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Introduction

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The 2016 election featured two of the most unpopular major-party candidates in American history, leading many (or, at least, me) to believe that the Libertarian Party had a chance. In a hopeful story in the May 29, 2016, issue of the Washington Times, the author described the Libertarian ticket of two former governors – Gary Johnson (New Mexico) and William Weld (Massachusetts) – as "the strongest presidential ticket in [the Libertarian Party's] history," and claimed that the libertarians were "throwing down the gauntlet" to the two major parties. Johnson and Weld got about 3 percent of the popular vote and won no votes in the Electoral College. Faith Spotted Eagle, a member of the Yankton Sioux Nation, got more electoral votes.[1] Needless to say, the libertarian moment that many believed was at hand in 2016 passed uneventfully. Boy, was I wrong (and disappointed)!

To make matters worse, very little about America today seems consistent with the classical liberal ideal. No current member of the Supreme Court could fairly be described as a classical liberal, nor are many politicians. Moreover, political correctness and calls for government regulation of so-called hate speech are rampant on college campuses. The ever-growing power of the administrative state also belies the claim we live in classically liberal times.

Government and its role in our lives is also bigger than ever. President Trump's proposed 2018 budget requested spending of over $4 trillion. This is more than double the final budget President Clinton submitted in 2000. The federal government has doubled in size in under twenty years! This is obviously a bipartisan phenomenon. The role of government in our lives did not go down because of the Republican wave election of 1994, despite the explicit promise – in the Contract with America – that they would reduce it. Government has grown consistently larger

[1] Robert Satiacum Jr., a Clinton delegate from Washington, voted for Spotted Eagle as a "faithless elector."

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over time, regardless of who is in charge. Those on the political Right in America are at serious risk of becoming Charlie Brown, running up to the football with hope despite repeatedly being duped by the Lucies we put in office.

Nevertheless, polls suggest about 10 to 20 percent of Americans describe their beliefs as "libertarian," and libertarian ideas have been ascendant in recent years. As of 2017, seven states and the District of Columbia legalized recreational use of marijuana, and nineteen other states permit medicinal use. This trend is consistent with the classical liberal view expressed by nineteenth-century English jurist Baron Bramwell in his broad philosophy of "live and let live." John Stuart Mill put this catch phrase in more philosophical terms, which he called the "harm principle." In his book, "On Liberty," Mill declared the harm principle as the basis for a just society:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right . . . The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[2]

The private use of marijuana could be reasoned to cause others harm through a contorted causal chain, but there is increasing societal consensus that the primary person users may harm is themselves, and that does not justify mobilizing the violence of the state to coerce different choices.

There have been other victories. In *Joseph Abbey v. Castille*, a federal court considered a Louisiana rule requiring retailers of caskets to be licensed funeral directors. The Benedictine monks at St. Joseph Abbey challenged the constitutionality of the regulations on due process grounds – that is, that the due-process guarantee of the Constitution protects people from government action that is not justified on public (as opposed to private) interest grounds. In essence, the monks argued that the Louisiana Board of Embalmers and Funeral Directors promulgated the rules to serve the interests of funeral directors by insulating them from potential competition. The district court agreed, holding that it was "unconstitutional to

[2] John Stuart Mill, On Liberty (1859).

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require those persons who intend solely to manufacture and sell caskets be subject to the licensing requirements for funeral directors and funeral establishments."[3] The federal court of appeals for Texas, Louisiana, and Mississippi affirmed. While the Fifth Circuit shied away from espousing "a judicial vision of free enterprise,"[4] the willingness to put government regulation of economic affairs to scrutiny is a long-standing dream of classical liberal lawyers. In fact, the mission of the Institute for Justice, a libertarian public interest law firm, is to overturn the *Slaughterhouse Cases*, which held that the Due Process Clause did not restrict the regulatory authority of the states in this way.[5] If the *Castille* case portends a renewed judicial interest in flyspecking economic regulation, it will add a substantial classical liberal constraint on government, even in the absence of widespread political support in state houses or Congress.

Although for classical liberals this result is clearly second best, it is a reality that they will probably accept. It would be better, of course, if legislatures did not pass statutes impinging on human liberty in the absence of demonstrable social harms (that exceed social benefits). But empowering federal judges to intervene on occasion when they do, provides a check on extensions of unjustified government activity. After all, classical liberal thinkers are not opposed to government regulation per se, but rather more circumspect about the need for additional regulation. Aaron Director, a longtime professor at the University of Chicago said it best: "Laissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error."

