What Is Classical Liberalism?

by
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Prior to the 20th century, classical liberalism was the dominant political philosophy in the United States. It was the political philosophy of Thomas Jefferson and the signers of the Declaration of Independence and it permeates the Declaration of Independence, the Constitution, the Federalist Papers and many other documents produced by the people who created the American system of government. Many of the emancipationists who opposed slavery were essentially classical liberals, as were the suffragettes, who fought for equal rights for women.

Basically, classical liberalism is the belief in liberty. Even today, one of the clearest statements of this philosophy is found in Jefferson's Declaration of Independence. At that time, as is the case today, most people believed that rights came from government. People thought they only had such rights as government elected to give them. But following the British philosopher John Locke, Jefferson argued that it's the other way around. People have rights apart from government, as part of their nature. Further, people can form governments and dissolve them. The only legitimate purpose of government is to protect these rights.

People who call themselves classical liberals today tend to have the basic view of rights and role of government that Jefferson and his contemporaries had. Moreover, they do not tend to make any important distinction between economic liberties and civil liberties.

On the left of the political spectrum, things are more complicated. The major difference between 19th century liberals and 20th century liberals is that the former believed in economic liberties and the latter did not. Twentieth century liberals believed that it is not a violation of any fundamental right for government to regulate where people work, when they work, the wages they work for, what they can buy, what they can sell, the price they can sell it for, etc. In the economic sphere, then, almost anything goes.

At the same time, 20th century liberals continued to be influenced by the 19th century liberalism's belief in and respect for civil liberties. In fact, as the last century progressed, liberal support for civil liberties grew and groups like the American Civil Liberties Union (ACLU) began to proudly claim the label "civil libertarian." Since liberalism was the dominant 20th century ideology, public policy tended to reflect its beliefs. By the end of the century, people had far fewer economic rights than they had at the beginning. But they had more civil rights.

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Characteristics of Individual Rights

The Bill of Rights proclaims that individuals have "rights." But what does it mean to have a right? Are some rights fundamentally different from others? In the classical liberal tradition, rights have several characteristics, including the following:

Rights Are Relational. Rights pertain to the moral responsibilities that people have to one another. In particular, they refer to a zone of sovereignty within which individuals are entitled to make choices without interference by others. In this way, rights serve as moral side-constraints on the actions of other people. In a world consisting of only one individual, or in which people never interacted, rights would not exist in the sense that there would be no one to claim a right against and no one who could interfere with the exercise of any individual's rights. Rights exist because people do interact in pursuit of their own interests. Rights are also relational in another sense: They limit the morally permissible actions government may take to interfere with the lives of individuals who are governed.

Rights Imply Obligations. Rights sanction morally allowable actions. In the process, they create obligations for other people to refrain from preventing those actions. To say that "Joe has the right to do X" implies all other people have an obligation not to interfere with Joe's doing X. For example, to say "Joe has a right to build a swing set in his backyard" implies that other people are obliged not to interfere with Joe's construction of the swing set.

Fundamental Rights Imply Negative Obligations. Joe's right to build a swing set obligates others to stay out of the way. It does not obligate others to help Joe — by furnishing labor, materials, etc. So, Joes' right creates negative obligations for others, not positive ones. All fundamental rights imply negative obligations in this way.

For example, the right to free speech implies a (negative) obligation on the part of others not to interfere with your speaking. It does not create the (positive) obligation to provide you with a platform, a microphone and an audience. The right to freedom of the press implies a (negative) obligation for others not to interfere with your publishing. It does not create the (positive) obligation to provide you with newsprint, ink and a printing press. The right to freedom of assembly creates the (negative) obligation for others not to interfere with your association with others. It does not create the (positive) obligation to furnish you with an assembly hall.

From primary rights (e.g., the rights to life, liberty and property) flow derivative rights. These are new obligations that arise as people exercise their primary rights. Virtually all rights created through trade, exchange or contract are derivative. For instance, Joe owns a motorcycle and agrees to let Tom rent it for a period of time. Joe has a right to expect to get his motorcycle back along with the agreed upon rental fee. Joe's rights entail positive obligations on the part of Tom.

Rights are Compossible. Can rights conflict? In the classical liberal conception, a conflict of rights implies a contradiction. Consider two claims:

1. Joe has the right to do X.
2. Tom has the right to interfere with Joe's doing X.

The first sentence implies that Tom has an obligation not to interfere with Joe's doing X, whereas the second sentence implies that he has no such obligation. Hence, there is a contradiction.

