The Classical Liberal Constitution

BY RICHARD A. EPSTEIN

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.

Working their way through these difficulties required the Framers to correct the disadvantages of weak central government, while heeding the somber warnings of their intellectual heroes who, for all their differences, agreed with Thomas Paine when he wrote: “Government even in its best state is but a necessary evil; in its worse state, an intolerable one.” Yet the greatest challenge to the original constitutional plan came, more recently, from a conscious reversal of philosophical outlook on the proper role of government.

The central mission of The Classical Liberal Constitution is to go against the grain of modern Supreme Court jurisprudence and much of the legal scholarship that has grown up around that body of work. The motivation for this argument should be apparent from the major disarray that infects every area of modern American life: steady decline in the average standard of living; constant battles over debt limits and fiscal cliffs; uncertainty over key elements of the tax structure; massive over-regulation of the most productive sources in society (health care and financial services); government-inspired brinkmanship in labor negotiations; and runaway redistribution programs that undercut the economic production that makes these programs viable.

Continued on page 6

RICHARD A. EPSTEIN is the Laurence A. Tisch Professor of Law at New York University and an adjunct scholar at the Cato Institute. This article is adapted from his most recent book, The Classical Liberal Constitution: The Uncertain Quest for Limited Government, which he discussed at a Cato Policy Book Forum in December.

On February 3, the Herbert A. Stiefel Center for Trade Policy Studies welcomed ERIC SCHMIDT (center), Google’s executive chairman, to headline the inaugural “Global Exchange” Dinner Series. Joined by the Institute’s president and CEO JOHN ALLISON (left) and trade policy director DANIEL IRENSON, Schmidt shared his perspective on international trade, data privacy, and human progress, among other topics.
Conservative originalists cannot remain faithful to the twin commitments of fidelity to text on the one hand and judicial restraint on the other.

structure and the articulation of individual rights. The last thing, therefore, that the Constitution represents is a full-throated endorsement of popular democracy. No faithful construction of the Constitution should water down its various protections in order to achieve that result under the dubious all-purpose banner of judicial restraint. The true test is to find the proper balance between legislative choice and constitutional constraint.

That Manichean approach to law is not the sign of intellectual confusion, but of an acute awareness that government has to be strong enough to discharge the limited tasks assigned to it, but not so strong as to wipe out the individual rights of people whom it has been entrusted to protect. It is often too easy today to forget that the central function of government is to deal with what the ancients called “self-preservation,” or the right to be free from both the use and threat of force. It is for that reason that the original defenders of the social contract started with the fundamental proposition that society depends on the mutual renunciation of force, which cannot be achieved in any stable way by a complex web of bilateral or multilateral agreements.

All of this is not to say that there is no place for judicial restraint. Indeed, in my view, the critical distinction is that which derives from corporate law, which allows the directors and officers of a corporation broad discretion in the operation of their business under the business judgment rule, which is suspended only when there is some clear conflict of interest between these individuals and the shareholders that justifies some higher level of scrutiny. At that point, a higher level of scrutiny is needed to see whether the corporation has dealt fairly with the parties who trade with it and whether those parties have received fair value for their contribution to the exchange. Likewise, when the government engages in taking or regulation, it should be subject to that “fair value” limitation, which embodies a high level of scrutiny insisting that the state show a strong justi-
The progressive synthesis is unsustainable: there are too many positive rights on a productive base whose size is shrunk by progressive legislation.

The errors of modern progressivism

The list of shortfalls of conservative originalism does not, however, legitimate the powerful strands of progressive thought that have dominated much of American constitutional law since the New Deal. The progressives have launched many misguided attacks on originalism to show how difficult it is to find shared meanings in ordinary texts or to anticipate the many changes in technology and political theory since the Founding period. In making ambiguity the interpretive norm, they do serious danger to the rule of law, which can only function if words are clear enough so that they can receive the same meaning by the authors of the text and the multiple and diverse parties who are bound by it. Ambiguity in some cases is to be expected, but usually only in complicated cases with mixed motives and uncertain extent. It is always a dangerous move to find that certain directives are so uncertain that it is necessary to defer to legislative and administrative bodies for their elaboration. A substantial degree of deference is appropriate where the government is running a business. But far less is required when the government takes it upon itself to tell other people how to run their own businesses.

