

## LITERATURE REVIEW

Compiled and Edited by N. Stephan Kinsella\*

Beginning with this issue of the *Journal of Libertarian Studies*, this section will provide short descriptions of recent scholarly articles expounding on libertarian theory or otherwise of special interest to libertarians. The articles listed will be drawn exclusively from non-libertarian periodicals, since specialized libertarian fora are well-known sources of libertarian theory. Thus, we will not review articles appearing in the following journals: *Independent Review*, *Reason Papers*, *Harvard Journal of Law and Public Policy*, *Journal des Economistes et des Etudes Humaines*, *Critical Review*, *Michigan Law and Policy Review*, *Cato Journal*, *Journal of Legal Studies*, *Public Interest Law Review*, *Journal of Law and Economics*, *Review of Austrian Economics*, *The Freeman*, *Reason*, *Liberty*, *Objectivity*, or the like; nor will we review position papers, pamphlets, or monographs published by think tanks. Likewise, recently published books are not included, primarily because most significant libertarian books are reviewed in at least one of the well-known libertarian fora, such as this very journal, *Laissez Faire Books*, *Reason*, *Liberty*, or *The Freeman*.

For practical reasons, this first installment is limited to articles having a publishing date of 1995. Additionally, a separate subsection provides the titles only of selected articles appearing in 1994. For previous libertarian-related literature, one useful source is the recently published booklet, *Conservative and Libertarian Legal Scholarship: An Annotated Bibliography*.<sup>1</sup> The Institute for Humane Studies also provides a regular email list of "Recently published works by IHS friends and alumni."<sup>2</sup>

The articles listed below are listed alphabetically by author, with special items such as entire issues of journals or symposia listed first. Unless otherwise noted, the abstract has

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<sup>1</sup>Compiled by Roger Clegg and Michael E. DeBow; published by the Federalist Society. This *Bibliography* may be obtained from The Federalist Society for Law & Public Policy Studies, 1700 K Street, N.W., Suite 901, Washington D.C. 20006; (202) 822-8138.

<sup>2</sup>For further information, contact Paul Feine at pfeine@gmu.edu or browse <http://osfl.gmu.edu/~ihs/>.

been prepared by the editor, often with generous and unattributed borrowing from the article's introduction, conclusion, and/or main body, or by adapting or reprinting an abstract provided by the author or published along with the article. In the interest of brevity, unnecessary verbiage, such as "the author argues that . . .", is frequently omitted from these abstracts. It should be understood that any restatement of an article's premises, arguments, or conclusions should not be taken to imply agreement with the points restated, by the editor of this Literature Review or by the editors of the *Journal of Libertarian Studies*.

Readers who are aware of articles that should be considered for inclusion in this Literature Review section are encouraged to send copies of articles or related information directly to the editor, Mr. Kinsella. Authors are requested to provide an abstract of their articles, preferably 100 words or less.

### 1995 ARTICLES

**"Symposium: The Federalist Society: Reinventing Self-Government: Can We Still Have Limits on National Power?"** *Cornell Journal of Law and Public Policy* 4 (Spring 1995). Includes articles by Richard A. Epstein, Malcolm Wallop, and others.

**Ajani, Gianmaria, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe,"** *American Journal of Comparative Law* 43 (1995): 93–117. Post-socialist legislators have turned to pre-socialist sources of law, such as the civil-law methodology of the continent (Western Europe). Anglo-American common-law, commercial, and private-law principles are increasingly influencing continental scholars and judges. The article questions how and to what extent legislation can act as an important factor in the creation of market economies, including a question of whether legislation can effectively be "borrowed" from other legal systems. [See Morriss, 1995, and Watson, 1994, below.]

**Amar, Akhil Reed, and Jonathan L. Marcus, "Double Jeopardy Law after Rodney King,"** *Columbia Law Review* 95 (January 1995): 1–59. The Double Jeopardy Clause of the Fifth Amendment provides that no person should be tried for the same offence twice. The Supreme Court's dual-sovereignty doctrine provides that two different governments (i.e., a state and the federal government) may, however, each try a defendant for essentially the same actions. The dual-sovereignty doctrine should be abandoned, with certain exceptions for offences by state officials.

Other flaws with the Court's double-jeopardy jurisprudence are examined, using the Rodney King trial as an example. [See also Susan N. Herman, "Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy," *Columbia Law Review* 95 (June 1995): 1090.]

**Amar, Akhil Reed, and Renee B. Lettow, "Fifth Amendment First Principles: The Self-Incrimination Clause,"** *Michigan Law Review* 93 (1995): 857. Carefully examines the text, structure, and history of the Fifth Amendment's Self-Incrimination Clause and criticizes the Supreme Court's failure to do so. [See Amar, 1994, below.]

