it clear to any textualist that countless rights, only a few of which could have been *enumerated* in the document, are nevertheless recognized by and hence "in" the Constitution because, as it plainly says, they are "retained by the people"—and you cannot "retain" what you do not first have to be retained. Thus the fundamental importance of understanding the theory of rights that has stood behind the Constitution from before the time the Bill of Rights made explicit what was always implicit in the doctrine of enumerated powers—that where there is no power there is a right, belonging either to the states (as powers) or to the people.

At a second ABA convention showcase program, this one in 1991 celebrating the Bicentennial of the Bill of Rights, Randy Barnett and I addressed both of those issues—both the powers and the rights issues—in speeches we gave on "The Forgotten Ninth and Tenth Amendments."<sup>29</sup> In the years since, the limits imposed by both enumerated powers and enumerated and unenumerated rights have been rediscovered—not entirely, to be sure, far from it—but in ways we could only have imaged decades ago. There is much more to be done, but the foundations for doing it are now in place.

Yet those foundations are hardly new. They have been refined substantially, for sure, and that is no small matter. But they rest on principles that have been understood over the ages, even if too often forgotten or ignored over the past century. Progressives thought they could improve the lot of mankind by ordering vast areas of life through law. America's Founders knew better. They understood that liberty, under the rule of law, was the path to both prosperity and dignity. That is the path the modern libertarian legal movement is taking.

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## ADDENDUM

After I had sent my symposium essay in to the *Chapman Law Review*, Professor Todd Zywicki was kind enough to send me his essay for this symposium<sup>30</sup> with the idea that I might wish to respond since it took a

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<sup>29</sup> Roger Pilon, *The Forgotten Ninth and Tenth Amendments*, 13 CATO POL'Y REP. 1 (1991).

<sup>30</sup> Todd J. Zywicki, *Libertarianism, Law and Economics, and the Common Law*, 16 CHAP. L.

somewhat different position than my own. I do wish to, briefly. Before continuing here, however, the reader should first read Professor Zywicki's essay below.

As will be seen, Zywicki's main aim is to distinguish libertarian legal theory from the common law and modern law and economics, despite their vast commonalities, and in the process to explain how he himself moved gradually from the former to the latter as the sounder approach to legal questions. Granting that the common law and law and economics are not exactly alike, he focuses on those few occasions where he believes they deviate from libertarian theory, which

has traditionally been deontological and normatively-oriented, typically grounded in natural rights theory and reasoning to normative statements about the content of the law. Law and economics, by contrast, purports to be foremost a positive theory of the common law, while also providing a normative justification for the common law as well (namely, social wealth maximization as a normative value).<sup>31</sup>

And he takes as his libertarian foil a 1982 *Cato Journal* essay by Murray Rothbard,<sup>32</sup> the libertarian economist who was a prolific writer on all manner of subjects right up to his death in 1995.

Rothbard's fecundity aside, I would note first that while he may be a particularly useful foil for his having argued directly against the law and economics approach, there are many in the normative libertarian law tradition, as I noted above,<sup>33</sup> who take a broader view than Rothbard did, finding a place for both the common law and the law and economics approaches *within* the underlying libertarian theory.<sup>34</sup> In fact, not only do the rights-based libertarian and efficiency-based law and economics approaches most often reach the same conclusions, but properly related they complement each other, as we will see shortly.

But second, in explicating Rothbard's—and “the libertarian”—approach to “allocating” rights and liability in a nuisance context—his main focus—Zywicki charges Rothbard with “retreating” and eventually with “drift[ing] quite far from his initial premise that any physical invasion of land is an abatable nuisance and anything else is not actionable.”<sup>35</sup> Yet a careful reading of Rothbard's essay, including passages Zywicki himself quotes, will show that Rothbard, as he goes along, is simply “refining” his

REV. 309 (2013).

<sup>31</sup> *Id.* at 309.

<sup>32</sup> Murray Rothbard, *Law, Property Rights, and Air Pollution*, 2(1) CATO JOURNAL 55–99 (1982).

<sup>33</sup> See *supra* text accompanying note 16.

<sup>34</sup> Three years before Rothbard's essay appeared, in fact, I myself argued for conclusions not unlike those Zywicki urges, though within a rights-based libertarian normative context, not an efficiency context. See Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1193–96 (1979); Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1332–39 (1979). See generally RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (2008).

<sup>35</sup> Zywicki, *supra* note 30, at 314.

“concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner’s use or enjoyment of this property. What counts,” Rothbard concludes, “is whether the senses of the property owner are interfered with.”<sup>36</sup> Thus, in defining property rights and setting liability rules, Rothbard would allow the “invasion” of radio waves or airplane flights at 35,000 feet, but not such standard nuisances as noise, odors, vibrations, and the like, at least if they are above a level that interferes with the owner’s quiet enjoyment of his rights.<sup>37</sup>

Seizing on Rothbard’s refinement of his position, Zywicki next brings us closer to his own thesis, that the Coase Theorem<sup>38</sup> is the better approach to nuisance disputes:

Thus, despite his best efforts to avoid Coase, Rothbard has in fact implicitly come to concede the core premise that underlies the Coase Theorem—that what matters are incompatible and competing uses of scarce resources, and as a result, costs are reciprocal. It is only because *both* parties want to use the same scarce resource that incompatible uses arise.<sup>39</sup>

. . . .

