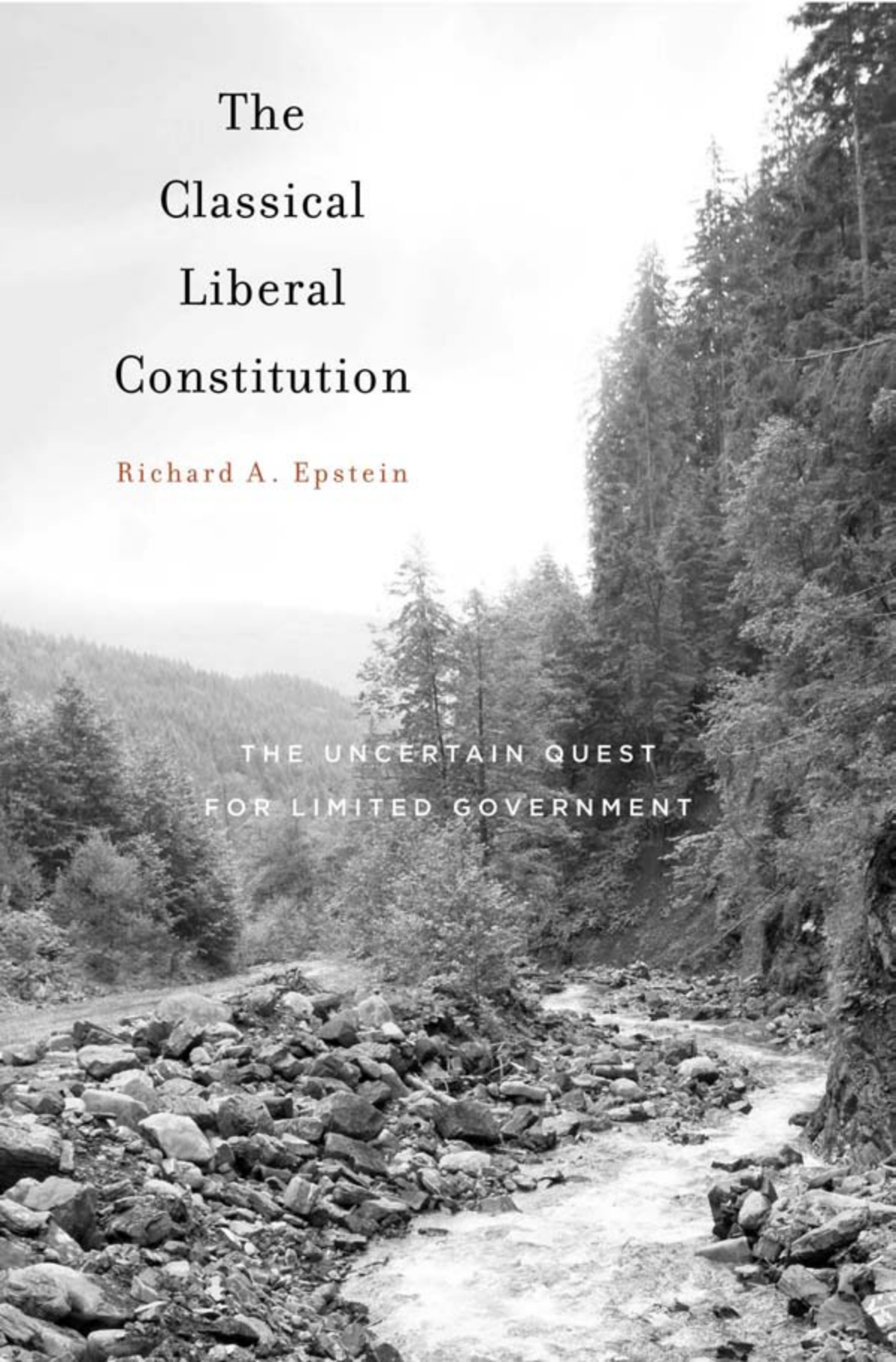
The Classical Liberal Constitution

Richard A. Epstein

THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT



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The Uncertain Quest for Limited Government

