quality and import of the remaining pieces demands that I say at least a few words about each.

Jeff McMahan powerfully argues that, contra the standard view, combatants fighting on the side of an unjust aggressor can seldom satisfy any of the requirements of *jus in bello*. He adds that though "it would be ideal if all acts of war that are seriously wrong because they violate important rights and cause great harm could be criminalized," he cites many reasons why it would be "unwise and morally wrong" to "hold unjust combatants liable to legal punishment" (172). C. A. J. Coady offers an account of what terrorism is and what responses to it are appropriate. A key thread of Coady's piece is an examination of reasons for and against supplementing existing law, for example, criminal laws defining and specifying sanctions for murders, with domestic and international regulatory measures that specifically target terrorism. Francois Tanguay-Renaud marshals a highly sophisticated exploratory discussion and defense of the claim that accounts of state responsibility must be supplemented with a doctrine of corporate excuse.

John Gardner defends the Diceyan doctrine of "citizens in uniform" against the criticisms of Malcolm Thorburn, a champion of the doctrine that Gardner refers to as "officials in plain clothes" (100). Whereas Thorburn's position is that there is a distinct body of criminal law that regulates "public officials in the exercise of their official powers" and grants them special immunities that attach to their office, the "citizens in uniform" doctrine holds that there are no such special immunities for officials (100). Rather, on this view, the key difference between officials and citizens lies not in their office but in the circumstances in which they typically find themselves. Gardner's chief objective is to rebuff Thorburn's reductio that one who accepts the "citizens in uniform" must also accept that there is no principled reason why the state should not farm out its various official powers to private entities (e.g., private armies, police, prisons). Finally, Jonathan Rogers examines in detail an aspect of the duties of public prosecutors. Rogers's key contention is that such duties depend in part on whether there is a determinate answer to the question whether the alleged wrongdoing is a crime. Rogers argues that the prosecutor must send cases to trial if "the comprehensibility of the law is of a minimum level such that the trial may have communicative value" or if trying the case promises to develop indeterminate law (60).

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Epstein, Richard A. *The Classical Liberal Constitution: The Uncertain Quest for Limited Government.*
Cambridge, MA: Harvard University Press, 2014. Pp. 704. $49.95 (cloth).

Richard Epstein is more of an academic hedgehog than a fox. His Reagan-era book, *Takings*, examined the idea of constitutional limits and constitutional rights generally through the specific lens of the constitutional requirement that owners receive just compensation when their property is taken by the government for public use. More so than other libertarian-oriented works of constitutional theory

of the period, *Takings* was particularly provocative because of its powerful analytical approach to thinking about constitutional rights. At heart, Epstein's claim then was that encroachments on individual liberty were justified only to the extent that there were compensating benefits to that individual from government action. But its virtue was also its vice. The takings clause provided an original and surprisingly illuminating angle on how individual rights and the public good interact, but it was hard to know how well the argument could be generalized to the broader range of constitutional rights, let alone other aspects of the constitutional interpretation.

Over the past three decades, Epstein has grappled with both constitutional law and legal theory. While he has not returned to the specific analytical frame that he used to discuss the takings clause, he has continued to elaborate the ways in which "simple rules" can help us navigate a "complex world." Part of what makes his work intriguing is the extent to which he draws on his expertise in private law to shed light on constitutional law. His approach to thinking about how the Constitution and the law generally work is grounded in the common law world of property, contracts, and torts.

*The Classical Liberal Constitution* is in many ways the culmination of these years of study and pulls together his developing thought on the theory and structure of the Constitution. The perspective is familiar, but here Epstein paints on a much bigger canvas. He moves deftly across American constitutional history and ranges over the entirety of the US Constitution, giving some attention to the property-rights provisions that first occupied him but giving equal time to other rights provisions and key structural features such as the commerce clause and federal judicial jurisdiction.

