LIBERTARIANISM AND ORIGINALISM IN THE CLASSICAL LIBERAL CONSTITUTION

Ilya Somin,
George Mason University School of Law


George Mason University Law and Economics Research Paper Series

14-60

This paper is available on the Social Science Research Network at http://ssrn.com/abstract=2521865
Libertarianism and Originalism in The Classical Liberal Constitution

Ilya Somin*

Richard Epstein deserves great credit for producing such an excellent book on the relationship between libertarianism and constitutional interpretation. It is an honor for me to participate in this symposium on The Classical Liberal Constitution, especially since I have been reading and admiring his scholarship since I was only eighteen years old.

Part I of this brief essay summarizes Epstein’s important contribution to constitutional scholarship, particularly his sophisticated effort to integrate originalism and libertarianism. In Part II, I consider a possible tension in his theory. Epstein’s desire to leave room for government regulation that cures market failures could potentially be used to justify a wide range of nonlibertarian forms of government intervention that might undermine the very constitutional

* Professor of Law, George Mason University School of Law. This article is a revised version of my remarks at the conference on Richard Epstein’s book, The Classical Liberal Constitution, at New York University, February 10, 2014.
rights that he seeks to protect. This is particularly likely if the judges who implement Epstein’s theory are themselves nonlibertarians who endorse wide-ranging theories of market failure embraced by many left of center economists.

In Part III, I suggest that this potential tension in Epstein’s theory can be partially mitigated by greater reliance on originalism, with fewer policy-driven exceptions for market failures. Given real-world judges and political actors, this might even result in greater economic efficiency, as well as stronger protection for individual freedom than Epstein’s approach. It also has the advantage of hewing closer to the original understanding at the time that the Constitution was enacted. In the process of considering these issues, I focus on the interpretation of the Bill of Rights. It may be helpful to look at the original meaning not just in 1791, when the Bill of Rights was first enacted, but also in 1868, when, as a result of the Fourteenth Amendment it became incorporated against state governments. Even today the vast majority of applications of the Bill of Rights are against state and local governments rather than against the federal government. In addition, the 1868 meaning of the Bill of Rights is in crucial respects more compatible with Epstein’s libertarian perspective than that of 1791. The case of the Public Use Clause of the Fifth Amendment, which Epstein and I have both written about extensively, exemplifies each of these points.

I. Richard Epstein’s Integration of Libertarianism and Originalism

One of *The Classical Liberal Constitution’s* biggest contributions is its integration of originalism on the one hand and classical liberalism on the other. Epstein contends that we should start with the text and original meaning of the Constitution, but emphasizes that we
need to supplement the textual analysis with classical liberalism as a kind of background principle. As he puts it, “the text as written is subject to a set of unspoken qualifications that either supplement or restrict its application.”

Epstein correctly recognizes that classical liberalism cannot be used to interpret every constitution in the world. Some of them clearly have meanings that are wildly at odds with classical liberalism, or any kind of liberalism. In 2011, Justice Antonin Scalia stated that “[t]he bill of rights of the former ‘evil empire,’ the Union of Soviet Socialist Republics, was much better than ours.” He wanted to make a point about how mere “parchment barriers” cannot effectively protect rights on their own. I believe that what he actually showed was that he had not read the Soviet Constitution at all carefully. Based just on the text alone, the Soviet Constitution was clearly the constitution of a totalitarian, one-party, socialist state. In interpreting the Soviet Constitution or many other constitutions, it would make little sense to use classical liberalism as a background principle.

Epstein recognizes that even with the U.S. Constitution, “there is no perfect correspondence between the classical liberal theory and the constitutional text,” citing the example of the original Constitution’s toleration of slavery as a key exception. Nonetheless, Epstein persuasively argues that libertarian principles of individual freedom, property rights, and liberty of contract are in fact essential background principles of the U.S. Constitution, because they were a

3 EPSTEIN, supra note 1, at 8.
crucial element of the ideological superstructure behind its original meaning.

The most impressive aspect of Epstein’s book is not just that it integrates libertarianism and originalism, but that it does so in a comprehensive fashion. It covers everything from presidential war powers to abortion to the constitutional issues surrounding the Federal Reserve System. Many years ago, Professor Epstein told me that not every work of scholarship has to be a battleship. Some can be little patrol boats. But I believe we can fairly say this book is in the battleship class. It will be sailing the seven seas of Constitutional interpretation for a long time to come. And, on the whole, it is a very well-built battleship. But like even the best battleship, it has a few leaks.