**Barnett, Randy E., "Foreword: Guns, Militias, and Oklahoma City"** [in "Symposium: The Second Amendment and the Right to Keep and Bear Arms"], *Tennessee Law Review* 62 (Spring 1995): 443. Discusses concerns of citizens who have come to distrust government. The federal government has acted far beyond its enumerated powers, and has denied protected rights, such as the right to bear arms, frustrating citizens through its dishonest interpretation of its powers and arrogant dismissal of their concerns. This makes the legal process appear more partisan and less legitimate, leading to massive distrust by pro-Second Amendment citizens. Brutal measures such as the Waco and Ruby Ridge/Randy Weaver incidents convey a message that the federal government is willing to use deadly, paramilitary force against its citizens who do not capitulate. Legislators and others have come to take it for granted that citizens will obey any law, regardless of the law's adherence to constitutional principles. They are endangering the delicate legitimacy of the law-making process, and "risking the permanent disaffection of significant segments of the people." Government should fully respect the scheme of enumerated and limited federal powers and the rights retained by the people—including "the right of the people to keep and bear arms."

———, **"Getting Normative: The Role of Natural Rights in Constitutional Adjudication,"** *Constitutional Commentary* 12 (Spring 1995): 93–122. Those who enact laws claim that the laws are not unjust and that citizens have a moral duty to obey them, which presupposes that these binding laws do not infringe natural rights. For such laws to be legitimate, they must be enacted by some process that assures that the laws have this rights-respecting quality. Under our constitution, judges have the role of scrutinizing legislation to ensure that enacted laws do not infringe the people's natural rights.

**Becker, Joseph, Comment, "Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States,"** *Northern Illinois University Law Review* 15 (1995): 671–718. Uses both Austrian economic theory (e.g., Ludwig von Mises and Murray N. Rothbard) and Austrian economic legal and ethical theory such as that of Rothbard and Hans-Hermann Hoppe, to criticize two precepts of U.S. constitutional jurisprudence: (1) that economic liberties are inherently different from fundamental liberties, can be conceptually separated, and should be afforded different levels of scrutiny and protection under the U.S. Constitution; and (2) that economic regulation benefits society as a whole and passes the minimal rational-basis test of constitutional review.

**Benson, Bruce L., "An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States,"** *Journal of Law, Economics, and Organization* 11 (October 1995): 479–501. The claim that arbitration is effective primarily because of the threat of court-imposed sanctions is not backed by evidence but is only an assumption. Arbitration statutes commanding courts to recognize arbitration settlements and arbitration clauses were not the stimulus for the growth of arbitration that they are often assumed to have been. Nonlegal sanctions clearly provide sufficient backing for arbitration to be effective in many circumstances. E.g., use of arbitration was widespread in the late 1700s to early 1800s while common-law judges were hostile to it; and arbitration expanded starting in the 1830s regardless of whether judges were supportive of arbitration.

**Benson, Bruce L., David W. Rasmussen and David L. Sollars, "Police Bureaucracies, Their Incentives, and the War on Drugs,"** *Public Choice* 83 (1995): 21–45. After 1984, local law enforcement agencies in the U.S. substantially increased arrests for drug offenses relative to arrests for property and violent crimes. This paper explores why this reallocation of police resources occurred, focusing on alternative public interest and bureaucratic self-interest explanations. The Comprehensive Crime Act of 1984 is shown to have altered the incentives of police agencies by allowing them to keep the proceeds of assets forfeited as a result of drug-enforcement activities. Empirical evidence is presented which shows that police agencies can increase their discretionary budgets through the asset-forfeiture process.

**Blackman, Rodney J., "There is There There: Defending the**

**Defenseless with Procedural Natural Law,”** *Arizona Law Review* 37 (1995): 285–353. Legal positivists like Austin, Kelsen, Hart, and Joseph Raz maintain that law can be separated from morality. Others like Aquinas, John Finnis, and Lon Fuller maintain the natural-law position that there is a necessary connection between law and morality. Natural-law theories are either substantive or procedural. Blackman defends a procedural natural-law position, arguing that, as normally defined, law has a procedural component that, if adhered to, limits a government’s arbitrary and irrational use of power. Language users implicitly accept this normative, procedural aspect of what is described as law. Further, to some extent, this analysis dissolves the traditional conflict between natural-law theorists and positivists, since even positivists use a definition of law that also limits what state power can be classified as law. [See Sebok, 1995, below.]