The book proceeds through three parts. In a set of introductory chapters, Epstein offers a broader perspective on the philosophy behind the Constitution and his approach to constitutional interpretation. There he briefly lays out the case for thinking that the US Constitution largely embodies classical liberal commitments to individual liberty, private property, and limited government. By contrast, he characterizes a Progressive view of the Constitution that traces from New Dealers like Robert Stern to contemporary liberals like Justice Stephen Breyer as committed to democratic policy making and administrative regulation. He urges a kind of qualified originalism as the best approach to interpreting constitutional requirements. The Constitution should be interpreted like other legal documents, he contends, with a focus on textual commitments and drafting assumptions. He is skeptical of interpretive approaches aiming at a living constitution to the extent that they tend to render constitutional constraints more malleable than they should be, inviting political readjustments of constitutional commitments to accommodate momentary policy preferences. But his interest in originalism is distinctly qualified given that in his view the written Constitution is full of ambiguities that require current judgment. Somewhat like Michael Greve (who is explicitly hostile to originalism), Epstein thinks that constitutional interpreters should ultimately be guided by an effort to maintain a "sound constitutional order" informed by the founding, classically liberal principles (69). The argument is less detailed than sketched, but it helps orient the reader to what is to come as Epstein works through the substance of the Constitution. As might be expected from this starting point, his proffered interpretation of specific constitutional rules is less concerned

with examining historical materials than elaborating the implications of first principles for particular political challenges.

The second part is concerned with constitutional structures. A set of chapters focuses on the federal judiciary. Unsurprisingly, Epstein starts with the power of judicial review, which he sees as a "clear victory for the theory of limited government" (77). Likewise, classical liberalism suggests the need for an active, skeptical court that will impose limits on legislative power. More surprising is where Epstein devotes most of his effort—the analysis of the largely court-made rules on when constitutional cases should be heard and decided by the judiciary. Such details of how issues get into the federal courts are rarely considered in works of general constitutional theory, and there have been few discussions of them from an especially classical liberal perspective. Broadly speaking, Epstein tends to regard limits on the jurisdiction of courts as "a retreat from the strong version of *Marbury v. Madison*" (100). He would prefer that issues be placed before judges relatively easily and that judges in turn would adopt a rigorous standard of review when evaluating the actions of government officials. He thinks modern doctrine has simultaneously hampered the ability of litigants to get before a court to challenge the authority with which the government acts and facilitated the ability of a different set of litigants to get before a court to force greater governmental activity. Epstein does a nice job of laying bare the principled significance of a fairly technical area of law, and he is undoubtedly correct that understanding the rules by which citizens can get a hearing from a court is essential to assessing the exercise of the power of judicial review generally. His arguments here are original, tend to put him at odds with both the Left and the Right, and are well worth careful consideration.

Another set of chapters revolves around congressional powers, primarily the relationship between the federal and state governments to regulate private behavior. This largely amounts to a consideration of the commerce clause, with brief forays into taxing and spending powers and the necessary and proper clause. The big picture here is that a classical liberal constitutionalism would be concerned about both central government power and national fragmentation, while progressive constitutionalism is only concerned with national fragmentation. On the so-called dormant commerce clause, Epstein simply worries that federal judges have not been willing to push far enough in restricting the ability of states to interfere with the operations of the national marketplace and provide political cover to anticompetitive business practices. While some originalists worry that this line of jurisprudence is inadequately grounded in original constitutional meaning, Epstein is far more concerned with whether these doctrines advanced market competition and restrain political rent seeking. What Epstein finds more puzzling than the constitutional foundations of the dormant commerce clause is why the modern liberals who have helped build up those doctrines are unconcerned by similar anticompetitive behavior at the federal level. Broadly speaking, Epstein believes that the nineteenth-century commerce clause doctrine helped prevent the political formation of national cartels that interfered with the free flow of economic goods, while twentieth-century doctrinal innovations have gradually opened the door to federal interference with free economic competition on behalf of favored economic interests. This probably reflects more William Leggett and George Stigler than James Madison and Alexander Hamil-

ton, but Epstein poses a sharp challenge to the present configuration of commerce clause doctrine.

A final set of chapters in this section deals, somewhat briefly, with the executive branch. His focus is largely on presidential appointment and removal powers, legislative delegation of policy-making authority to executive agencies, and presidential war powers. It is a bit unfortunate that Epstein does not provide a more extensive consideration of executive power from a classical liberal perspective. The growth of executive power is another distinctive feature of American constitutional development in the twentieth century and a development that poses problems for classical liberals. Epstein's basic orientation toward executive power runs counter to that of some conservatives who might be more sympathetic to his examination of legislative power, but Epstein only scratches the surface of these puzzles here.