II. MARKET FAILURE AND JUDICIAL DISCRETION

Unlike more hardline libertarians, Professor Epstein wants to leave room for various kinds of government intervention to cure what economists call market failures, including public goods problems, holdout problems, and externalities. This implementation of economic theory is part of the background principles that he wants judges to keep in mind as they interpret the individual rights provisions of the Constitution.

In some cases, these principles are compatible with originalism. But they will also often diverge. This is particularly true once we recognize that the original meaning of the Constitution goes beyond what Epstein describes in the book. It includes not just the text as such but also in many cases the understanding of the text at the time, either by the general public, experts in law, or some combination of the two. Originalists actually disagree amongst themselves
as to whose understanding of the original meaning is relevant. But whichever understanding it is can often go beyond the words of the text and conflict in some ways with the classical liberal principles that Epstein advocates. Thus, it may be more difficult to reconcile originalism and classical liberalism than Epstein sometimes allows.

In some ways, however, Epstein’s theory might lead to less libertarian results than sticking to the original meaning would. In leaving room for these government efforts to cure market failure, Epstein’s battleship potentially could have leaks that expand in size. Epstein has a relatively narrow vision of what counts as a market failure and how often such failures occur. But many people including many economists have a much broader view. They see many more public goods problems in the world, or many more externalities, or see these factors as bigger problems than Epstein does. A judge influenced by the economic theories of Paul Krugman or Joseph Stiglitz, while seeming to follow Epstein’s principles, would allow a much wider range of government interventions than Epstein would be comfortable with. A judge influenced by Milton Friedman or F.A. Hayek would take a narrower view. But there is no reason to expect that judges applying these doctrines will necessarily be Friedmanite or Hayekian judges as opposed to Krugmanite judges, Keynesian judges, or behavioral economics judges. Potentially, we would end up not with the classical liberal Constitution, but with the welfare state liberal Constitution, justified by various theories of market failure.

This danger can be partially mitigated by enforcing the original meaning of the Constitution even in cases where judges believe that doing so may prevent the government from effectively addressing market failures. Obviously, there are likely to be cases where the

---

4 For a discussion of various different approaches, see Ilya Somin, Originalism and Political Ignorance, 97 MINN. L. REV. 625 (2012).
original meaning itself permits unjustified government intervention. But Epstein’s theory would allow the government to restrict constitutional rights to address market failures even in cases where the original meaning would otherwise forbid it.

Bringing in the original meaning as of 1868 could help cabin this to some degree because, as scholars such as Akhil Amar have demonstrated, the 1868 view of the Bill of Rights was in many ways more individualistic and more restrictive of government than the 1791 view. There are many areas where the 1868 understanding is more libertarian, or more classical liberal, than the 1791 understanding. After all, the adoption of the Fourteenth Amendment was specifically intended to protect individual rights against abuses of state power of the kind that had been used to persecute African-Americans and white Unionists in the southern states. Relying on the 1868 understanding is also good originalist theory, as that is the point at which the Bill of Rights became applicable to state governments.

III. THE CASE OF THE PUBLIC USE CLAUSE

The case of the Public Use Clause of the Fifth Amendment exemplifies these tensions in Epstein’s theory. The clause states that property cannot be “taken for public use... without just compensation.” It has been interpreted as meaning that property can only be taken for something that is a public use. Scholars and jurists have long debated the meaning of “public use.” The broad interpretation view of public use exemplified by such modern cases as Berman v.

---

6 For a discussion of various versions of originalism that justify relying on the 1868 understanding of the Bill of Rights in cases involving state governments, see ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN, (University of Chicago Press, forthcoming), ch. 2.
7 U.S. CONST. AMEND. V.
Parker\(^8\) and most recently *Kelo v. City of New London*,\(^9\) holds that a public use is anything that might potentially benefit the public in some way. That, of course, includes pretty much anything that the government might take property for. By contrast, the narrow view holds that a public use requires either government ownership of the condemned property or, if privately owned, then the general public must have a legal right to use it in some way, as in the case of a common carrier or public utility.\(^{10}\)

Epstein wants to split the difference between the narrow and broad view of public use. Going beyond the narrow view, he argues that judges should also uphold takings that are needed to overcome holdout problems.\(^{11}\) For example, there may be some extremely valuable project or development that one holdout could undermine if the government cannot use eminent domain to force him to say. Epstein’s argument resembles theories advanced by economists who argue eminent domain should be confined to situations where it is needed to overcome holdout problems, though Epstein would also allow takings for government ownership in cases where holdouts are not an issue.