**Boettke, Peter J., “Hayek’s *The Road to Serfdom* Revisited: Government Failure in the Argument Against Socialism,”** *Eastern Economic Journal* 21, no. 1 (Winter 1995): 7–26. Hayek has been misread even by pro-market intellectuals, who maintain that Hayek failed to adequately address subsequent developments in socialist, interventionist, and even pro-market theory. They allege that he ignored developments such as public-choice theory, and “was content simply to beat the intellectually dead horse of central planning.” Boettke attempts “to reconstruct his argument in *The Road to Serfdom*, survey the reaction to his argument by his contemporaries, elaborate on why his argument was misunderstood by his contemporaries and subsequent generations, and finally explain the continuing relevance of his thesis concerning the failure of government to either control or supplant the market mechanism in a manner consistent with the principles of liberal democracy.”

**Bolick, Clint, “Thatcher’s Revolution: Deregulation and Political Transformation,”** *Yale Journal on Regulation* 12 (Summer 1995): 527. Discusses British Prime Minister Margaret Thatcher’s program of deregulation. Examines the challenges Thatcher faced, the principles and strategies she used to meet them, and the application of those principles and strategies to her particular circumstances. Assesses the results of her efforts, and synthesizes some broadly applicable lessons from the “Thatcher Revolution” that are relevant for deregulatory innovation elsewhere.

**Boudreaux, Donald J., Jody Lipford, and Bruce Yandle, “Regulatory Takings and Constitutional Repair: the 1990s**

**Property-Rights Rebellion,”** *Constitutional Political Economy* 6, no. 2 (Summer 1995): 171–90. In spite of the Constitution’s Fifth Amendment prohibition against uncompensated property takings, politicians systematically impose almost confiscatory land-use restrictions on citizens. Growth of regulation and property-rights uncertainty have spawned grass roots opposition and political efforts to reinforce constitutional protections. Lacking success at the national level, property-rights advocates moved to the states where by August 1994 more than 40 introduced property-rights legislation. Statistical estimates of the likelihood that such legislation would be introduced reveal strong support of the notion that the property-rights movement is a reaction to growth of government regulation. [See Clegg, 1995, Epstein, 1995 (*Nollan and Dolan*), and Marzulla, 1995, below.]

**Brietzke, Paul H., “Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict,”** *Wisconsin International Law Journal* 14 (Fall 1995): 69. Somewhat confused, non-libertarian discussion of the status of the right under international law to self-determination of various national groups within established states. Article is nonetheless somewhat interesting, given the relative paucity of libertarian writing on international law and secession. [See Wellman, 1995 (*Defense of Secession*), and Gauthier, 1994, below.]

**Byrne, Donna M., “Progressive Taxation Revisited,”** *Arizona Law Review* 37 (Fall 1995): 739. The case for progressive taxation is uneasy even for its proponents because of largely unexamined philosophical assumptions underlying their arguments. Byrne tries to make these assumptions explicit. She examines the traditional arguments for and against progressive taxation, and the philosophical approaches of John Rawls, Ronald Dworkin, and Robert Nozick to issues of fairness, to explain why the case for progressivity is uneasy although the notion of progressivity, itself, may be intuitively appealing. [See McGee, 1996, above, and Schoenblum, 1995, below.]

**Carter, Ian, “The Independent Value of Freedom,”** *Ethics* 105 (1995): 819–45. Presents a case for viewing freedom as valuable as such, as having value independently of the value of the particular things it leaves us free to do.

**Chester, Ronald, “Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of *Hodel v. Irving*,”** *Southwestern University Law Review* 24 (1995): 1195. Not a libertarian, Chester points out that Jefferson and others argued that the rights to receive and transmit property at the owner’s

death were merely civil, not natural rights. Inheritances could thus be regulated, taxed, or otherwise freely altered by Congress or state legislatures, and this view was supported by early Supreme Court case law. Nevertheless, a recent Supreme Court case seems to declare that the right to pass on property at death is a constitutionally protected property right. This case, however, will not likely have substantial effects except in limited circumstances.

**Clegg, Roger, "Reclaiming the Text of the Takings Clause,"** *South Carolina Law Review* 46 (1995): 531. The Supreme Court has fashioned a three-part balancing test for determining when government actions—especially regulatory actions—that diminish the value of private property constitute a compensable taking. This article explains which elements of this test can and which cannot be reconciled with the text of the Takings Clause, discusses more generally the application of the text to regulatory takings, and calls for a rule rather than a balancing approach. [See Boudreaux, 1995, above, and Epstein, 1995 (*Nollan* and *Dolan*), and Marzulla, 1995, below.]

