New York University Journal of Law & Liberty New York University School of Law 110 West Third Street – Basement New York, NY, 10012-2411

Tel: (212) 992-8940 · Fax: (212) 995-4032 http://www.law.nyu.edu/journals/liberty

cite as: NYU J.L. & LIBERTY

<u>Submissions</u> – The *NYU Journal of Law & Liberty* gladly accepts unsolicited manuscripts. We publish well-written articles and essays of any length. Please footnote only when a citation is *necessary* or *helpful* and use the standard Bluebook format. The Journal prefers *electronic* submissions in *Word format*, emailed to:

law.jll.submissions@nyu.edu

Hard-copy submissions can be sent to:

Submissions NYU Journal of Law & Liberty NYU School of Law 110 West Third Street New York, NY 10012-2411

<u>Subscriptions</u> – For domestic addresses, subscriptions are **\$30 per year** (\$28 for agents) or \$10 per issue. Foreign subscriptions are \$36 per year (\$34 for agents). Postage is included. Subscription requests should be sent **with payment** (check made payable to "New York University") to:

Journal Subscriptions NYU Journal of Law & Liberty NYU School of Law 110 West Third Street New York, NY 10012-2411

For further inquiries, contact us at law.jll.info@nyu.edu.

Cover photograph by C.M. Bell, Collection of the Supreme Court of the United States.

The NYU Journal of Law & Liberty is a quarterly publication devoted to the critical discussion of classical liberal legal scholarship. The Journal publishes essays and articles on the nature of rules & order, legal philosophy, theories of rights & liberty, constitutional law, jurisprudence, legal history, and historical & contemporary legislation.



New York University Journal of Law & Liberty

Masthead (2004 - 2005)

Editor-in-Chief Robert C. Sarvis

Managing Editors	E E1.
Charbel Barakat	Executive Editor
Stephen Boske	Brian L. Frye
Hayden Windrow	

Articles Editors
Articles Editors
Samuel Cahn
Michael Koplow
John Lennon
Sean Nation
Aaron Nagano
Hayley Reynolds
Andrew Reynard
Aaron Schechter

Associate Editors Yemi Olowoyeye ~ Ines Tofalo ~ Richard Yun

Staff Editors

Christopher Black ~ Ronald Bliss ~ William Bunting ~ Darcy Faint
Timothy Fourteau ~ Toby Freund ~ Joseph Hammond ~ J. Chris Hemphill
Kevin Lees ~ Robert McNamara ~ Benjamin Miles ~ Chris Moon
Joshua Pohl ~ Laura Pomeroy-Gerber ~ Eavon Rolich ~ Emily F. Schleicher
Sue Silverman ~ Jonathan Toren ~ Zeke Vermillion

Adjunct Editors Rich Mancill — Irina Manta — Pe

Julia Cervantes ~ Rich Mancill ~ Irina Manta ~ Peter Northup

<u>Academic Advisors</u> Clayton Gillette ~ Geoffrey Miller ~ Mario Rizzo

New York University Journal of Law & Liberty

Volume 1	2005 Nun	nber 1
Copyright ©	2005 New York University Journal of Law & Liberty	
	~	
THE 100 TH ANNIVERSARY OF	E LOCHNER V. NEW YORK, 198 U.S. 45 (1905)	323
FOREWORD: WHAT'S SO WIG Randy E. Barnett	CKED ABOUT LOCHNER?	325
OF CITIZENS AND PERSONS: CLAUSE OF THE FOURTEENT Richard A. Epstein	RECONSTRUCTING THE PRIVILEGES OR IMMUNITIES TH AMENDMENT	334
REFLECTIONS ON JUSTICE SA STILL A MEATY SUBJECT Jonathan Lurie	AMUEL F. MILLER AND THE SLAUGHTER-HOUSE CASE	355 355
THE PROTECTION OF CONTR PROVISIONS James W. Ely, Jr.	RACTUAL RIGHTS: A TALE OF TWO CONSTITUTIONAL	370
LOCHNER V. NEW YORK: TRA	ADITION OR CHANGE IN CONSTITUTIONAL LAW?	404
LOCHNER, LIBERTY, PROPER Wayne McCormack		432
LABORING IN THE "POISONO THE LOCHNER COURT Matthew S.R. Bewig	DUS GASES": CONSUMPTION, PUBLIC HEALTH, AND	476
LOCHNERIAN ANTITRUST Daniel A. Crane		496
FREEDOM OF CONTRACT AN LOCHNER V. NEW YORK Ellen Frankel Paul	ID THE "POLITICAL ECONOMY" OF	515
THE ART OF READING LOCH Rebecca L. Brown	INER	570

WEALTH, UTILITY, AND THE HUMAN DIMENSION Jonathan Klick & Francesco Parisi	
WINE, COMMERCE, AND THE CONSTITUTION	609
Todd Zywicki & Asheesh Agarwal	
~	
Воокѕ	655
LARRY D. KRAMER	
THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM	
AND JUDICIAL REVIEW (2004)	
RANDY E. BARNETT	
RESTORING THE LOST CONSTITUTION: THE PRESUMPTION	
OF LIBERTY (2004)	
Reviews by:	
Glenn Harlan Reynolds	
Jack N. Rakove	
~	
APPENDIX: LOCHNER-RELATED HISTORICAL MATERIALS	A1-A44

CALL FOR PAPERS

The New York University Journal of Law & Liberty is currently seeking papers on the following topics for publication in 2006:

- Customary Law: Its Existence, Evolution, and Effects
- The History and Future of the Trial by Jury
- Behavioral Law & Economics' Challenge to the Classical Liberal Program.

The Journal also accepts submissions throughout the year that are relevant to the subject of human freedom generally, as well as submissions for our intermittent Essays on Liberty series.

Thank you to the 2004-2005 Journal Staff for making the Journal's publication a reality and **congratulations & best wishes** to the members of the incoming Editorial Board:

Robert J. McNamara, Editor-in-Chief
Laura Pomeroy-Gerber, Managing Editor
Jonathan Toren, Executive Articles Editor
Emily Schleicher, Executive Notes Editor
Christopher Black, Articles Editor
R. Joshua Bliss, Articles Editor
M. Christopher Moon, Articles Editor
Joseph Hammond, Notes Editor
Jacob R. Kreutzer, Notes Editor
Benjamin Miles, Notes Editor
Joshua Pohl, Notes Editor
Sue Silverman, Notes Editor
Zeke Vermillion, Notes Editor

— The 2004-2005 Editorial Board