In order to be logically consistent, therefore, rights cannot conflict; which is to say, they must be compossible. Compossiblility means that each person's rights are compatible with everyone else having the same rights. This is the feature behind the adage "Your right to act ends at my nose," and vice versa. Take the claim that each person has a right to liberty. Compossibility implies that when any one person is exercising her liberty she is not violating other peoples' right to liberty.

This does not mean that people cannot compete to achieve mutually exclusive goals. It does mean that the competition must be in the context of rights. Put differently, there may be conflicts among people (e.g., they may be pursuing conflicting goals) but there cannot be conflicts of rights. Also, the statement that rights are compossible does not imply that there cannot be arguments and disputes about what those rights are (which is why we have courts of law). But the presumption of a legal hearing is that even though the disputants may disagree, there are objective, non-contradictory rights for the court to discover.

Fundamental Rights are Inalienable. In the Declaration of Independence, Thomas Jefferson declared that basic rights are inalienable. This means they cannot be alienated from the individual who holds the rights. They cannot be given away or taken away. They cannot be bought, sold or traded. They can be violated, however.

Joe can give away his swing set or sell it or trade it for some other asset. Joe can also buy, sell, trade or donate other pieces of property. But he cannot give away, sell or trade away his right to property as such. Individuals, through consent or contract, may limit their liberty to take specific acts (e.g., under the terms of a contract); but they may not give up their right to liberty as such.

Fundamental Rights Do Not Come from Government. Not only do rights not get their legitimacy from government, but — as the Declaration of Independence so eloquently states — it's the other way around. Government gets its legitimacy from the existence of rights. In the view of Locke, Jefferson and others, rational, moral people form governments for the express purpose of protecting rights. In the *Second Treatise on Government*, Locke argued that legitimate governments are, in fact, instituted to facilitate the more effective protection or enforcement of these rights, and may not abrogate an individual's natural rights.[2] In natural rights theories, legitimate governments are created by consent, but fundamental rights are not grounded in consent.

Substantive Rights vs. Procedural Rights. Some of the rights enumerated in the Bill of Rights are "substantive" rights. Others are "procedural." The founding fathers were clearly very concerned with both. The distinction is as follows. Legitimate governments are created to protect substantive rights. But in carrying out this task, the government is required to adhere to certain procedures, and these requirements create procedural rights. For example, the Constitution

[2] See, for example, John Locke, *Second Treatise on Government* (1952) Sections 85, 88, 94 and Chapter IX (among other places) for statements concerning the role of government, and Sections 93, 131 and Chapters XI and XIX (among other places) for statements concerning the limitations on government power and what can be done when a government violates its trust. Following standard practice, citations of Locke are to section or chapter numbers.

specifies that certain government officials must be elected. This implies that citizens have a (procedural) right to vote.

Furthermore, in order to protect rights and to adjudicate disputes about rights, the government must exercise certain police powers. In our system, certain procedural safeguards were built into the Constitution specifying how the government must act in exercising these powers. For instance, the Constitution requires the government to get a warrant before arresting a person or seizing his property. In addition, for serious crimes it requires the government to provide the accused with a speedy, public trial before an impartial jury, the ability to confront witnesses and to compel testimony. All these rights are procedural rights.

Characteristics of Procedural Rights. As noted, the right to vote, the right to a trial by jury, the rights that flow from all the rules of evidence that courts enforce — these are examples of procedural rights. Procedural rights have at least four characteristics of interest:

1. *They are less fundamental than substantive rights*. Indeed, the reason for establishing procedural rights is to protect substantive rights.
2. *They are conventional.* Whether the legislature has one house or two, whether we vote once a year or once every six months, whether we have three branches of government or four or five — all these are decisions to be made. And one decision is not necessarily superior to any other. Despite the fact that these rights are conventional, many of them are nonetheless constitutional. The Founders did not want them to be easily changed.
3. *They imply positive obligations.* Unlike fundamental substantive rights (which imply only negative obligations), procedural rights imply positive obligations. For example, the right to vote obligates others (government officials) to provide a polling booth, set aside a day for voting, print up ballots, etc. The right to a trial by jury obligates others (government officials) to empanel jurors, provide a judge, make a court house available, etc.
4. *They are the result of a balancing of interests.* Because procedural rights create positive obligations, arguably, they cannot be secured without the exercise of force or the threat of force. Governments are thus empowered to make people do things which they might otherwise not do in order to secure such rights (including, for example, collecting taxes from unwilling taxpayers). For this reason, the securing of procedural rights requires a delicate balancing between the value of the substantive rights they are designed to protect and the danger of violating these rights in the very act of attempting to protect them.