**Epstein, Richard A., "Surrogacy: The Case for Full Contractual Enforcement,"** *Virginia Law Review* 81 (1995): 2305. In one type of surrogacy contracts, the sperm of the biological father is used to impregnate the designated female surrogate, and the resulting offspring becomes by contract the exclusive child of its biological father, later to be adopted by his spouse. Epstein argues that "the case for full enforcement of these contracts is fully defensible, notwithstanding the urgent pleas for their unenforceability, regulation, or prohibition." This is not merely an ad hoc inquiry; Epstein bases his conclusion on a more comprehensive theory assessing the strength and weakness of a general system of voluntary exchange.

———, **"The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still A Mistake,"** *Harvard Law Review* 108 (March 1995): 1085. Provides various reasons against antidiscrimination laws, and critiques new arguments in favor of such civil rights laws. "The key social task is to minimize the level of public force in human affairs, which only the repeal and not the enforcement of the civil rights laws can achieve."

———, **"History Lean: The Reconciliation of Private Property and Representative Government,"** *Columbia Law Review* 95 (April 1995): 591. Responds to a prior article by Martin Flaherty which examined Bruce Ackerman's, Cass Sunstein's, and Epstein's theories of constitutional interpretation, and which

critiqued Epstein's view that historical debates need not be automatically resorted to in interpreting the Constitution, where the intended meaning is found in the ordinary words used in the Constitution as understood in the popular discourse at the time of its adoption.

———, "Introduction: The Harms and Benefits of *Nollan* and *Dolan*," *Northern Illinois University Law Review* 15 (Summer 1995): 477; and Epstein, Richard A., and William H. Mellor, III, "*Dolan v. City of Tigard*: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners," *Northern Illinois University Law Review* 15 (Summer 1995): 493 [both in "Symposium: Discretionary Limits in Local Land-Use Control"]. The latter reprints *amicus curiae* brief filed in the Supreme Court case concerning the limits on government power when conditioning the right to use and develop one's property on the surrender of other property to the government without compensation. Argues that the takings clause requires that the government must use public funds for public improvements in cases such as this one, where a landowner's building permit is conditioned on her granting a greenway and bicycle path that benefit the community at large. The former article discusses the since-decided *Dolan* case and a related case. [See Boudreaux, 1995, and Clegg, 1995, above, and Marzulla, 1995, below.]

Feofanov, Dmitry N., "Luna Law: The Libertarian Vision in Heinlein's *The Moon is a Harsh Mistress*," *Tennessee Law Review* 63 (Fall 1995): 71. Robert Heinlein's classic sci-fi novel is an extended presentation of the individualist, libertarian political philosophy. Feofanov compares current legal institutions to those posited in Heinlein's book, to help understand what caused our own legal systems to emerge. With Heinlein's book for contrast, Feofanov points out several foundational theoretical fallacies of the current American legal regime.

Gordon, Doris, "Abortion and Rights: Applying Libertarian Principles Correctly," *Studies in Pro-life Feminism* 1, no. 2 (Spring 1995): 121. Abortion choice requires and promotes such false ideas as: (1) There are two tiers of humanity under unalienable rights, persons and non-persons. Abortion kills non-persons, thus is not homicide. (2) Abortion is merely abandonment, letting die, not killing. (3) Children have no right to parental support and protection from harm. (4) Legalized abortion and abandonment follow from libertarianism's non-aggression principle. Using non-religious reasoning, Gordon, President of Libertarians for Life, argues that abortion is unjust homicide. She uses a



libertarian framework of unalienable rights and obligations to examine evidence regarding pregnancy and abortion, and shows why the prenatal child has the right to be in the mother's womb. [See Rice, 1995, below.]

**Hasnas, John, "The Myth of the Rule of Law,"** *Wisconsin Law Review* 1995 (1995): 199–233. Despite common belief to the contrary, there is no such thing as "a government of laws and not people" (the so-called "rule of law"). Such a myth serves to maintain the public's support for society's power structure. The maintenance of liberty requires not only the abandonment of the ideal of the rule of law but also the commitment to a monopolistic legal system. The preservation of a truly free society requires liberating the law from state control to allow for the development of a market for law.

———, **"From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights,"** *Northwestern University Law Review* 89, no. 3 (Spring 1995): 900–41. The legal conception of rights has changed, for the worse, over the last century, from the "classical" conception of legal rights, in which rights are viewed as indefeasible, morally fundamental entities that protect individual autonomy, to a contemporary conception in which rights are viewed as means to the achievement of more fundamental moral interests. Hasnas traces the historical development of these differing conceptions, identifies the essential characteristics of each, and argues for the superiority of the classical conception, since the contemporary conception of rights does not serve to restrain state power.

