I am a libertarian, originalist Jew whose work is not yet finished. What's next? Libertarianism and originalism both need additional theoretical development. And many Jews need to rethink their political commitments. I hope to assist with all three projects as a libertarian, as an originalist, and as a Jew.

What's Next for Libertarianism?

What is known as "libertarianism" is a model that was developed in the 1960s, '70s, and '80s. Like any intellectual model, it needs to be developed and refined as difficulties reveal themselves—just as originalist theory has developed since the 1990s. Yet the libertarianism I adopted and helped develop in the 1970s and '80s has been pretty much frozen in amber since then. On my list of things to do is a reconsideration and refinement of libertarian first principles.

When, as a law student, I was writing my reply to Ronald Dworkin's argument against a general right to liberty, he accused me of being a "propertarian" rather than a libertarian. This was because I invoked private property rights to define what Lockean liberty is and to distinguish liberty from Hobbesian license. This libertarian focus on private property is entirely justified. As I have elaborated in *The Structure of Liberty: Justice and the Rule of Law*, the recognition and protection of the rights to private property—or what I referred to as "several" property—and freedom of contract are essential to addressing the pervasive social problems of knowledge, interest, and power.

As originally conceived, however, libertarianism was a response to the pervasive arguments of communists, socialists, and other collectivists who favored central planning, and who deemed everything to be public and nothing truly private. Libertarians opposed government or "public" intervention into the free market as properly defined by property rights. For libertarians, "the state" was and still remains the biggest threat to liberty. Reflecting this view, the rights contained in what we now call the Bill of Rights are all aimed at abuses of individual rights by government.

If we are to be libertarians and not propertarians, however, libertarians need also to be concerned about threats to individual liberty now posed by privately owned companies. While remaining vigilant against *socialism* in all its guises, libertarianism needs to be more vigilant against *fascism*. The meaning of "fascism" is highly contested. But one component that separates it from pure communism and socialism is the collaboration it favors between the government, business, and labor. Since the 2000s, the dominance of fewer and larger nongovernment or "private" companies has had serious consequences for the liberty of individuals.

When government officials coerce private companies to restrict the liberties of the public, libertarianism has no difficulty finding that this constitutes an unjust violation of individual rights. But what if private companies do the very same thing on their own? Does that make it okay? Perhaps, but when private companies become big enough and few enough, they may become as big a threat to individual liberty as the government itself. The Hayekian concept of "several" property, which I employed in *The Structure of Liberty*, presupposes that property holdings are distinct, numerous, and widely dispersed. Do the rights justly afforded to owners of private property apply in the same way when nongovernmental, privately owned providers of some essential services become so few and so pervasive as to resemble government institutions?

For example, what happens to individual liberty when most all our political speech takes place on nongovernment-owned "platforms"? Social media platforms have come to dominate public speech due to their extraordinary convenience as compared with setting up one's own website on the internet. Of utmost appeal is the "network effect" they provide. There's little incentive to publish one's views on a website where no one is there to listen. When nearly everyone is on a social media platform, one must speak on social media to be heard.

Libertarians are rightly skeptical that government control of social media would better protect liberty. That is the fox guarding the henhouse. But the Reconstruction Republicans proposed the Fourteenth Amendment both to protect the privileges or immunities of U.S. citizens from state action and also to remedy the refusal of states to protect the civil rights of citizens from private actors. With that power, Congress enacted the Civil Rights Act of 1875 to bar discrimination in access to public accommodations, common carriers, and places of public amusement.

The Reconstruction Republicans recognized the principle that citizens of a nation had a right to access public places on a nondiscriminatory basis—and that "public places" were sometimes privately owned. This bar on irrational discrimination with respect to public places is now pervasive throughout the United States in the form of public accommodation laws.

How might libertarianism incorporate a right to be free from irrational or arbitrary exclusion from access to public places? A good theoretical start would be to separate the "public-private" binary from the "government-nongovernment" binary. Then we see there are not two categories, but four: governmental-public, governmentalprivate, nongovernmental public, and nongovernmental private.

In the nongovernmental *private* spaces, like our homes and our beds, we are free to exclude whomever we wish. So too can government in governmental private spaces such as military bases and government office buildings. But in governmental and nongovernmental *public* spaces, irrational and arbitrary exclusion can be barred. All citizens have a civil right to access such spaces on a nondiscriminatory basis, subject of course to reasonable regulation.

In addition to considering the relationship of persons to each other within civil societies or polities, libertarians also need to think harder about the relations between polities of nation-states. Take borders, for example. When it comes to defending a polity from physical aggression, the function of a border is obvious. What about the free movement of people across borders?

Libertarians have long favored open borders and unrestricted immigration. After all, Americans are free to move and settle wherever they want among the fifty states within the U.S. My ancestors greatly benefited by their ability to immigrate to the United States, which makes me a beneficiary of immigration as well. I still remember when my grandfather became an American citizen, rather than a citizen of Canada, and ceased being a resident alien who had to register at the post office every year.

In a world of competing nation-states in which some polities are much freer and more rights-respecting than others, libertarians need to think harder about the potential ill effects of unregulated immigration of persons beyond the capacity of American society to assimilate them as my ancestors were assimilated. There are also security threats posed by unrestricted movement of persons from hostile regimes.