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To Eileen again, for everything,

and

To the Memory of David Currie (1936–2007)
constitutionalist extraordinaire

Contents

Preface: My Constitutional Odyssey

The Classical Liberal Constitution represents the culmination of my lifetime project of developing a distinctive synthesis of constitutional law that does not fall squarely within either the conservative or progressive camp. I started work on this volume in 2006, finished a first draft in 2010, and have done extensive revision and expansion of the book to prepare it for publication in late 2013. At one level, my ambition has been to give a comprehensive account of how the various provisions of the United States Constitution, dealing as they do with both structural issues and individual rights, can best be explained in light of classical liberal theory. That theory in turn starts from the twin pillars of private property and limited government, and seeks to make sure that each and every government action improves the overall welfare of the individuals in the society it governs. It is no part of the theory to extol any version of philosophical egoism that allows any individual to do what he or she will no matter what the consequences to others. Classical liberalism is a social theory, not the magic paean of radical individualism with which it has often been conflated, especially by its detractors on all sides of the political spectrum.

In the course of my thinking on this subject, it became increasingly clear that an examination of constitutional law principles must start with the text of the Constitution. But that truism is not a full-throated endorsement of the strong modern defenses of constitutional originalism. The harder one probes, the more apparent it becomes that analysis must go quickly beyond that starting point in order to fill in the details of the larger picture of which the text is an indispensable part. In particular, the Constitution makes liberal use of such terms, taken in alphabetical order, as "citizen," "commerce," "contract," "cruel and unusual

punishments," "due process," "freedom," "general welfare of the United States," "judicial power," "law and equity," "necessary and proper," "private property," "religion," and many more. Yet at the same time the document, self-consciously, does not contain a glossary of what these vital terms mean. We know, however, that their use long antedates their inclusion in the Constitution, so that in a deep sense no one can understand how these terms operate without understanding their historical context in relation to both institutional arrangements and private transactions. Many of these terms have received extensive elaboration in private law disputes between ordinary persons. Others were in constant use in public law contexts prior to the drafting of the Constitution. A full analysis must take both these developments into account.

At the same time, the Constitution does not contain such vital terms as "police power," "privacy," "race," "sex," and "standing" that have become critical to complement the exposition of those provisions found in the Constitution. Any constitutional analysis must explain why and how these additional elements play an essential role in constitutional interpretation. A general theory of constitutional interpretation therefore deals with at least two levels of integration: first, public and private law, and second, the written and implied provisions in the constitutional structure.

Constitutional interpretation also contains a third organizing principle—what I call constitutional prescription. In ordinary private disputes, notions like prescription, statutes of limitation, and the doctrine of laches play an essential role in legitimating through the passage of time actions and behaviors that were regarded as wrongful when committed. Thus long use allows a party to obtain a prescriptive easement over the lands of a neighbor even though that right originates in a wrongful trespass against the original owner. Constitutional law has its own doctrine of prescription whereby some (but not all) doctrines that have been in play for long periods of time become part of the constitutional culture even though they were incorrect constructions of the original text under the first two interpretative principles dealing with textual interpretation and implication respectively. The issue is of immense importance because many of our most entrenched constitutional doctrines, including that of judicial supremacy, are incorrect under normal interpretive principles.

In working through these puzzles, I should state at the outset that in a conventional sense I am not a teacher of constitutional law, having

taught the structural course and the First Amendment course once each, and over a decade ago. But by the same token I count as a constitutional lawyer because I have taught a wide range of courses in which constitutional issues play an integral role. These include basic first-year courses in civil procedure, contracts, property, and torts. These also include upper-level courses in subjects like antitrust law, conflicts of law, employment discrimination law, environmental law, food and drug law, labor law, land use planning, political theory, taxation, telecommunications law, and especially jurisprudence, legal history, political theory, and Roman law. All of these courses shed light on topics that are normally overlooked or disparaged by more conventional constitutional scholars who have scant interest or knowledge in many of these areas. It is also significant that my initial legal education was at Oxford in the mid-1960s, where my common law education contained no serious discussion of either federalism or the basic structure of the United States Constitution.

The consequences of my distinctive intellectual background should be evident in this book, which defends with a passionate intensity the classical liberal vision of the Constitution against its rival, and ascendant, progressive alternative. Any close reading of the historical materials shows that the Constitution is grounded in the work of such great Enlightenment thinkers as Hobbes, Locke, Hume, Madison, and Montesquieu. There is always slippage between the world of ideas and the world of practical politics, so that it would be a mistake to posit any perfect correspondence between what the original Constitution prescribes and what a classical liberal theory demands. In part this is due to the fact that the standard social contract theory that undergirds the classical liberal approach thinks of compacts among individuals that form a state, and not compacts between states to form a federal nation. In part this is because of the inability of the Founders to deal decisively with slavery, which introduced major blemishes into the original structure that only a blood-soaked Civil War could remove. And it is in part because the Founders, in sailing uncharted waters, made many serious errors, both of omission and commission, in designing the Electoral College, the structure of federal courts, the institution of judicial review, and the relations between dual state and federal sovereigns.

