

# Probing Liberty's First Principles

Reviewed by Donald J. Boudreaux

## SKEPTICISM AND FREEDOM: A Modern Case for Classical Liberalism

By Richard A. Epstein

311 pp., Chicago, Ill.: University of Chicago Press, 2003

I will say it up front: Richard Epstein is really, really smart. A reasonable presumption is that, if you disagree with Epstein, he is right and you are wrong.

Of course, that is not strictly true; he is not always right. But he is right so often and so deeply that, if you possess a dollop or more of good sense, you can never disagree with him without suffering a nagging fear that his vision and knowledge (especially, but by no means only, of law and economics) reveal to him things that you somehow have missed.

Happily for my own peace of mind, I am in wide, if not complete, agreement with Epstein. He is a classical liberal who understands that the state is a human institution afflicted by all of humanities' flaws. He understands that the special legitimacy fueling state power often generates fearsome tyranny out of otherwise innocuous human pettiness, vanity, greed, ignorance, and envy. He is committed to reason, preaching its virtues and practicing what he preaches. He knows that being principled does not mean being dogmatic. He loves freedom; he has no wish to impose his tastes and preferences upon others; he realizes that markets need not be perfect in order to be good; and he eloquently explains that private property is indispensable for both

prosperity and liberty.

Epstein — for 30 years now a professor of law at the University of Chicago — probably is the world's leading living philosopher of freedom (under the age of 91). For this reason alone, any book by him is welcome. His latest work, *Skepticism and Freedom: A Modern Case for Classical Liberalism*, is no exception. In the first third of the book, he reviews freedom's foundational meaning and its classical liberal justification. In the next two thirds, he tackles some recent challenges to classical liberalism. Throughout, Epstein displays his signature deftness at negotiating from first principles to specific applications and back again.

### FREEDOM'S FOUNDATION

Although no longer as skeptical as he was in his youth of consequentialism, Epstein continues to found his case for freedom on natural law.

But his natural law is no brooding otherworldly omnipresence. Instead, it evolves out of real-world situations and takes human nature and the world we inhabit as they are. It is the utilitarian-inspired natural law of Henry Hazlitt (whom Epstein does not cite) and of Randy Barnett (whom Epstein cites briefly but inadequately).

What does this natural law command? If the goal is maximum and widespread human flourishing and prosperity, then the following are the foundational requirements:

- individual autonomy, or self-ownership;
- private property rights with initial ownership established by the rule of first possession;
- contract; and
- protection against the initiation of aggression.

To those foundational features, Epstein adds three less obvious (and less liberal-sounding) rules, all stemming from cases of what, in Anglo-American law, is known as necessity. Necessity softens otherwise strict property rights protections, often

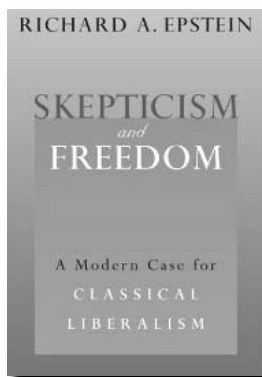
justifying the replacement of contract with the practice of "take and pay."

First, take and pay is usually justified in dire emergencies in which negotiations are impractical. The classic case is the sailor who, surprised by a violent storm, secures his boat to a dock without the dock-owner's permission. As long as the sailor compensates the dock owner for any losses the owner suffers because of such emergency dockings, the law does not and should not require the sailor who is at imminent risk of losing his life to first

to get permission before docking. Second, government must tax and sometimes even use powers of eminent domain to acquire the resources necessary to supply genuine public goods (of which, of course, national defense is the most potent example). Third, government must actively police against private

monopolies.

The dire emergency exception to the work-a-day rules of property rights and voluntary contract is clearly justified. Only the most wooden "libertarian" would have the law permit a dock owner to deny the safety of his dock to a boat caught in a deadly storm. But the second and third exceptions are less obviously justified. This review is not the place to join the debate on the feasibility of a purely voluntary, stateless society. Epstein has a powerful point when he reminds his readers that states are ubiquitous in time and space. That fact surely conveys a great deal of relevant information. So let us not argue here with Epstein's case for taxation. But eminent domain is quite a different matter. The only justification Epstein offers is the standard argument that government cannot let vital projects be held hostage to private owners who might withhold their property. He, no doubt, imagines the highway or airport that would get built but for the recalcitrant grandmother who refuses to sell her family farm, either because she truly does attach an enormously high sentimental value to the homestead or because she is



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strategically holding out for an absurdly high price.