Substantive Rights versus Police Powers of the State

In order to prevent crime, catch and punish criminals, settle disputes and carry out other duties necessary to protect rights, every government will necessarily exercise police powers — powers that are generally denied to ordinary citizens. Among the questions these powers raise, here are three important ones:

1. If one individual violates another's rights (say, by committing a crime) does the violator forfeit his rights to life, liberty, etc.?

2. If the government compels testimony, subpoenas records, secures property, etc., from people who are subsequently shown to be completely innocent of any crime, is government violating the rights of the innocent?
3. If the answer to the preceding question is "not always," where is the boundary to be drawn beyond which the legitimate exercise of police powers becomes a violation of individual rights?

In the classical liberal world, people are free to pursue their own interests so long as they do not violate the rights of others. They are free to trade with others or not to trade. They are free to associate with others or not to associate. Since fundamental, substantive rights create negative obligations, one respects another's rights by not interfering with the exercise of those rights. Interference generally consists of force, the threat of force or fraud (which is interpreted to be an indirect form of force). The classical liberal world, therefore, is a peaceful world. All interactions are voluntary. A world in which all rights are respected is a world without force or fraud.[3]

A potential problem arises when government exercises its police powers in defense of rights. A classical liberal citizen clearly has the right not to be seized or searched at random. But suppose a government official suspects the citizen is a thief and that he harbors contraband. Suppose also, that after a search, seizure and trial, the citizen is proved to be guilty. How can we describe these government acts using the language of rights?

Under certain circumstances rights are *defeasable.* That is, they are justifiably set aside. For instance, people who are imprisoned for committing crimes (i.e., violating the rights of others) have not lost their inalienable rights to life, liberty and the pursuit of happiness; but in order to punish them for the crimes they committed, their rights are (temporarily) set aside.

A person need not have done wrong, however, to have his or her rights set aside. For instance, the same reasoning applies to the search and seizure of a person who is later shown to be innocent. If the search was reasonable and well-founded, it does not count as a violation of the innocent person's rights. Instead, those rights are suspended or ignored in pursuit of a larger objective (defending everyone else's rights).

Clearly, a lot hinges on defining what is "reasonable." Defined too broadly, the police powers of the state threaten every substantive right of every citizen. To ensure that these powers are narrowly circumscribed, procedural rights are established and enshrined in the Constitution. These procedural rights are important not only to drug dealers and mafia capos (who use them to maximum advantage). They are important to every citizen in the exercise of every right.

Rights versus Needs

To appreciate the classical liberal concept of individual rights, it is as important to understand what is being rejected as it is to understand what is being asserted. To say that individuals have the right

[3] This is not the world the Founding Fathers created. It is instead a vision or ideal that guided much of what they did in forming a government. Moreover, that ideal became more fully developed in the 19th century by classical liberals who argued for an end to slavery and for women's suffrage and the expansion of liberty in other ways.

to pursue their own happiness implies that they are not obliged to pursue the happiness of others. Put differently, the right to life, liberty and the pursuit of happiness implies that people are not obligated to serve the needs, concerns, wishes and wants of others. This doesn't mean that everyone has to be selfish. It does imply that everyone has a right to be selfish.

In the classical liberal world, need is not a claim. That is, the needs, wishes, wants, feelings and desires of others are not a claim against your mind, body or property. At the time the Declaration of Independence was written, this meant that the American colonists had the right to pursue their own interests, independent of the needs of King George and the British Empire. In time, the concept was broadened — affirming each individual's right to pursue his or her own interest, despite the existence of unmet needs somewhere on the planet or even next door.

The idea that need is not a claim applies to procedural rights as well as substantive rights. Tom may feel safer if all suspicious-looking people are routinely seized and searched. But in the world of classical liberalism, Tom's need to feel safe is not a justification for initiating force against all suspicious-looking people.

The Collectivist Notion of Rights

It is worth noting that all forms of collectivism in the 20th century rejected this classical notion of rights and all asserted in their own way that need is a claim. For the communists, the needs of the class (proletariat) were a claim against every individual. For the Nazis, the needs of the race were a claim. For fascists (Italian-style) and for the architects of the welfare state, the needs of society as a whole were a claim. Since in all these systems the state is the personification of the class, the race, society as a whole, etc., all these ideologies imply that, to one degree or another, individuals have an obligation to live for the state.