But what is striking about the whole package is this firm proposition. Whenever the Supreme Court takes any constitutional claim seriously, it reverts back to classical liberal principles, often without

acknowledging the close resemblance between that theory and its own judicial decisions. Basic rights are defined broadly to prevent political evasion; police power justifications for the use of state or federal power tend to be narrowly confined to such objects as the control of force and monopoly. That trend of classical liberalism is equally evident in dealing with judicial efforts to maintain open trade across state borders in connection with the dormant Commerce Clause and to protect political dissent through freedom of speech under the First Amendment. The difference in subject matters should never be allowed to conceal the unity of approach.

The tenor of judicial decisions, however, changes rapidly once specific constitutional protections are watered down by a low "rational basis" standard of review. In this new environment, rights are narrowly constructed; state justifications for the limitation of these rights are broadly stated. The relentless application of the lax "rational basis" test in the treatment of contract, property, the commerce power, and the power to tax and spend has left such rights and powers twisted from their original meanings. There is, to be sure, a critical place in the overall analysis for some deference to government, but it should—to use the appropriate corporate law analogy—involve the acceptance of a business judgment rule. To the extent that the government runs major social institutions, including the military, the courts, and the schools, it receives the benefit of the doubt in making hard choices so long as it acts reasonably and in good faith. But by the same token, no government should receive that level of deference when it uses its political muscle to tax, to regulate, or to change liability rules in ways that limit the protection of both liberty and property. At that point, deference is an open invitation to the faction and intrigue that have done so much in recent years to sap the strength and the focus of the nation, so much so that all too many people today rightly see the United States as a great power in decline.

In taking this position, I know that my outspoken views run against the grain of both conservative and progressive constitutional approaches. But in light of the massive disarray of modern American culture, I regard this conscious departure from conventional wisdom as a point of strength and not of weakness. I leave it to the reader to judge whether I have made the right choice.

I have spent a long time pursuing this unorthodox path in my legal writings. My engagement with constitutional law took explicit form in

the mid-1980s with the publication of my 1985 book, *Takings: Private Property and the Power of Eminent Domain* (Harvard), which took dead aim at the New Deal jurisprudence on the Takings Clause. Two years later I wrote an article in the *Virginia Law Review*, "The Proper Scope of the Commerce Power," that defended the pre-1937 view of that power against the modern synthesis. In 1993, I wrote a book entitled *Bargaining with the State* (Princeton). In it, I articulated the doctrine of unconstitutional conditions, which imposes principled limitations on how the government uses its monopoly power to restrict private parties who receive grants or licenses from the government. In 2006, I wrote a short book entitled *How Progressives Rewrote the Constitution* (Cato Institute), which took that movement to task for its views on private property and the federal commerce power. And most recently in 2011, I wrote a short book, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard), which sought to explain why systems of private property and limited government are, as an empirical matter, best able to preserve the level of independence and evenhandedness associated with the rule of law. In some sense, *The Classical Liberal Constitution* should be regarded as both a summation and an expansion of these earlier works on constitutional law.

I owe thanks to the many colleagues and institutions that have, over the past several years, and often with disbelief, heard me present the main arguments of this book. On countless occasions, I have benefited from both casual encounters and detailed conversations on various issues discussed in this book with Larry Alexander, Rachel Barkow, Randy Barnett, Paul Brest, Gerhard Casper, Adam Cox, Barry Friedman, Jacob Gersen, Michael Greve, Don Herzog, Samuel Issacharoff, Andrew Koppelman, Larry Kramer, John Manning, Michael McConnell, John McGinnis, Frank Michelman, Trevor Morrison, Richard Pildes, Sai Prakash, Michael Rappaport, Adam Samaha, Geoffrey Stone, Cass Sunstein, and surely others. Many of these eminent scholars were doubtless unaware of their unwitting role in the evolution and formulation of the ideas that eventually came to fruition in this book, but their influence is evident throughout this work.