The difficulty with Epstein’s approach is that judges and others may have an expansive view of where holdout problems exist, and therefore could end up upholding a wide range of takings. Even in cases like *Berman* and *Kelo*, which Epstein and I dislike, the argument was made that there was a genuine holdout problem. Epstein claims that these assertions were wrong, and I agree with him. But it all depends on how closely you are scrutinizing what is going on and on what sorts of economic theory you apply to the situation.

---

\(^{8}\) 348 U.S. 26 (1954).
\(^{9}\) 545 U.S. 469 (2005).
\(^{10}\) For a more detailed discussion of the broad and narrow theories of public use, see SOMIN, GRASPING HAND, supra note 6, at ch. 2.
\(^{11}\) See EPSTEIN, supra note 1, at 357-59.
In an ideal world of benevolent despot government, the holdout model actually works well. It would allow the government to carry out the few private takings where there really is a serious holdout problem blocking a valuable project, while closing off the rest. Given real-world government and real-world judges, it is very unlikely that this approach will work. Experience in state supreme courts that have adopted similar approaches suggests that both government officials and judges are likely to stretch the holdout concept to encompass a variety of takings that benefit powerful interest groups at the expense of the politically weak. This may not happen because judges are deliberately trying to promote abusive takings, but because jurists who place a higher value on government planning and a lower value on property rights than Epstein does might genuinely believe that holdout problems exist in a wide range of situations where they are actually minimal, or nonexistent.

If, on the other hand, courts stick to the narrow view of public use, judicial and legislative discretion is greatly reduced, and the likelihood of authorizing abusive condemnations will be diminished. The narrow view offers a relatively clear rule that can effectively bind judges with varying ideological proclivities. Applying the narrow view is also likely to increase economic efficiency as well, thus coming closer to Epstein’s goal of limiting eminent domain to situations where it increases aggregate societal wealth.

Perhaps we would give up some takings that would actually be beneficial. But effective enforcement of virtually any constitutional right requires us to give up some exercises of government power that might prove beneficial in a world of benevolent despot government; for example, effective enforcement of the criminal procedure rights granted by the Bill of Rights requires us to allow some dangerous criminals to go free.

---

12 SOMIN, GRASPING HAND, supra note 6, at ch. 8.
But enforcement of the narrow view would prevent more takings that are actually harmful, or where the holdout problem is either nonexistent or small relative to the harm caused by the taking itself. In the real world, the use of eminent domain is usually driven by the balance of political power rather than any objective effort to implement economic theories of holdout problems. The costs of adherence to the narrow view are further reduced by the reality that the private sector actually has ways of its own to deal with holdout problems, such as secret assembly.\(^{13}\)

The narrow interpretation of public use is also closer to the original meaning than the broad one. It generally predominated at the time of the Founding, when most jurists believed that “a law that takes property from A and gives it to B”\(^{14}\) must be unconstitutional. And, as I discuss in a forthcoming book,\(^{15}\) its dominance crystallized around 1868, by which time a clear majority of state supreme courts had endorsed the narrow view of public use in interpreting their state constitutions, and leading jurists and treatise writers supported it as well. The 1868 meaning is particularly relevant in this case, since the vast majority of takings are conducted by state and local governments, not the federal government.

CONCLUSION

_The Classical Liberal Constitution_ is a major contribution to constitutional theory, one that scholars will be grappling with for years to come. It integrates libertarianism and originalism more comprehensively than any previous work. But in seeking to combine originalism with economic theory, Epstein sometimes makes too many concessions to the latter at the expense of the former. In the hands of

---

\(^{13}\) See _id_. at ch. 3.


\(^{15}\) See _Somin, Grasping Hand_, _supra_ note 6, at ch. 2.
real-world judges and legislatures, that approach may tend to undermine the very limits on government power that he seeks to defend. This danger could be mitigated by stronger adherence to original meaning, including the original meaning of the Bill of Rights as understood in 1868, when it was incorporated against the states.