———, **"Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument,"** *Duke Law Journal* 45, no. 1 (1995): 84–132. Legal realists and the Critical Legal Studies movement (the "Crits") argue that Anglo-American law is indeterminate, that is, that the rules of law do not compel judges to decide cases one way rather than another. The judge, therefore has virtually unlimited discretion when deciding a case, so that law is employed as an exploitative weapon by the economically and politically powerful. Thus, it should be used as a weapon to counter this, in favor of egalitarianism. But, Hasnas counters, even if law is indeed indistinguishable from politics, then market forces should be used to combat such oppression since, as public-choice-type inquiry shows, political action is relatively inefficacious in countering political oppression caused by politically dominant groups.

**Holzer, Henry Mark, "Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court,"** *Animal Law* 1 (1995): 79. Ayn Rand's former lawyer (and apparently only semi-libertarian, given his apparent pro-animal-rights views) tries to point out what was wrong with the Supreme Court's decision holding that freedom of religion guarantees protected Santeria worshipers' right to religious sacrifice of animals. Holzer maintains that if animals can be legally "murdered" (!) (e.g., boiling lobsters alive to eat them), then "how can the Constitution, which protects the free exercise of religion, prohibit the killing of animals for religious purposes?" Advocates laws to prohibit the "murder" of animals, so that the Court will be less likely to favor the right to religious sacrifice of animals.

**Kmiec, Douglas W., "Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law,"** *American Journal of Jurisprudence* 40 (1995): 209. Hayek distinguished between planned or imposed order and "that which arises spontaneously from within." In general, he favors customary law over legislation, giving legislation only a supporting role of correcting legislation. Such views of customary and common law and spontaneous order are congenial to the natural-law tradition, "[b]ut Hayek's understanding of liberty is misconceived insofar as it is built on an incomplete relationship between natural and customary law. To complete the relationship, individual liberty and the corresponding immunity from state directive must be reconciled with the social inclination of human nature to live in society." Somewhat confused and non-libertarian article.

**Kopel, David B., "It Isn't About Duck Hunting: The British Origin of the Right to Arms,"** *Michigan Law Review* 93 (1995): 1333-62 (review of Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* [Cambridge, Mass.: Harvard University Press, 1994]). Assesses Malcolm's radical thesis that before 1689 there was no right to bear arms. When the 1689 Convention Parliament decided to guarantee a right to arms, the Convention chose, for political-tactical benefit, to pretend that it was reaffirming an ancient right to arms.

**Larson, Jane E., "Free Markets Deep in the Heart of Texas,"** *Georgetown Law Journal* 84, no. 2 (1995): 179-258. Contends that Houston, Texas, typically cited as an example of a successful non-zoned city, is actually not a good example of a free market in land use because, although it has no official zoning, it has a range of other governmental land-use regulations. Housing

subdivisions (*colonias*) in the unincorporated areas of the Texas counties that border Mexico provide a better example. Not a libertarian, Larson concludes that the *colonias*, “products of a regime that allocates land uses according to a market rather than a regulatory logic,” provide “deplorable,” “shantytown”-like housing and environmental conditions, and proposes a land-use policy for the *colonias*.

**Lester, Jan, “Popper’s Epistemology versus Popper’s Politics: A Libertarian Viewpoint,”** *Journal of Social and Evolutionary Systems* 18 (1995): 87–93. Anarcho-capitalistic libertarianism, rather than socialism and state experimentation, are consistent with Karl Popper’s epistemology. Illustrates the analogies between Popper’s epistemology and methodology and libertarian principles, and their incompatibility with Popper’s democratic liberalism. Suggests possible reasons why Popper does not see that libertarianism is the better social application of his philosophy than is socialism.

**Lieber, Benjamin, and Patrick Brown, Note, “On Supermajorities and the Constitution,”** *Georgetown Law Journal* 83 (July 1995): 2347. Non-libertarian article arguing that certain supermajority requirements, such as House rules requiring a supermajority to increase taxes, are unconstitutional and unwise, for various reasons. Even argues that a supermajority voting enacted by *constitutional amendment* would be “unconstitutional.” [See McGinnis, 1995, below.]

**Machan, Tibor R., “Posner’s Rortyite (Pragmatic) Jurisprudence,”** *American Journal of Jurisprudence* 40 (1995): 361–75. Advocates of natural law maintain that law is an institution that requires a moral foundation, while positivists maintain that law is a system of rules requiring merely its imposition by the will of those in power. The influence of Richard Rorty, an advocate of one type of skepticism (neo-pragmatism) underlying positivism, is unfortunately being felt among certain legal theorists, including Richard Posner, federal judge, legal scholar, and law professor. Posner’s Rortyite skepticism and belief that natural-law jurisprudence is a failure leads him to advocate intuitionism, an untenable account of the nature of law. [See Rosen, 1995, below.]