Despite the fact that 20th century collectivists opposed the classical liberal concept of rights, very rarely did they attack the notion of "rights" as such. Instead, they often tried to redefine the concept of "right" in a way that virtually eviscerated any meaningful notion of liberty. For example, in his 1944 State of the Union Address, President Franklin D. Roosevelt called for a "second Bill of Rights," which included the following:

- The right to a useful and remunerative job in the industries or shops or farms or mines of the nation.
- The right to earn enough to provide adequate food and clothing and recreation.
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living.
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.
- The right of every family to a decent home.
- The right to adequate medical care and the opportunity to achieve and enjoy good health.
- The right to adequate protection from the economic fears of old age, sickness, accident and unemployment.
- The right to a good education.

Note that these rights are very different from the rights Locke, Jefferson and the Founding Fathers had in mind. Among the characteristics of Roosevelt's rights are the following:

1. *They imply positive obligations on the part of others.* When Roosevelt says people have the right to "earn enough to provide adequate food, clothing and recreation," he does not mean that people have the right to work hard (extra hours if necessary) to earn money to buy what they need. Instead, he means that other people (including potential employers, consumers, other workers, etc.) have an obligation to insure each worker's wage is sufficiently high. Similarly "the right of every farmer to ... a decent living" does not mean farmers have the right to work the land and produce sufficient output. Instead it means others are obliged to act in a way that insures the farmer's minimum income. In general, your "right to a useful...job" implies others are obligated to provide that job if you can't find one on your own. Your "right ... to a decent home" implies others are obligated to provide you with a home if you cannot otherwise obtain one. And so forth.

2. *Each individual's positive obligations are notoriously unclear.* Consider all of the ways in which you could potentially violate a farmer's "right" to a decent income. You might buy groceries on sale, or at a discount outlet, instead of paying a higher price. You might buy cheaper substitute products (corn instead of soybeans or vice versa). You might grow some crops in your own backyard instead of buying items at the supermarket. You might buy some land and become a farmer yourself — thereby increasing output and depressing overall market prices. You might change your diet and not buy the farmer's output at all. Clearly the list is almost endless, as is the list of things you might do to increase the farmer's income. One thing is certain: From the statement that a farmer has a "right to a decent income" there is no way for any of us to determine what precisely our positive obligations are.

3. *As a practical matter, only government action could insure such rights.* Even if you could figure out how your actions might help the farmer, you would by no means be home free. In Roosevelt's view, everyone has the right to earn a decent income. So in the very act of helping the farmer, you might be hurting someone else. Whenever you buy from A at the expense of B, you help the employees of A at the expense of the employees of B — and vice versa. Indeed, every transaction you make — every act of buying and every act of selling — potentially violates one of Roosevelt's "rights." As a practical matter, therefore, Roosevelt's rights could be observed only if all of us ceded much of our liberty to make economic decisions to the government. And the amount of power that would have to be ceded would be enormous.

4. *They imply virtually unlimited government power with respect to the economy.* Incredibly vague rights imply incredibly vague obligations, and, if nothing else, all of Roosevelt's rights are very, very vague. Hence if government is to act as the agent for all of us, the potential scope for action would be enormous. In fact, Roosevelt believed that there was no economic decision — no act of buying or selling or producing — that government should not be able to regulate. Thus in implementing Roosevelt's second Bill of Rights one would at the same time be eliminating all of the economic rights that classical liberals thought

people had. That is, implementation of Roosevelt's scheme would eliminate the right of every individual to pursue his own happiness — at least in the marketplace.

Historical note: It's hard to exaggerate how truly collectivist Roosevelt's vision was. At his behest, Congress passed the National Industrial Recovery Act (NIRA), which attempted to regulate the entire economy, based on the Italian fascist model. In each industry, management and labor were ordered to collude to set prices, wages, output, etc. (acts that today would be a criminal violation of the anti-trust law). So intrusive were these regulations that what in retrospect seems like an incredibly silly regulation made it all the way to the Supreme Court, which responded by declaring the entire scheme unconstitutional.[4]

Roosevelt was among the most collectivist (anti-individual rights) president the United States has ever had. And not just in the economic realm. Although Abraham Lincoln and Woodrow Wilson before him had suspended constitutional rights in the time of war, Roosevelt went further than any president before or since. On his orders Japanese Americans were rounded up and forced into detention camps (for no other reason than the fact that they were of Japanese ancestry) for the duration of World War II.