While it is easy to imagine such problems, I doubt that they are significant enough to entrust politicians with the power to take private property, even if politicians follow Epstein's sound advice on when to pay for whatever properties are taken. America is planted thick with housing developments on large contiguous plots of land. Private developers manage to assemble those tracts without eminent domain. The Walt Disney Company purchased 30,000 contiguous acres of land in central Florida for its amusement park and resort. That is an area twice the size of Manhattan. With skillful contracting maneuvers — for example, buying each plot of land contingent upon the successful purchase of all other plots of land necessary to build the road or airport — a government intent on serving the public should be able to do its job without powers of eminent domain.

Epstein's case for active government policing against private monopoly power is even less persuasive. His presumption is that, in markets, monopolies arise with sufficient frequency and durability to justify antitrust legislation. That presumption, of course, is widespread — even at Epstein's home institution, otherwise famous for its confidence in the reliability of markets. But the only evidence he provides is the fact that the common law refused to enforce contracts in restraint of trade. Indeed it did. But it is too long a leap from recognizing the potential wisdom embodied in this common-law rule (and in a few other related ones, such as those imposing special duties and restrictions on common carriers) to the conclusion that active state policing against monopoly power is justified. I know of no compelling evidence that private monopoly power is a problem in reality; I know of plenty of compelling evidence that antitrust statutes have been abused by plaintiffs to thwart competition. Therefore, a useful simple rule for our complex world is to abandon all statutory efforts ostensibly aimed at protecting consumers from monopolies in markets.

**BEHAVIORAL ECONOMICS, LAW, AND LIBERTY** Given the scope and depth of this book, the above is nit-picking an eloquent, powerful, and persuasive case for classical liberalism. Especially welcome are the final three chapters on behavioral economics.

The case for classical liberalism is sometimes made inappropriately. A chief example is objecting to government intervention on the grounds that it is unnecessary because individuals are hyper-rational — that is, so rational as to be immune to systematic error in perceiving and judging reality.

Properly understood, individuals are

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rational. But contrary to the impressions left by some writers, everyone this side of the grave has emotions and psychological traits that cause actual perceptions and choices to differ often from what most reasonable standards hold to be accurate and wise ones. In 2002, Daniel Kahneman, a professor of psychology at Princeton University, shared the Nobel Prize in Economic Science (with my colleague Vernon Smith) for his pioneering work on how real people differ from the *homo economicus* of economists' models. This work in "behavioral economics" is both interesting and important. But because the strongest case for liberalism does not rest on the assumption that people are hyper-rational, discovering and cataloging the many ways that individuals deviate from hyper-rationality does surprisingly little damage to liberalism's rationale.

Perception and decision-making biases do exist, but they often cancel out when decision-making is decentralized, are minimized by specialization, are further minimized by the market's concentration on each decision-maker of the benefits and costs of any decision, and have especially great potential to wreak widespread damage when they distort collective decision-making processes. Epstein successfully argues that the best

of behavioral economics strengthens the case for classical liberalism.

Less successful is his attempt to use behavioral economics to strengthen the case for a standard of strict liability for unintentional torts. Readers familiar with Epstein's work know that he has long championed replacing the negligence standard with one of strict liability. With some exceptions, Anglo-American tort law uses a standard of negligence. Under this standard, the person causing the damage is liable to compensate those suffering losses only if the damage resulted from that person's negligence — that is, from that person failing to exercise reasonable care. Under a strict-liability standard, the person causing the damage is liable for it regardless of how carefully he engaged in the acts that resulted in losses to third parties.

Epstein's argument is that juries, being comprised of fallible humans, inevitably suffer from at least some of the cognitive and decision-making biases identified by behavioral economists. One bias that he highlights is the "hindsight bias" that makes people overestimate *ex post* how likely some actual event was *ex ante*. Epstein worries that the negligence standard "necessarily immerses the jury in a swamp of probabilistic calculations that oozes hindsight bias."

He is right to worry. But the distortion weakens his case for explicit adoption of the strict-liability standard. Because the hindsight bias makes jurors believe that the probability of actual accidents is higher than it really is, jurors are more likely to find defendants to have been negligent. That is, liability under the negligence standard will be imposed more frequently than it would if there were no hindsight bias. (If the probability of harm is believed to be higher than it really is, the minimum level of care judged to be reasonable will also be believed to be higher than it should be. Defendants failing to exercise this higher level of care will be found liable.) The correct conclusion is that the negligence standard in reality is closer to that of strict liability, which weakens the case for formally moving to strict liability (or, at least, makes the case less urgent).