———, **“Individualism versus Classical Liberal Political Economy,”** *Res Publica* 1, no. 1 (1995): 3–23. Collectivists from Marx to communarians, and even some supporters of the free market, have charged that the classical-liberal order is unjustifiably individualistic, that it fosters licentiousness,

libertinism, hedonism, and moral subjectivism. Individualism, however, has not had a full hearing. Machan argues that proponents of the virtues of classical liberalism can embrace classical individualism without losing these values. Classical individualism need not lead to amoralism and recklessness since it recognizes that individual behavior might be morally praiseworthy or blameworthy, although it holds that the individual has the right to choose which way to act.

———, **A Revision on the Doctrine of Disability of Mind,** *Persona y Derecho* 33 (1995): 213–22. *Mens rea*, or “guilty mind,” is typically required before regarding an agent as guilty of a criminal act. Fingarette/Hasse have proposed a test to determine when a disability of mind (DOM) relieves the actor of culpability. Machan provides some support for this theory in response to one of their critics’, by making certain aspects of their DOM theory more explicit.

**Marzulla, Nancie G., “State Private Property Rights Initiatives as a Response to ‘Environmental Takings,’”** *South Carolina Law Review* 46 (Summer 1995): 613. Marzulla, president and chief legal officer of Defenders of Property Rights, discusses the enormous growth in the environmental regulatory state, in particular the countless uncompensated “takings” of private property by way of environmental protection regulations. Neither the judiciary nor the federal executive or legislature have played a satisfactory role in protecting private-property rights against such uncompensated “environmental takings.” Thus, individuals are turning, with increasing success, to state legislatures for protection in the form of property-rights bills. Marzulla denies that the right to property itself is “anti-environmentalist,” and points out that property is a fundamental human right. [See Boudreaux, 1995, Clegg, 1995, and Epstein, 1995 (*Nollan and Dolan*), above.]

**McConnell, Michael, “Originalism and the Desegregation Decisions,”** *Virginia Law Review* 81 (1995): 947. Challenges the scholarly consensus that *Brown v. Board of Education* cannot be squared with the original meaning of the Fourteenth Amendment. Response and reply: Michael J. Klarman, “*Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell,” *Virginia Law Review* 81 (1995): 1881; and Michael W. McConnell, “The Originalist Justification for *Brown*: A Reply to Professor Klarman.”

**McGee, Robert W., “The Moral Case for Free Trade,”** *Journal of World Trade*, 29, no. 1 (February 1995): 69–76. Points out that

whether a trade agreement is good or bad is almost always determined purely on utilitarian grounds. Argues that utilitarianism is an improper yardstick, and that the best yardstick to use is to determine whether anyone's rights are violated.

**Mcginnis, John O., and Michael B. Rappaport, "The Constitutionality of Legislative Supermajority Requirements: A Defense,"** *Yale Law Journal* 105 (November 1995): 483. The House rule requiring a supermajority to increase tax rates is not unconstitutional, despite the contentions of several law professors who sent an Open Letter to Congressman Newt Gingrich. The House may enact a rule governing its internal operations so long as the rule does not violate another provision of the Constitution. Yet, there is no constitutional clause prohibiting such a supermajority rule. [See Lieber, 1995, above.]

**Morriss, Andrew P., "This State Will Soon Have Plenty of Laws—lessons from One Hundred Years of Codification in Montana,"** *Montana Law Review* 56 (Summer 1995): 359. In 1895, Montana changed the state's law via codification, using legal reforms designed previously for New York and California. Montana's experience both with adopting the substance of other jurisdictions' laws and in adopting a top-down codification/legislation approach should be illuminating for liberalizing economies considering adopting or transplanting the substance of foreign western law, and suggests that they approach this with caution. Sketches the codification movement in the U.S. and Montana's adoption of various codes in 1895. Draws lessons from codification for future legal reform efforts. [See Ajani, 1995, above, and Watson, 1994, below.]

**Ostas, Daniel T., and Burt A. Leete, "Economic Analysis of Law as a Guide to Post-Communist Legal Reforms: The Case of Hungarian Contract Law,"** *American Business Law Journal* 32 (1995): 355. Law and economics insights can be useful in emerging economies such as those of East-Central Europe. Economic analysis of the law is briefly explained and is used to critique Hungarian contract law as embodied in its civil code. Analogous provisions in various Western nations are also critiqued. The critiques are used to illustrate the power of economic analysis to guide the legal-reform process in emerging economies. Potential obstacles to implementing economic jurisprudence in the post-communist world are discussed. [See Thornton, 1995, and Kinsella, 1994 (Lithuania), below.]