This view is broadly shared on the political right in America, especially in the sometimes fetishization about the structural design of our Republic. In his first dissent as an associate justice of the Supreme Court, Neil Gorsuch put it this way when urging a party to take their case to the legislature, instead of the courts:

> To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn't some bug in the constitutional design; it's the point of the design, the better to preserve liberty.[6]

So, what is the future of classical-liberal thought in law and policy? What does classical liberal thought have to say about matters of pressing public concern, ranging from immigration policy to consumer welfare regulation to the growth of the prison system?

This book collects some voices on these issues in the hopes about advancing the conversation. Chapter 1 sets the stage with an historical overview by the great Ralph Raico, who died in 2016. This essay was influential in the formation of my own views of political philosophy, and it is reprinted here with permission of the Future of

[3] Joseph Abbey v. Castille, 835 F. Supp. 2d 149 (E.D. La. 2011), aff'd, 712 F.3d 215 (5th Cir. 2013).
[4] 712 F.3d 215 (5th Cir. 2013).
[5] 83 U.S. 36 (1873).
[6] Perry v. Merit Systems Protection Board, __ U.S. __ (2017), June 23, 2017.

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Freedom Foundation. Although not a complete history, its ten-thousand-foot view articulates a compelling narrative of what made the west prosper over the past several centuries. It is unfortunately a history that is lost to most historians.

In Chapter 2, the philosopher Jason Brennan challenges the cartoon version of libertarians – that they only care about liberty, and thus are indifferent to actual human conditions of suffering. Brennan rehabilitates classical liberalism from a bad reputation it earned from the pens of Ayn Rand or Murray Rothbard, who's thick conceptions of liberty admitted a thin conception of human compassion. To make a positive case for classical liberalism, Brennan goes back to its roots, finding in Adam Smith and other early thinkers a commitment to what we call social justice. Brennan makes a welfarist case for liberty.

A central foundation of classical liberalism are well-defined property rights, premised on the right being held by the discoverer or first user. In Chapter 3, economist Art Carden defends this foundational principle against criticisms that delineating property from among communally owned things is selfish. Carden argues that it is not the first-comer who is "lucky" but the latecomer; the first in time does not *take* from the commons but *gives* to it by doing the difficult work of identifying potentially valuable property, manipulating it to become valuable, and then bringing it into the market to be exchanged. When the uncertain nature of materials and the impact of work is considered, rules that seem to be about selfishness turn out to be other regarding.

If the subject of Chapter 3 – who owns what? – is at one end of the spectrum of classical liberal ideas, law professor David Bernstein's topic in Chapter 4 – should libertarians favor antidiscrimination laws? – is at the other. Classical liberals, most prominently Richard Epstein (who we will hear from in Chapter 16), often oppose statutes, such as the Civil Rights Act of 1964, on the grounds that freedom of association is a more important social value, and that left to its own devices competitive markets will reduce discrimination to tolerable levels. The willingness to stand up for this First Amendment right has caused some critics to label libertarians as racists. Bernstein confronts this charge head on in Chapter 4. He points out the asymmetry of this argument, noting that when liberals defend the right of Nazi's to march, it does not turn them into Nazis. Principles by their nature admit uncomfortable cases. Bernstein goes on to situate the debate about speech and association in the modern context, offering insightful commentary on cases involving the tension between the constitutional rights of individuals doing business and the interests of individuals to be free from harmful discrimination. Whether you are persuaded by Bernstein's argument, at the very least this chapter should take the sting out of the cry that classical liberals are uncaring racists.

Another area in which classical liberals might appear to be vulnerable to substantive attacks is in the field of environmental policy. Pollution is the classic example of an externality that seems to compel government action as a means of addressing persistent collective action problems. In Chapter 5, law professor Jonathan Adler

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argues that well-defined property rights can be an effective mechanism for addressing a range of environmental issues, using examples ranging from pollution to fisheries. Although there are challenges to defining property rights in some areas, such as ocean-based fisheries, Adler demonstrates with convincing case studies that it is possible to utilize classical-liberal approaches to address environmental concerns. One of these tough cases that Adler identifies is the topic of global warming, since the earth's atmosphere represents the biggest commons we can imagine. Yet, Adler argues that libertarian principles and approaches may even be valuable here, issuing in effect a call to arms to classical-liberal scholars to take more seriously environmental issues and the potential welfare gains from attacking them using tools of classical-liberal thinking.