Too often progressives show an uncritical affection for administrative expertise and impartiality in cases where both are hard to come by. They are clearly wrong on both accounts. One reason why some progressives will say that “Originalism is Bunk,” to use the infelicitous title of Mitchell Berman’s article, is that for all its weaknesses as a general theory, originalism reaches powerful conclusions that are at war with the progressive vision of strong government at every level coupled with sharp limitations on private property and economic liberties.

One of the major progressive sins is the constant willingness to let the legislature create an endless stream of positive rights as part of the modern social democratic state. The original notion of negative rights cannot cover the entire waterfront, but it does set the stage for a proper appreciation of the role of government. The protections against force and fraud create norms that function well among all persons. Their protection does not depend on any particular level of social wealth, and the protection applies to all persons equally. The rights work in small and in large societies. Once the issue turns to Social Security, Medicare, Medicaid, unemployment benefits, food stamps, and other programs, the rights become harder to define in rational and sustainable ways. The levels of payment are highly contingent on wealth, and the principles that might work in smaller societies cannot work in larger ones. Confining these tasks to the state level places an effective brake on their size because of the threat of exit. Placing them at the federal level guarantees their expansion to higher levels.

It is therefore nothing short of amazing how willing progressive judges and scholars are to read positive rights into a Constitution drafted with the opposite ends in mind. The Privileges and Immunities Clause no longer is intended to guarantee rights of trade and occupational liberties across state boundaries. Justices instead become concerned with the extension of welfare benefits. The Equal Protection Clause is no longer focused on ensuring that the criminal justice system is fair for both future victims and future offenders. It now becomes the all-purpose provision to attack traditional forms of classification as invidious discrimination. It has even been argued that the Thirteenth Amendment, whose first section reads, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction,” should be interpreted as a platform for positive rights on the ground that those who do not have certain minimum levels of wealth are in a condition of involuntary servitude, which now “exists” for millions of people.

To be sure, the progressive movement has not been able to find positive rights in the Constitution. But it has been able to remove any and all constitutional barriers to their legislative creation, which results in a huge expansion of the size of government. In a word, the progressive synthesis is unsustainable: there are too many positive rights on a productive base whose size is shrunk by progressive legislation.

Conclusion

It should be clear, then, that both the progressives and conservatives work on models that are too divorced from constitutional text, constitutional theory, and private law. Conservative thinkers often start their constitutional analysis with neither text nor structure, but with their own view of the proper role of the Supreme Court in a democratic society. In their view, the essential choices about the social and economic structure properly belong to the political branches of government at both the federal and state level.

The view holds that the judiciary should override statutes and executive actions only in exceptional cases. They think no judge
The principles embodied in the classical liberal constitution are not those that work only in this or that era. They are principles for the ages.

Unlike conservatives, progressives defend these laws. But their judicial attitude is driven by the same skepticism about judicial intervention in economic matters. That is the message of Justice Oliver Wendell Holmes's famous Lochner dissent: "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire."

So it is that two giants on the opposite ends of the political spectrum make the identical mistake: neither thinks that it is possible to map onto the U.S. Constitution the substantive theory of government. Holmes makes that mistake when he talks about "a constitution" when the proper frame of reference should be the United States Constitution. Bork decries Lochner as "judicial usurpation" because he denies that there can be an independent textual or structural basis for striking down any economic regulation, no matter how misguided it may be.

What is perverse about both positions is that a constitution (indeed any constitution) is adopted precisely to establish some permanent framework in which laws can be made and validated. An ancient constitution could follow Justinian's maxim quod principi placuit legis vigorem habet, which means, "that which is pleasing unto the prince has the force of law." However, the U.S. Constitution explicitly rejects this approach by adopting all sorts of measures intended to diffuse the power of public officials: in part through federalism and in part through the division of government power into the Congress, the president, and the Courts. These structural protections are augmented by a broad catalogue of individual rights, which checks both federal and state power. Judicial usurpation is, to be sure, one sin. But to read these broad protections narrowly is the inverse mistake of judicial abnegation.

The bottom line here is that the same mindset that works for individual rights works for understanding the structural constitution. In both areas the result of energetic government, or what Clark Neily calls "judicial engagement," pays handsome and enduring public dividends. The principles embodied in the classical liberal constitution are not those that work only in this or that era. They are principles for the ages.

Excerpted from The Classical Liberal Constitution: The Uncertain Quest for Limited Government by Richard A. Epstein, published by Harvard University Press. Copyright © 2014 by Richard A. Epstein. Used by permission. All rights reserved.