**Provost, Sian E., Note, "Defense of a Rights-Based Approach to Identifying Coercion in Contract Law,"** *Texas Law Review* 73 (February 1995): 629. Objectivist/libertarian attack on the judicial expansion of the concept "coercion" in contract law to cover non-coercive concepts or situations like bargaining power or economic duress. Epistemological subjectivism is responsible for contaminating the concept and definition of coercion. Under an objective approach such as Ayn Rand's Objectivist theory of concepts, including concepts such as "bargaining power" in the concept of coercion is invalid. Thus, rendering contracts unenforceable for these false kinds of coercion is unjustified. Judges' subjectivism allows them to manipulate words to suit their true purposes, which is not a commitment to a particular definition of coercion, but the desire to redistribute wealth.

**Rice, Charles E., and John P. Tuskey, "The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists,"** *Regent University Law Review* 5 (Spring 1995): 83. Pro-lifers contend that "[i]t is possible to argue that under commonly applied criminal law principles, killing an abortionist as he arrives at the abortuary is a legally justified use of force in defending another. However, it is unlikely that any court would accept that argument" due to *Roe v. Wade*. "In any event, intentionally harming abortionists is not morally justified, and the law should not (and probably may not legitimately) sanction such clearly immoral conduct." Pro-lifers should rely on the stronger weapons of "speaking the truth," and prayer. [See Gordon, 1995, above.]

**Rosen, Jeffrey, "Overcoming Posner"** (review essay of Richard A. Posner, *Overcoming Law* [Cambridge, Mass.: Harvard University Press, 1995]), *Yale Law Journal* 105 (1995): 581. Review of Posner's latest tome by *The New Republic's* legal-affairs editor. Remains unconvinced by Posner's argument for constitutional pragmatism as an overarching constitutional methodology. [See Machan, 1995 (Posner), above.]

**Schoenblum, Jeffrey A., "Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals,"** *American Journal of Tax Policy* 12 (Fall 1995): 221. Prominent opponents of President Clinton's 1992 call for the "rich" to pay their "fair share" of taxes tend to object on economic or political grounds, for example the argument that increased taxes on the rich could affect economic growth or prolong the recession. Schoenblum challenges the notion that it is "fair" for richer taxpayers to pay more taxes, relatively or even absolutely, than others. Opposes proportional taxation and

argues for absolutely equal taxation among wage earners regardless of the amount of income earned. [See Byrne, 1995, above.]

**Sebok, Anthony J., "Misunderstanding Positivism,"** *Michigan Law Review* 93 (June 1995): 2054. In America there has been an assumption that legal positivism is somehow inherently conservative and associated with the idea of "judicial restraint." Sebok argues that this is due to particular historical circumstances under which only a narrow version of positivism was developed in America, and that positivism does not have to be conservative. Sets forth a historical account of the evolution of legal positivism in American jurisprudence, and reevaluates the relationship between classical positivism and formalism. [See Blackman, 1995, above.]

**Shearmur, Jeremy, "The Individual: A Suitable Case for Privatization,"** *Policy* 11, no. 2 (Winter 1995): 31-35. Concerning a current controversy in Australia, argues that an individual should have a right to voluntary euthanasia.

———, **"Epistemology and Human Nature in Popper's Political Theory: A Reply to Stokes,"** *Political Studies*, 43, no. 1 (March 1995): 124-30. Discusses the theme of human nature in Popper's political thought.

**Siegan, Bernard H., "Separation of Powers and Economic Liberties,"** *Notre Dame Law Review* 70 (1995): 415. The major objective of the separation of powers is to preserve liberty and prevent oppression. The power of each branch is limited on the basis of its limited function, and each branch checks and balances the others. The U.S. Supreme Court has generally accomplished these two-fold purposes, with two major exceptions. First, the Court has strayed from its role as interpreter by imposing affirmative mandates on the legislative and executive branches. Second, recently, the Court has failed to protect economic liberty. The article discusses the latter problem from the perspective of a separatists constitution and explains the necessity and desirability of a change in judicial policy.

**Sunstein, Cass R., "Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State,"** *Stanford Law Review* 48 (January 1996): 247-309. The election of the 104th Congress, together with its "Contract with America" and its "distinctive" approach to government, signals the dawning of a "constitutional moment" in which the role of government at all levels will be reexamined, including examining regulation to determine if the benefits justify the costs. Sunstein

suggests that Congress should adopt an “Administrative Substance Act,” building upon the recent learning about the performance of regulation and modeled after the Administrative Procedure Act. Calls for the enactment of a “substantive supermandate” requiring a general background rule of cost-benefit balancing for all federal regulation.