As a law student sitting in Roberto Unger's Contracts class and in Murray Rothbard's living room, I realized that the specific laws needed to regulate the making of contracts requires more than abstract appeals to freedom of contract. So too might the freedom of movement between countries require laws to preserve what makes a polity worth moving to.

Libertarians may also want to think harder about "private" corporations. Do publicly traded corporations necessarily have the exact same civil rights as individuals like Jack Phillips, the owneroperator of Masterpiece Cakeshop, or the closely held Hobby Lobby Stores, Inc., or an expressive corporation like Citizens United? There is a relatively obscure strain of libertarian thinking that has questioned whether corporations are actually free-market institutions. Short of that conclusion, maybe all corporations are not created equal.

In short, libertarian theory must take more seriously how liberty needs to be protected in the real world, from threats both governmental and nongovernmental, domestic and foreign.

Finally, libertarians should consider whether and how principles of ethics and virtue should be a part of libertarianism, in addition to individual rights. In the past, I have defended libertarianism as strictly a *political* theory that is compatible with competing *moral* theories. I have rejected the view that libertarianism needs to present a comprehensive theory of the good.

In recent years, however, I have begun to suspect that the natural rights basis of libertarianism needs to be compatible with a natural law approach to the good. I have long believed that, while the protection of individual liberty is the proper end of politics, individual liberty is not an end in itself but is rather a means to the higher end of individual human flourishing. One cannot fully justify the moral imperative for the individual liberty defined by natural rights without considering the ends that liberty is necessary to achieve. I am now open to the possibility that, without such an account, libertarianism as a political theory is incomplete.

One place for libertarians to start is with a 1985 book, *Human Rights: Fact or Fancy?*, the last book written by my beloved mentor, Henry Veatch. In this book, Veatch explains and justifies the idea of natural law morality—or what he sometimes calls natural *ends* morality. He then provides a natural law basis for the inalienable rights to life, liberty, and property on the ground that such rights are necessary for individuals to fulfil their moral duty to themselves to pursue the good life, to make something of themselves.

Individual liberty is essential to the pursuit of the good, he contended, because "no human being ever attains his natural end or perfection save by his own personal effort and exertion. No one other than the human individual—no agency of society, of family, of friends, or of whatever can make or determine or program an individual to be a good man, or program him to live the life that a human being ought to live. Instead, attaining one's natural end as a human person is nothing if not a 'do-it-yourself' job."[*]

These are just three of the ways that the libertarian model needs to be rethought and perhaps refined. I have not reached firm conclusions on any of these issues. I write books first and foremost to discover what I think, and I haven't yet done the necessary work on these knotty subjects. So I cannot be sure how exactly libertarianism as a political theory needs to be updated. But my gut tells me it needs to be more realistic about how individual liberty is to be protected in the real world than it sometimes has been.

Finally, if libertarianism should require refinements along any or all of these lines, this in no way represents an abandonment of libertarianism as a political theory. What distinguishes libertarianism is its core commitment to personal liberty and individual sovereignty. Just as originalism has been strengthened by its continued refinement, so too would libertarianism be strengthened by a more realistic approach to securing its fundamental commitment to liberty.

What's Next for Originalism?

My discussion of the nominations of Justices Gorsuch, Kavanaugh, Barrett, and Jackson already suggested the greatest problem facing originalism. Having justices who *identify* as originalist is necessary but not sufficient to restoring our lost Constitution. They must also put their commitment to originalism into practice.

Perhaps the biggest barrier to their doing so is the doctrine of stare decisis or precedent: the extent to which justices feel bound to follow their predecessors' nonoriginalist decisions rather than the original meaning of the Constitution. In truth, while what the Constitution calls "inferior" courts are bound to follow the holdings of Supreme Court decisions, no justice has ever denied that the Supreme Court retains the power to reverse its own previous decisions. The only debate is over when, not whether, it should do so.

While originalist academics and judges are well aware of the challenge, as yet there is no consensus on how it should be addressed. Larry Solum and I have already begun to develop our approach to this problem. For one thing, it is important to be accurate about what exactly constitutes the binding "holding" of a previous decision, as opposed to nonbinding "dicta" or statements by the Court. The actual holdings of the Supreme Court that inferior courts are bound to follow may not be as capacious as the statements contained in the justices' opinions.

For another thing, hewing to the nonoriginalist results of previous Supreme Court cases does not entail continuing to expand the nonoriginalist principles underlying those decisions and applying them to new facts and circumstances. In other words, when dealing with nonoriginalist precedents, something like Chief Justice Rehnquist's "this far and no farther" approach mgiht might be adopted.

Originalists also need to attend to how we transition to a system that is more consistent with the original meaning of the text. For example, Michael Rappaport and John McGinnis have proposed that the Supreme Court adopt the practice of "prospective overruling." As they explain, "Prospective overruling is a practice by which the Court would not apply its ruling retroactively to past statutes and actions but only prospectively to future ones. The advantage of prospective overruling is that it allows the justices to respect past reliance [by persons on the prior rulings of the Court] where necessary while nevertheless moving the law decisively to the original meaning."[*]

Finally, originalists also need to pay greater attention to the provisions of the text that point to the existence and importance of unenumerated rights. Such rights are recognized in the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth. One theoretical issue is whether the set of such rights was fixed when these provisions were enacted or expands along with our understanding of their substance and scope. Just as libertarianism may need to take more seriously the morality dictated by natural law, originalism needs to take more seriously the natural rights underpinnings of the Constitution.