Despite his best efforts to articulate simple bright-line rules, Rothbard’s clear rules inevitably collapse under the weight of a multitude of *ad hoc* exceptions. But the myriad of exceptions illustrates the central problem—it is precisely the problem of incompatible uses that gives rise to the need to define property rights in the first place . . . . If the problem is incompatible uses among *people* then there is no obvious reason (as Rothbard implicitly admits) that it must be intrinsically tied to particular parcels of land or that the concept of physical invasion takes on some particular normative primacy.<sup>40</sup>

Having reduced the matter to incompatible uses, the solution Zywicki (and Coase) offer to this dilemma then follows naturally. Where there are low transaction costs, how a court allocates the rights does not matter, because either way the parties can bargain to an allocation of rights that maximizes total wealth. But where transaction costs are high, the initial allocation of rights might well matter, because the parties, for any number of reasons, may be unable to negotiate an efficient solution. In the stock example, a plaintiff suffering small losses from the actions of a defendant will seek to enjoin those actions, the effect of which, if the injunction is issued, will impose huge losses on the defendant. In such cases, Zywicki argues, “the law should try to *replicate* the bargain that the parties *likely*

<sup>36</sup> *Id.*

<sup>37</sup> Regrettably, Rothbard sees no place for defining those levels through public, statutory law, even in large number contexts like automobile pollution. At the same time, after citing Rothbard to the effect that supersensitive plaintiffs do not get relief (“Those who have a special desire for quiet, Rothbard observes, must build their own soundproof room.”), Zywicki then implies that Rothbard does *not* take that position (“Nor would nuisance arise [on the Rothbard view] if, for example, Mr. Burns [in Zywicki’s example] only had a normal, and not a highly sensitive, sense of smell.”) *Id.* at 315.

<sup>38</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>39</sup> Zywicki, *supra* note 30, at 314.

<sup>40</sup> *Id.* at 315.

would have struck had they been able to sit down and bargain out the terms, but are unable to do so because of the high transaction costs.”<sup>41</sup>

Well what is wrong with that approach? Not a lot, really, assuming we can approximate individual and social costs—no small assumption. But we are not home free yet. First, Zywicki writes that “what matters” is that we have incompatible and competing uses of scarce resources. But clearly, more than that matters. In particular, *causality* matters. And the efficiency approach effectively ignores that issue as it considers alternative ways to “allocate” rights and liability. Thus, in the first of Zywicki’s examples it is the polluting vaccine factory, not its downstream victim, that is causing the harm, but for which that victimized owner would not be seeking an injunction, the effect of which, if issued, would *then* harm the factory. Ignore the temporal aspects of that causal sequence and, indeed, it becomes then a matter simply of incompatible and competing uses of scarce resources, the solution to which could very well turn on “maximizing social wealth” as one among several possible values. But if a court initially, in the name of efficiency, allocated the right to the factory by refusing to grant the injunction, that result would be achieved at the expense of the no-harm principle, properly qualified, that most people think fundamental to justice. The factory would not be internalizing the full costs of its actions but would be imposing some of those costs on unwilling strangers. Thus, again, “what matters” here is more than incompatible and competing uses.<sup>42</sup>

Second, although Rothbard does not accept the idea that a court might have to impose an efficient solution on the parties where transaction costs are high—as in the decisions Zywicki cites, *Ploof v. Putnam*<sup>43</sup> and *Alaska Packers v. Domenico*<sup>44</sup>—his refinements of his initial “physical invasion” premise do not amount to “a multitude of *ad hoc* exceptions,” as Zywicki asserts. In fact, it is causation, a factual matter, and not incompatibility that enables the libertarian to distinguish legitimate from illegitimate uses of property, whereas incompatibility alone leaves one with only an evaluative criterion for making such distinctions. Quiet uses by adjacent owners are compatible because they are causally inefficacious. Active uses are causally efficacious and hence are compatible with quiet uses or with other active uses only if active users internalize the costs they impose on others, including through compensation agreements, for which a bedrock causal analysis is essential.<sup>45</sup>

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41 *Id.* at 317 (emphasis in original).

42 I discuss some of these issues more fully in Roger Pilon, *Property Rights and a Free Society* in *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST*, 369–401 (M. Bruce Johnson ed. 1982); reprinted as *Property Rights, Takings, and a Free Society*, 6 *HARV. J.L. & PUB. POL’Y* 165 (1983).

43 81 Vt. 471 (1908).

44 117 F. 99 (9th Cir. 1902).

45 I discuss these issues more fully in *Property Rights*, *supra* note 42.

But finally, if Rothbard's approach does not amount to a multitude of *ad hoc* exceptions, Zywicki's "law of necessity"—the very law that common law courts have fashioned in decisions like *Ploof* and *Alaska Packers*—does operate, by Zywicki's own admission, "as an exception to the general rule of property and tort that your property is yours to keep"—and rightly so, as the facts in those decisions should make clear. The old common law judges who fashioned such exceptions over the years may not have invoked the language of "bilateral monopolies" or "negative-sum rent-seeking transactions," but their intuitions were on the mark.

Libertarian legal theory, at its best, does not hold that rights are absolute, for the world is too complex and varied to allow for such a conclusion. But it does rest on reason, from which rights themselves are derived, and it takes reason as far as it will go, after which evaluative considerations like those that are inherent in the Coase Theorem, as applied in necessity and other such contexts, come into play. It is crucial to appreciate, however, just what the order is. It is not that "social wealth maximization" is a free-standing base line, as many in the law and economics movement would have it. Rather, that criterion comes into play in the context of a prior, normatively grounded property rights foundation, where pre-existing rights are held "by nature," to be *recognized*, not "assigned," by legislatures and courts. And it comes in toward the end, as an exception to the normal rules. Deciding precisely *when* to invoke exceptions like the law of necessity is another matter, of course, as is the underlying theory of natural rights, but those are matters for another day.