**Thornton, Judith, “Economic Reform and Economic Reality”** [in “Symposium, Development of the Democratic Institutions and the Rule of Law in the Former Soviet Union], *John Marshall Law Review* 28 (Summer 1995): 847. Reform in Russia has not resulted in a full free-market system. Halfway transitions sometimes privatize the revenue of economic activity while leaving costs socialized. The solution is not more regulation, it is the elimination of government policies that create rents and corruption. Russia must also implement policies that provide a stable environment for free-market activity, financial stability, physical safety of citizens, and clear, enforceable property rights. [See Ostas, 1995, above, and Kinsella, 1994 (Lithuania), below.]

**Weingast, Barry R., “The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development,”** *Journal of Law, Economics and Organization* 11 (April 1995): 1. Thriving markets require free markets and also a secure political foundation that limits the ability of the state to confiscate wealth. This requires a form of limited government under which states are credibly committed to honoring economic and political rights. Studies how limited government arose in the developed West, and focuses on the critical role of federalism for protecting markets in both England and America. Federalism proved fundamental to the economic rise of England in the 18th century, America thereafter, and also to the spectacular economic growth of China over the past 15 years.

**Wellman, Christopher H., “A Defense of Secession and Political Self-Determination,”** *Philosophy and Public Affairs* 24, no. 2 (Spring 1995): 142–71. Addresses the right of secession from a liberal standpoint. Concludes “that liberalism houses a robust right to secede grounded in political self-determination and that the principal characteristic required for this right is a group’s ability and willingness to perform the functions that a government must.” Respecting the right to self-determination can check the state’s monopolistic control of areas. The “constant threat of secession can exert market pressures on existing states to treat minority groups with the decency they deserve.” [See Brietzke, 1995, above, and Gauthier, 1994, below; also Robert W.



McGee, "The Theory of Secession and Emerging Democracies: A Constitutional Solution," *Stanford Journal of International Law* 28 (1992): 451.]

———, "On Conflicts between Rights," *Law and Philosophy* 14, no. 3-4 (1995): 271-95. "Specificationists" hold that rights are absolute but not universally general: rights hold absolutely except in certain, enumerated cases. Prima facie theorists claim that rights are universal in generality but lack absoluteness. When rights apparently conflict, the specificationist theory best explains and resolves the conflict. Possessing a right against another entails a type of advantage over this party, and the greater the precision with which one can specify the nature of this advantage, the better one understands the right.

Wonnell, Christopher T., "Market Causes of Constitutional Values," *Case Western Reserve Law Review* 45 (Winter 1995): 399. Some argue that a free market is supported by the Constitution and also supports personal liberties protected in the Constitution, while others maintain that capitalism is a threat to constitutional values. Wonnell explores another issue, whether the existence of our free-market institutions causes us to embrace certain constitutional values, such as racial and religious tolerance, personal privacy, and freedoms of speech and press. Discusses whether market incentives have systematic effects on the values of market actors, which are then reflected in constitutionally enshrined values.

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Amar, Akhil Reed, "Fourth Amendment First Principles," *Harvard Law Review* 107 (1994): 757. [See Amar and Lettow, 1995, above.]

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BeVier, Lillian, "Campaign Finance Reform: Specious Arguments, Intractable Dilemmas," *Columbia Law Review* 94 (1994): 1258.

**Brietzke, Paul H., "Designing the Legal Frameworks for Markets in Eastern Europe"** [in "Symposium: Doing Business in Central and Eastern Europe"], *Transnational Lawyer* 7 (Spring 1994): 35.

**Child, James W., "Can Libertarianism Sustain a Fraud Standard?"**, *Ethics* 104 (1994): 722.

**Comeaux, Paul E. and N. Stephan Kinsella, "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance,"** *New York Law School Journal of International and Comparative Law* 15 (1994): 1.

**Cooter, Robert D., "Decentralized Law for a Complex Economy"** [in "Economic Symposium: F.A. Hayek and Contemporary Legal Thought"], *Southwestern University Law Review* 23, no. 3 (1994): 443.

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**Cox, Stephen D., "The Two Liberalisms,"** *American Literary History* 6 (1994): 453–66.

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**Gauthier, David, "Breaking Up: An Essay on Secession,"**

*Canadian Journal of Philosophy* 24, no. 3 (1994): 357–72. [See Brietzke, 1995, and Wellman, 1995, above.]

Hutston, James H., "The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey," *American Journal of Jurisprudence* 39 (1994): 185.

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