Chapter 6 is a reprint of Leonard Read's iconic biography of a Mongol 482 pencil assembled, fabricated, and finished by Eberhard Faber Pencil Company. It sounds silly at first, but none other than Milton Friedman called Read's essay the best illustration of Adam Smith's invisible hand and of F. A. Hayek's concept of dispersed, local knowledge. Whenever classical liberals hear claims from politicians or law professors about how a complex process or industry could be managed better by a centralized group of so-called experts, a common retort is: "No one knows how to make a pencil!" This comment doesn't make a great deal of sense until one reads and appreciates Read's essay. If something as simple as a pencil is beyond the ken of any individual or even group of highly talented and motivated individuals, the argument goes, how could anyone possibly try to plan the multi-trillion-dollar US health care system. An old (and probably apocryphal) story tells of a Soviet visitor to London who, amazed by the abundance in British supermarkets, asks to meet the person responsible for getting bread into the city. A cheeky response would have been to hand the Russian a copy of "I, Pencil."

Law professor Ilya Somin presents a summary of his forthcoming book on what he calls "foot voting" in Chapter 7. He claims that voting with your feet, whether among political jurisdictions (either within a country or across countries) or among competing firms in commerce is better at achieving political freedom than voting at the ballot box. Somin argues that exit is superior to voice (to use the terminology of Albert Hirschmann) in politics. This result obtains, he claims, across various theories of political freedom, ranging from consent to positive liberty to nondomination accounts. There are a range of historically grounded objections to relying on exit as a means of political accountability, including our experience with invidious exclusion of certain groups and the possibilities of poverty traps limiting exit. Somin does not shy away from these objections, and in doing so demonstrates that libertarian theories are not mere pie-in-the-sky fantasies of Ayn Rand, but can lead to institutional reforms that can help expand political opportunities, while mitigating potentially downsides.

In the next chapter, we move from high theory to the practical details of government administration. In Chapter 8, law professor Michael Rappaport takes

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us on a grand tour of administrative law, as currently practiced by powerful administrative agencies foreign to the classical liberal tradition. While some classical liberals, such as Richard Epstein, and conservatives, such as Philip Hamburger, advocate getting rid of the administrative state lock, stock, and barrel, Rappaport takes a much more practical and lawyerly approach to trying to advance the mission of a more classically liberal state. The key ingredient in Rappaport's approach is the doctrine of separation of powers, which, he argues, advances classical liberalism in several ways: it limits government power, it furthers the rule of law, it increases accountability, and it reduces the pathologies of administrative law, such as capture or political meddling with expertise. While Rappaport admits sympathy to those in the classical liberal tradition who would prefer a world of small government to one with big government, the chapter takes a realistic approach, noting contingent on having a big government (which may be unavoidable, at least in the short run), the classical liberal should strictly prefer one with strong separation of powers to one with weak separation of powers. Rappaport makes his case in a comprehensive treatment of administrative law, covering the key cases, doctrines, and details of administration in a way that is refreshingly pragmatic and in touch with the important of foundational tenets of classical liberalism.

Political theorist Jacob Levy's contribution – in Chapter 9 – is a bucket of cold water dumped over the head of the classical liberal thinker. Levy, who considers himself a classical liberal, rejects the core principle of that particular faith stretching back to Locke and Jefferson and beyond. For them, as for most of us today, classical liberalism is antipolitical or perhaps prepolitical. Locke's harm principle and Jefferson's social contract set forth in the Declaration of Independence assert that the purpose of the state is to protect rights. Levy calls this limited conception of classical liberalism "absurd" and "an end-run around politics" that he believes has made classical liberal ideas less relevant to actual governing than ideal. Looking out at the state of modern politics, Levy sees strands of illiberalism in society (for example, populism, nationalism) that need to be confronted, and it is insufficient, he argues persuasively, to retreat to the enumerated powers of the Constitution. Levy demands classical liberals reengage with ordinary politics instead of retreating to towers of formulaic principles.

Although, given its emphasis on a minimal state, classical liberalism is often thought of as a species of right-wing politics in the United States, there are numerous places where libertarian policy preferences are more aligned with the left wing of American politics. Classical liberals have historically been abolitionists, feminists, sympathetic to gay rights, against the "war on drugs," and skeptical about mass incarceration, especially the racial composition of prisons. These commitments are evident throughout this book. In Chapter 10, law professor Fernando Tesón provides another example of how far libertarians diverge from current Republican politics, making the classical liberal case for a much more open immigration policy. Tesón rejects claims by those hostile to immigration, grounded in national security, hoary

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notions of sovereignty, or cultural nativism, as well as those supportive of immigration, grounded in the value of diversity. Instead, Tesón bases his argument on solidly bourgeois notions of economic opportunity and equal dignity. For a classical liberal like Tesón, perhaps no policy is a clearer way to increase social welfare than a liberalization of our immigration policy.