Epstein tries to buttress his argument with the correct observation that “a legal rule that makes certain questions of fact irrelevant helps to reduce jury discretion (and indeed judicial discretion).” Again, he is right. But strict liability enjoys no advantage on this front over negligence. The reason is that a strict-liability standard must be coupled with a defense of contributory negligence — and so, *voilà!*, negligence is back in the picture. Courts cannot escape the need to make an assess-

ment of negligence, regardless of which standard applies to the conduct of potential tortfeasors.

As with his discussion of eminent domain and private monopoly, these faults are secondary. The three chapters Epstein offers on behavioral economics alone make the book well worth reading. But you must read the entire volume. It supplies a masterful analysis of classical liberalism and of the most potent current ideas that threaten to undermine it. **R**

abroad should be entitled to “prompt, adequate and effective compensation, in the event of expropriation.”

■ Investors should have “the right to transfer profits and capital freely” and “the opportunity for impartial third-party settlement of disputes with governments of host countries.”

None of this, of course, sat well with the UN’s strong socialist bloc. Keyes correctly diagnosed that bloc’s interest in the creation of the transnational corporate code as primarily “political” in nature, rather than economic. That is, the USSR and other proponents of state control over the economy saw the code as a chance to promote an adversarial relationship between

Western firms and third world countries that received investments from those firms. The socialist bloc promoted this adversarial position by using discussions on the code to propose bans on, for example, “interference” by companies in the “internal affairs of host countries,” which was a popular 1970s bogeyman.

The socialist bloc cultivated additional tension by attempting to insert language into the code enshrining the right of host governments to nationalize the assets of transnationals, without laying down a clear standard for appropriate compensation.

Given the enormous gulf between the United States and the socialist bloc, it is no surprise that the search for a code collapsed in the early 1990s and did not restart. After years of perpetual jaw-jawing, it had become a pointless exercise. Around the same time, the UNCTC’s responsibilities were transferred to other UN bodies, and the center itself shriveled up.

I am optimistic that the global shift in favor of free markets makes the idea of reviving the UNCTC and its code of conduct a lost cause. Still, a revitalized UNCTC would be useful to the anti-globalizers, if they could somehow capture and use it for their own ends. If this idea does indeed catch on, then future historians will no doubt look back on *Insurrection* as a most prescient book **R**

## Glimpsing Another Mindset

Reviewed by Neil Hrab

### INSURRECTION: Citizen Challenges to Corporate Power

By Kevin Danaher and Jason Dove Mark  
288 pp., New York, N.Y.: Routledge, 2003

**K**evin Danaher and Jason Dove Mark’s new book *Insurrection* presents the views and strategies of those who resist global free trade and markets. The activist authors sketch out five highly detailed, succinct case studies of the movement’s various constituencies in action. The case studies make up the bulk of the book, and give readers insight into how the movement’s organizers build and deploy coalitions in policy debates.

As illuminating as the case studies are, I found the book’s conclusion to be the most interesting section. The authors use the closing chapter to explain how the anti-globalization movement can advance from merely opposing the trend toward freer global trade to actively undermining and reversing that trend. The conclusion includes a bold plan to turn the United Nations into a kind of weapon that the movement can wield against its most hated enemies: transnational corporations.

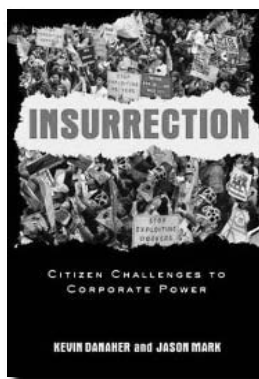
The authors want to revive something called the “United Nations Center on Transnational Corporations” (or UNCTC). The center is barely remembered today,

but during its brief life from 1977 to 1992 it was a kind of think tank within the UN organization. The UNCTC studied transnational corporations and worked to create what the authors call a “sweeping — thorough voluntary — code of conduct for [those] corporations.” The authors call for the creation of a new UNCTC to “help draft, oversee the ratification of, and implement [an] international treaty on corporate accountability.”

*Insurrection* claims that the United States ordered the UN to close the UNCTC in 1992 out of fear that its efforts would hurt American businesses. That is one version of events. Those close to the actual talks over the center advance a more nuanced explanation. The effort to create a code never escaped the nettlesome snag of what Alan Keyes, then U.S. ambassador to the UN, described in congressional testimony in 1987 as “fundamental philosophical/ideological differences” between the Western bloc and the Eastern bloc regarding transnational firms.

According to Keyes, the United States’ position revolved around the following key points:

- “Market forces rather than government intervention should determine international capital flows.”
- Investors who risk their capital



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