The last part of the book focuses on individual rights, in particular rights relating to property, speech, religion, and equal protection. Of course, liberals since the mid-twentieth century have taken an expansive view of individual rights, but the basic approach of the modern court has been to raise up favored islands of individual rights from the sea of government powers. Epstein does not quite propose to reverse that priority and go back to what some have characterized as islands of government powers surrounded by a sea of rights, but he does argue that the courts should abandon one aspect of the New Deal rights framework.

In the post–New Deal era, the court embarked on the task of identifying preferred freedoms that were regarded as particularly fundamental and would be subject to greater judicial protection. Government infringement of preferred freedoms triggers judicial strict scrutiny, which leans against the government, while other governmental actions are evaluated against the lower standard of rational basis review, which almost always results in upholding the challenged action. Epstein would prefer to scrap the two-tier system, applying strict scrutiny across the board to all legitimate rights claims (not that Epstein is always very satisfied with how the justices have applied strict scrutiny analysis). This approach leaves open difficult questions about what kind of rights claims should be subject to serious judicial investigation. Presumably, not all claims to constitutional protection are equally credible, and the two-tier approach was designed in part to help separate the wheat from the chaff. Those problems are unlikely to disappear if judges are willing to cast a wider net. It also seems likely that the strict scrutiny standard would have to be watered down in practice in order to accommodate more rights claims—that is to say, the court would likely find a wider range of justifications for restricting rights to be acceptable even under this more searching judicial investigation. The court has, in fact, already begun that process. Commentators could once reasonably claim that strict scrutiny was "strict in theory, fatal in fact" as legislation almost always fell once the strict scrutiny standard was invoked. That is much less true now, as the justices have simultaneously expanded the set of preferred freedoms and weakened the judicial barriers to restricting those freedoms.

Political theorists are likely to be somewhat frustrated with this book. It does not provide the kind of systematic analysis of the first principles that ought to serve to justify and limit state action that Epstein explored in *Takings*. It is more a work of applied theory, showing how his basic perspective on political author-

ity plays out across a wide range of constitutional controversies. From that perspective, *The Classical Liberal Constitution* is an important book. It puts on display Epstein's mature thought and his incisive legal analysis and pushes forward the kind of challenges that a classical liberal approach to constitutional theory can pose to both conservatives and progressives.

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Gilbert, Margaret. *Joint Commitment: How We Make the Social World.* Oxford: Oxford University Press, 2014. Pp. 464. $85.00 (cloth).

The everyday world is rife with instances in which we act with others—we go for walks together, we enjoy an old blues record with another music lover, we form reading groups with our colleagues. The philosophical problem that these cases present, however, is whether the individuals in question share the intention to go for the walk, enjoy the music, or form the reading group or each individually intends to act in concert with one another.

Margaret Gilbert's large body of work has taken as its target these sorts of cases, arguing that they are best explained as instances in which "we," as a plural subject, act together. Gilbert has extended this argument, originally developed in *On Social Facts* (New York: Routledge, 1989), to apply to collective responsibility, political obligation, promises, and what she calls 'sociality'. It is this last concept to which her collection of essays, *Joint Commitment: How We Make the Social World*, is dedicated. The aim of this collection is to explain how the social world is generated from those ubiquitous instances of shared action. Since sixteen of the eighteen essays in *Joint Commitment* have been published elsewhere, this collection provides an opportunity to understand how one central feature of shared agency—what Gilbert calls "joint commitment"—figures in many of the relationships, activities, and institutions that comprise the social world.

In what follows, I explain how, taking these essays as a whole, Gilbert takes joint commitment to bring the social world into being. Doing so requires that I propose plausible constraints for an account of how we "make" the social world. I then evaluate the extent to which Gilbert's account meets these constraints.

## INITIAL DEFINITIONS

Gilbert takes joint commitment to be a familiar phenomenon that is best understood by beginning with an account of personal commitments (38). Personal commitments—say, my commitment to walk to campus rather than drive tomorrow morning as long as it does not rain—are brought about when I decide in advance that I will undertake a particular course of action. In this regard, they are "commitments of the will," or commitments that I bring about by willing myself to take on this decision as my own (6). I am thus answerable to myself if I fail to walk to campus tomorrow even though the sun is shining (38). In particular, I have failed to do as reason dictates, Gilbert thinks, if I rescind the decision in this way.