The Source of Rights

Where do rights come from? How can they be defended? The Founding Fathers believed that fundamental, substantive rights come from nature. Hence the term, "natural rights." But they also relied on other types of reasoning to defend both substantive and procedural rights, including utilitarianism, common law and social contract theory.[5]

Nature as a Source of Rights. Rights as moral (and subsequently) legal claims limiting government and individual actions taken against an individual or for enforcement of certain claims arose first in the natural rights tradition in philosophy. Philosophers Hugo Grotius (1583-1645), Samuel von Pufendorf (1632–1694) and, most famously, John Locke (1632–1704) argued that humans have certain fundamental rights (e.g., to life, liberty and property). These ideas clearly influenced our Founding Fathers and are reflected in the Declaration of Independence and other documents. While early theorists, including Locke, believed that God granted humans these rights, all of them argued that, even absent God, humans had rights and that they could be discovered by using the human capacity for reason to examine the natural laws of the universe.

The argument from natural rights is appealing when applied to broad categories of substantive, fundamental rights, such as the right to life, liberty and property. It is easy to see how natural rights

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[4] The National Industrial Recovery Act (NIRA), passed in 1933, established price and wage codes with the intent of stimulating economic recovery during the Great Depression. The U.S. Supreme Court overturned the NIRA, when it ruled in *A.L.A. Schechter Poultry Corp. v. United States* (1935) (often referred to as the "sick chicken" case) that the Act encroached on states' rights and gave the executive branch powers reserved for the legislature.

[5] A number of contemporary scholars have gone to great lengths to provide defenses of or argument for rights, rather than treating rights or liberty as fundamental and not needing justification. See, for example, Robert Nozick, *Anarchy, State and Utopia* (New York, N.Y.: Basic Books, 1974); A. John Simmons, *The Lockean Theory of Rights* (Princeton, N.J.: Princeton University Press, 1992); Ellen Frankel Paul, *Property Rights and Eminent Domain* (Somerset, N.J.: Transaction Publishers, 1987); Tibor R. Machan, *Individuals and Their Rights* (Peru, Ill.: Open Court Pub. Co., 1989).

theory conforms to the substantive rights listed in the Bill of Rights including the areas of speech, religion, assembly, etc. But what about the procedural rights? On a natural rights theory, procedural rights or subsets of rights and restrictions upon government action are chosen on the basis of how well they protect the fundamental rights that government was established to protect.

Utility as a Source of Rights. A second philosophical line of argument used to ground rights, and recognized by the Constitution's writers, is the argument from utility. On this view certain rights are vital because they create the conditions under which happiness, or the general state of welfare, is maximized. And because most individuals are the best judge of their own needs, wants, desires and values, the sum of individual (and cumulatively) social welfare is likely to be maximized when people are free to make their own decisions rather than have those decisions made by someone else. Thus, in order to secure human happiness and well-being, it is necessary to create a sphere of personal autonomy within which each individual's personal judgment concerning what he or she wishes to do is paramount and cannot be legitimately interfered with by either other individuals or by governments, even for that person's own good.

Theorists as far back as Locke recognized a utilitarian argument for rights. For example, in arguing for property rights, Locke observed that by allowing people to remove property from the commons and make it their own, the effort they put into improving their property would produce benefits to society as a whole.

The Common Law as a Source of Rights. A third source of rights, closely tied to the natural rights view and known and noted by the Founders, was the common law. In general the law can be divided into two broad categories, the public law and private or common law. Public laws, created by legislative bodies, consist of statutes based on constitutional strictures. Private law, on the other hand, historically evolved as a result of court rulings or judicial determinations in the areas of property, contract and tort law.

"Common law" is a label used to describe the ancient legal process of discovering and delineating the law on a case-by-case basis. Historically, common law judges did not see themselves as creating law so much as discovering it. They subscribed to natural law doctrine whereby "there are natural rules of conduct inherent in humanity itself, most easily discovered by the evolution of customs of dealing. The job of the common law judge was to look to custom in an effort to discern the law that already existed and then render rulings based upon it.[6] Over time the notion evolved that similar cases should be decided similarly and the concept of *stare decisis* was born.[7]

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[6] Marlow H. Green, "Common Law, Property Rights & the Environment: Analysis of Historical Developments & a Model for the Future," Unpublished Manuscript, Political Economy Research Center, 1995, page 3.