In addition, this book is markedly stronger than it would ever have been without the comprehensive and insightful comments of my good friend Steven Calabresi, who went far beyond the requirements of a referee in giving a detailed account of arguments that I had overlooked or

misunderstood, or cases that I had ignored. I have also benefited greatly from some comments on particular texts of the book from Aziz Huq at the University of Chicago and Daniel Ho of Stanford University, on the First Amendment and standing, respectively.

I have lost track of all the institutions that have hosted me for talks on one or another part of this volume, but they include at the very least both the University of Chicago, where I was a regular member of the faculty from 1972 to 2010, and New York University School of Law, where I have been a member of the full-time faculty since 2010. They also include Berkeley Law School, Boston University Law School, Columbia Law School, DePaul Law School, Duke Law School, Harvard Law School, Michigan Law School, Northwestern Law School, Stanford Law School, and Yale Law School. I have also benefited from the ability to present various arguments at many meetings of the Federalist Society, the American Constitution Society, the Southern Economics Association, and the Canadian Law and Economics Association, as well as from speeches and events at the Cato Institute, the Manhattan Institute, the American Enterprise Institute, and other gracious hosts both inside and outside the academy.

The actual preparation of this book was a huge effort, which could not have been done without the incredible assistance, devotion, and excellence of my research assistants who spanned several generations of law students at NYU Law School: Melissa Berger, Jean Bisnar, Mikalya Consalvo, Thomas Coyle, Jordana Haviv, Matthew Holbreich, Peter Horn, Benjamin Margo, Hannah Menda, Amber Rudolphi, Daniel Schwartz, and Joshua Stanton, and also Graham Safty of the University of Chicago. The constant iterations of the manuscript; their detailed comments on each word and phrase; the endless marginal questions forced me time and again to expand the basic text to respond to their objections as best I could. They spared me many errors and infelicities. They are obviously not responsible for those that remain.

In addition, I owe a debt of special thanks to the unwavering institutional support that I have received from the University of Chicago under Deans Saul Levmore and Michael Schill; from the Hoover Institution, whose Director John Raisian welcomed me into the ranks of the Hoover Scholars in 2000 and has provided me with generous support ever since; and of course from Richard Revesz, who recruited me to NYU after I took emeritus status at Chicago and has been a strong supporter

of my work ever since. All three institutions have prospered under their able leadership. I have also received invaluable help from my longtime personal assistant, Kathryn Kepchar, and from Marjorie Holme, who often ventured beyond her work administering the Law and Economics Program at the University of Chicago to help out in a pinch. The University of Chicago reference librarian, Margaret Schilt, never failed to find obscure historical information in record time. I owe a debt of gratitude to my two NYU assistants, first Jeremy Heilman and then Jennifer Canose, who guided the traffic from the New York end. In addition, I am thankful for the support that I received from the Hoover Institution's John and Jean De Nault Task Force on Property Rights, Freedom, and Prosperity. It was at an early meeting of that group that I was prompted to write a short and snappy introduction to constitutional law. Somehow that venture spun out of control to morph into this far more ambitious project that I hope does indeed show how property rights, freedom, and prosperity are inextricably linked together in deep and profound ways that our Founders understood, but which our modern lawyers, thinkers, and judges all too often have forgotten.

PART ONE

PRELIMINARIES

Introduction

Our Two Constitutions

The United States Constitution must, on any neutral evaluation, count as the greatest triumph of political statecraft in the history of the world. That achievement is all the more remarkable because it came in the face of immense practical and theoretical difficulties. The Constitutional Convention in Philadelphia was called together to remedy the manifest ills of the Articles of Confederation that had governed the United States since 1781. But the Founders quickly went beyond their original mandate, with obvious misgivings, after concluding that the basic structure of the Articles, with its ineffectual national government, was beyond repair. Their self-imposed task of nation-building, moreover, did not align itself neatly with the major classical political theory teachings of Thomas Hobbes, John Locke, Montesquieu, or David Hume. The Framers did not seek to forge a government for individuals living together in uneasy harmony in the state of nature. Rather, they sought to form a federal government consisting of individual states, which were already full-fledged sovereigns and signatories to the now-imperiled Articles.

The obstacles encountered in Philadelphia were sufficient to ward off any utopian beliefs in the perfectibility of man or civil society. The Articles of Confederation had achieved some major triumphs, including the passage of the Northwest Ordinance in 1787. But the structure had proved weak insofar as it did not provide for any executive authority or give the national government the direct power to tax. Both of these structural features touched a sensitive historical nerve, for the former raised the specter of arbitrary royal power, while the latter recalled fierce colonial