Economist Mario Rizzo provides an assessment of recent criticisms of neoclassical economics in Chapter 11. The biggest development in economics over the past few decades has been the surge in "behavioral" economics. While all economics is about behavior of humans, the Nobel-winning work of Daniel Kahneman, Richard Thaler, and others has suggested that prevailing economic models are incomplete insofar as they purport to describe people as "rational" human actors. Since much classical liberal theory and politics is premised on economic models of competitive markets, behavioralism can be thought of as an attack on classical liberals. In fact, it is probably not a coincidence that the rise of behavioralism came after a period of several decades in which neoclassical economic models completely reshaped American law, often in a more classically liberal direction. Mario Rizzo argues that the differences between these competing approaches is insufficiently clear. In a return to first principles, Rizzo attempts to reframe our understanding of economic models by considering in detail what we mean when we say "rational" and "irrational." The classical liberal, progressive, and everyone in between will be challenged to rethink their assumptions about economics.

The foundational precept of classical liberalism is private property. (Bodily autonomy is as well, but few deny its importance today.) In Chapter 12, law professor James Stern defends private property against critics, like Thomas Grey, who argue that it is a construct that merely reflects the regulatory choice of the state. Stern grounds his defense against the property relativists in a consideration of the current law of intellectual property, specifically, copyright and patent law. Stern argues that we do not merely call intellectual property "property," out of convenience or otherwise, but rather that intellectual property's structures and doctrines are consistent with and shaped by the fundamental features of property, writ large. Moreover, Stern points out, that an attempt to describe intellectual property as merely a means of achieving public ends fails to account for the law and policy in the field.

The term "classical liberal" and "libertarian" are often used synonymously, and, in fact, they are often used that way throughout this book. But in Chapter 13, law professor Gus Hurwitz and law and economics scholar Geoffrey Manne tease out an important distinction – views about technological change may create a tension between these two strands of thought. Libertarians generally embrace technology, especially modern information technology, as a means of empowering individuals. This can be seen in the fantastical claims about the potential of the Internet to create superempowered individuals free from government constraint. Of course, governments can also use technology, making this position somewhat naïve. But the schism with classical liberals is along another dimension. Starting from Locke, the

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classical liberal ideal depends on a strong state capable of enforcing property rights and maintaining a peaceful civil society governed by the rule of law. This includes not just ISIS and China, but muggers on the streets of Chicago and fraudsters peddling get-rich-quick schemes and bogus remedies. Hurwitz and Manne explore the proper role of the state and the ways in which technology may upset the historical alliance between classical liberals and libertarians in this thought-provoking chapter.

As the faculty sponsor of the student chapter of the Federalist Society at the University of Chicago Law School, one of my jobs is to deliver the annual "Introduction to the Federalist Society" remarks during the first week of a new school year. (That I inherited this job from Richard Epstein when he decamped to NYU for the Fall each year, is one of the great honors of my professional life.) In these remarks each year, I make a point of arguing for the cross-party nature of classical liberal ideals. To do this, I frequently cite statistics about incarceration rates in the United States, especially the racial nature of them. In Chapter 14, my progressive colleague at Chicago, Aziz Huq, elaborates on this point, urging classical liberal scholars to do more work on the issue of incarceration. After all, if the goal of a political philosophy is to actually impact policy choices, then coalitions must be built, and this in turn depends on goodwill being earned. Common ground can be found among Left and this strand of the Right in America, but it will require classical liberal thinkers to be more forceful in their rejection of the pro-prison agenda that earns Republicans electoral victories. Huq gives several persuasive arguments for why classical liberal thinkers should be against the carceral state, and why this bargain might be the right one to strike.

The final two chapters present a debate of sorts between law professors Michael Seidman and Richard Epstein. The written chapters are a summary and extension of a passionate debate witnessed by participants at the end of the conference. Seidman, a highly regarded man of the Left, had been a playful interlocutor during the event, but when he rose as the penultimate speaker, he set forth his normative views on the content of classical liberalism, as he understands it. Chapter 15 is an enumeration of seven "problems" that Seidman believes are fatal to classical liberalism as a political philosophy, let alone a recipe for guiding American policy making. In classical Seidman style, the points are sharp. In the final chapter, Epstein, the most prolific and articulate defender of classical liberalism in the legal academy today, if not anywhere, responds in kind. Epstein takes Seidman's arguments seriously, offering a robust defense of classical liberalism to each objection, using legal arguments, philosophy, and empirical judgments based on real-world policy. These two chapters taken together paint a fairly complete picture of the two rival political ideals that are competing for the attention and blessing of the American electorate and of policy makers in Washington and across America.

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