[7] "Stare decisis" literally translates as "to stand by decided matters." The phrase "stare decisis" is itself an abbreviation of the Latin phrase "stare decisis et non *quieta mover*" which translates as "to stand by decisions and not to disturb settled matters." What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Paul Perell, "Stare Decisis and Techniques of Legal Reasoning and Legal Argument," *Legal Research Update* 11-21, 1987. pages 1-2. Although the doctrine of stare decisis does not prevent reexamining and, if need be, overruling prior decisions, "It is . . . a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy . . . 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into

Until the latter part of the 19th century, individuals used three bodies of the common law (e.g., trespass, tort and riparian law) to quite good effect.[8] It is easy to see why the Constitution's authors were supportive of the common law. Its development is closely tied to recognition of the rights that they cherished. The common law is connected to the classical liberal analysis of natural rights to life, liberty and property.

Note that although the common law approach and the utilitarian approach to individuals' rights start with very different premises, theorists such as Richard Posner[9], Goodman[10] and Rubin[11] have argued that both approaches often arrive at the same conclusions.

Social Contract as a Source of Rights. In writing the Constitution, its authors were also aware of and profoundly influenced by social contract theory and its relation to individual rights. The philosopher Thomas Hobbes argued that legitimate government is founded on a social contract between subjects (who promise to obey the sovereign) and the sovereign (who in return for their obedience promises to protect them from crime and foreign aggression). Locke, whose views had more direct influence on the founders, construed the contract as between the members of society who mutually promise to forego certain freedoms that they could rightfully exercise in the state of nature in exchange for security provided by a government instituted by the contract. Both Hobbes, in a very limited sense, and Locke argued that certain citizens retained certain rights even against government action. Once the contract is instituted and the government becomes established, it is expected to set up certain procedural rights and safeguards (derivative rights) to secure individuals' basic rights from violation whether by third parties or the government itself.

The basic insight of social contract theory is that government gains its legitimacy from the consent of the governed — people who have the right to form a political compact. The compact itself creates obligations and powers for both the governed and the governors. While no government ever arose from an actual social contract, social contract theory was developed as a way of both justifying obedience to the government by the governed — and placing justified limits on the government. On this view, governments are justified to the extent that they protect rights and unjustified when they either fail to persistently protect individuals from other persons violating their fundamental rights or when the government itself oversteps its legitimate authority and begin to violate individual rights.

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relationships with reasonable assurance of the governing rules of law.'" (*Moradi-Shalal v.Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296. http://lectlaw.com/def2/s065.htm)

[8] As opposed to the common law, public or legislatively created law may be characterized as one group of individuals creating rules that govern others and sometimes themselves as well. This might be unobjectionable if the first groups interests were coextensive with the interests of everyone, but this is not often, if ever, the case. Rather, public law represents the interests of some groups too strongly and others too weakly, with rent-creating and rent-seeking rather than an equitable distribution of the benefits and burdens of social life being the norm.

[9] Richard Posner, *Economic Analysis of Law*, New York: Aspen Law & Business, 1998.

[10] John C. Goodman, "An Economic Theory of the Evolution of Common Law," *Journal of Legal Studies*, vol. 7, 1978, page 393.

[11] See Hugo M. Mialon and Paul H. Rubin, "An Economic Analysis of the Conflict Between the Patriot Act and Civil Liberty," NCPA's Debate Central Web site, online at http://www.debate-central.org/topics /2005/LINKS/ economic.html

More recently, John Rawls, among other philosophers, has brought new life to social contract theory. Rather than viewing rights as gifts from government or from God, or basing rights on utility or on principles that could be divined by applying reason to a study of natural law, Rawls argues for a social contract as the basis of rights. This is not an actual contract that people sign.

Instead, it is a hypothetical agreement that rational people would agree to if they knew they were going to have to live under the agreement, but did not know what their individual positions were going to be. In real life, each of us has assets and liabilities, including intelligence, strength, health, income, wealth, family relations, etc. With this knowledge each of us would be inclined to choose social institutions advantageous to us. But Rawls asks us to imagine we are standing behind a "veil of ignorance." That is, we know we are going to be born into a world and be one of its people — but we don't know which one so we have to choose to institutions "position blind," without knowing which person we will be.

Rawls and others have argued that in an original position, absent personal biases or prejudices, rational people would conclude that basic political institutions are just if and only if each person has an equal right to the most extensive basic liberty compatible with similar liberty for all. Seen in this light, the social contract position is a different way of reasoning toward people having fundamental rights to life and liberty — with compossibility built in.

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