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The Bill of Rights at 200 Years: Bicentennial Perspectives

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THE BILL OF RIGHTS AT 200 YEARS: BICENTENNIAL PERSPECTIVES

INTRODUCTION

RODNEY A. SMOLLA*

The Sixth Annual Symposium of the Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law, commemorated the 200th anniversary of the Bill of Rights. This symposium issue of the *William and Mary Law Review* begins with an exploration of the Madisonian theory of liberty by one of the preeminent Madison scholars in the United States, Professor Jack N. Rakove of Stanford University.

James Madison is finally taking his rightful place in American culture as one of the most subtle and complex theorists the nation has ever produced, and as the chief architect of the Bill of Rights. None of the framers of the Constitution were more concerned with the protection of individual and minority rights than Madison, nor did any member of the first federal Congress play a more crucial role in the adoption of the Bill of Rights. Yet privately, Madison was far from persuaded that a bill of rights could play a useful role in protecting liberty. Professor Rakove examines the nuances of

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Madison's thinking on rights within the larger context of his constitutional theory.

The symposium issue next rushes fast-forward 200 years to an essay by Charles A. Reich on liberty in the modern state. While a professor of law at Yale in the 1960s, Reich wrote a pathbreaking article in the *Yale Law Journal* entitled *The New Property*.¹ In slightly different form, that article became one of the central chapters in Reich's bestselling book, *The Greening of America*,² one of the principal intellectual manifestos of American counter-culture during the Woodstock years. Reich's argument was that a new species of "property" had come to exist in American life in the form of entitlement to governmental largess—welfare benefits, government pensions, disability payments, admissions to state universities, tax subsidies, governmentally issued franchises, licenses and operating permits—an entire gamut of valuable interests that depend in some way on government. He argued that these governmentally created interests had come to occupy a place as central in the lives of modern Americans as more traditional forms of "property," such as real estate or chattels, had occupied in the lives of Americans at the time the Constitution was created. We should no longer think of such interests as charity, he maintained, but rather as a form of property protected from arbitrary interference from government. Reich's work had an enormous influence on law and culture; his writings were cited with approval in a landmark Supreme Court decision, *Goldberg v. Kelly*,³ that established a due process right to a hearing prior to the termination of welfare benefits. In his essay in this symposium, Reich speaks to the "new property" concept for the first time in twenty-five years. He looks to the future of property and liberty in the modern corporate and industrial state with the same provocative, humanistic insights characteristic of his thought two decades earlier.

The symposium comes full circle with a piercing article on religious liberty in the welfare state by Richard A. Epstein, the James Parker Hall Distinguished Service Professor of Law at the Univer-

1. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964); see Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245 (1965).

2. C. REICH, *THE GREENING OF AMERICA* (1970).

3. 397 U.S. 254, 262 n.8 (1970).

sity of Chicago. Like Reich, Epstein is profoundly disturbed by the threats posed to civil liberties by the modern state. Although Reich's response is to engraft significant legal restraints on the power of large public and private institutions to control individual liberty, Epstein's response is to largely dismantle the administrative state. Epstein argues that in a world in which the regulatory and redistributive functions of the modern state did not exist, pressures on civil liberties would be dramatically eased. Administrative agencies such as the National Labor Relations Board, for example, often confront issues in which the Board's interests intersect with religious interests in ways that threaten either the accommodation values of the free exercise clause or the separationist values of the establishment clause. If the National Labor Relations Board were deemed unconstitutional, however, and put out of business, it could not threaten first amendment interests. Drawing on his passionate scholarly crusade for recognition of a reinvigorated set of economic liberties under the Constitution,⁴ Epstein argues that a dramatic rollback of the administrative state to a minimalist government, in which most matters are left to the free market and private bargains, would not merely be more efficient, but more protective of noneconomic civil liberties as well.

This issue also contains thoughtful commentaries from a rich collection of scholars: Anita L. Allen, Bruce Fein, Brigitte Fleischmann, Charles F. Hobson, Joseph Gordon Hylton, Jr., Charles H. Koch, Robert A. Rutland, Rodney A. Smolla and Paul R. Verkuil. Their contributions added enormously to the quality of the symposium and are greatly appreciated.

Finally, one should note that the symposium was also graced by two wonderful public presentations that did not include published papers. The symposium began with a public address by John Henry Faulk, one of the nation's most entertaining humorists and cultural critics, who stirred a capacity crowd with a moving tribute to freedom of speech and tolerance. The symposium ended with a powerful address by Senator Joseph A. Biden, Jr., before a standing-room-only audience, in which he unveiled a comprehensive plan for rewriting the War Powers Resolution of 1973.

4. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

The Seventh Annual Symposium of the Institute of Bill of Rights Law, to be held in April 1990, will be on the topic of "Freedom of Speech and the Problem of Racial, Sexual and Religious Harassment."