THE CLASSICAL LIBERAL CONSTITUTION: AN ORIGINALIST ASSESSMENT

Michael B. Rappaport*

It is my great pleasure to talk about Richard Epstein's new book. Back when I was in law school at Yale, the faculty didn't include any classical liberals. But happily the Federalist Society would, once a semester, have Richard out to give a talk. I felt that I learned more from that single talk than from anything else I was being taught during the semester. Gary Lawson, who was there, can vouch for this. And to this day, when it comes to policy issues, I agree with Richard over 90 percent of the time.

The Classical Liberal Constitution is an impressive book. It covers a great deal of ground, integrating classical liberal theory with both the original Constitution and the Constitution's development over time. It exhibits a significant degree of learning with highly original and persuasive arguments.

But while I agree with Richard 90 percent of the time on policy issues, I cannot say the same as to the Constitution's original mean-

* Hugh & Hazel Darling Foundation Professor of Law, University of San Diego.

800
ing. Today, I want to examine Richard's methodology in an effort to explore whether his book can be considered an originalist work.

In my view, Richard's book places more emphasis on his version of classical liberalism than on the Constitution's original meaning. Thus, I must conclude that the Classical Liberal Constitution, despite its other many virtues, cannot be considered an originalist book.

I. Epstein's Position

Let me start by examining Richard's interpretive approach. To summarize Richard's view, he believes that one should follow the text, but that the text will only take an interpreter so far. According to Richard, the text will not answer various questions - most importantly, it does not tell us about the police power and the need to place limits on rights.

How then does Richard find the answers to these questions? Richard believes that one must interpret the Constitution by reading the text through the lens of classical liberalism. The idea here is that classical liberalism was the dominant view at the time and it "animated the drafting of the original text."¹ Thus, issues not clearly addressed by the text or history should be given a classical liberal meaning.

Finally, Richard's implementation of classical liberalism requires a significant degree of what I would call policy analysis. Much of the book is not text or history, but policy arguments - claims about how a position will provide net social benefits or promote freedom.

II. IS EPSTEIN’S POSITION ORIGINALIST?

The question, then, is whether Richard’s approach can be squared with originalism – in particular, whether these implicit limitations on the text, such as the police power, are consistent with an originalist approach. The answer will depend on how we understand these implicit limitations.

A. DEPARTING FROM THE TEXT

One way is to see these limitations as contrary to the text— as departures from it. If we understood Richard as advocating departures from the text, then some originalists, such as those who follow Justice Scalia, would quickly say that Richard is not an originalist, because he is adding and subtracting from the text.2

But there are other types of originalism than Justice Scalia’s. One might argue that such departures are justified by the traditional interpretive rules. Under a version of originalism known as original methods originalism—which John McGinnis and I have developed—one discerns the original meaning of a provision by interpreting it in accordance with the interpretive rules that would have been deemed applicable to the Constitution at the time of its enactment.3 At one point, Richard comes close to articulating this view, saying that the Constitution was “drafted against the background” of the interpretive approach he follows, “which was familiar to the Founders from their study of both Roman and common law.”4

---

4 EPSTEIN, supra note 1, at 53.
There have been significant arguments about the content of these interpretive rules. Under one version of these rules, one could depart from the text to find the intent of the law's author based on values at the time. And thus Richard might justify departures from the text based on this view.

But there are problems with this move. First, there is controversy about what the rules were and one would need to establish that this version was actually the most popular view, which Richard does not even attempt to do. I, for one, am skeptical that this version was the leading view. Second, one could depart only when there was a strong case for doing so based on values at the time. In my view, Richard applies the police power and other limitations more than this strict requirement would allow. In fact, I doubt that Richard believes he has to satisfy this strict standard before departing from the text.

B. ENFORCING, NOT DEPARTING

A second way of understanding Richard's approach is to argue that these limitations are not really departures from the text. Instead, one might maintain that concepts such as the police power are actually built into the text. Thus, when one applies these concepts, one is not departing from the text, but enforcing it.

Consider the freedom of the press. There is a strong but controversial argument that freedom of the press had a particular meaning in 1791—that it meant something like no prior restraints, truth as a defense, and jury determination of the facts. If that is what freedom of the press meant—or was at least one of the meanings—

\[5\] See 1 William Blackstone, Commentaries *61; McGinnis & Rappaport, Original Methods Originalism, supra note 3, at 788-791.

then applying those limits would not be departing from the text, but enforcing it.

This way of understanding Richard’s interpretive moves—as enforcing a thicker view of the text—has some real advantages for him. Since it does not depart from the text, one need not have particularly strong evidence to find these limitations. Moreover, it is pretty orthodox originalism.

But it also has drawbacks for Richard. In order to invoke it, the limitations must actually exist in the concept or doctrine prior to the Constitution’s enactment. While this might work for some constitutional clauses, I do not think it will work for much of what Richard does, especially as to the original Constitution and the Bill of Rights, because Richard fails to show that the police power was a developed concept that was part of the law in the late 18th century.

C. ENFORCING CLASSICAL LIBERALISM

So let me move on to a third way of understanding Richard’s interpretive approach. Under this approach, one interprets the concepts in the Constitution to have the classical liberal meaning where other evidence does not strongly suggest some other result. This approach would be like the second one in that it would not depart from the text but enforce it; however, instead of viewing the text as containing preexisting doctrine, one would view it as containing classical liberal principles.

As an aside, let me say that to account for what Richard does in the book, one would also need to understand the classical liberal provisions as requiring interpreters to engage in policy analysis. For example, to determine what the freedom of speech means in particular circumstances, Richard often analyzes the competing interests at stake in accordance with a kind of cost benefit analysis. But this neo-Dworkian move might be questioned if one concluded that the classical liberal principles were not intended to be explicated based on a judge’s independent analysis of policy.
Getting back to the main point, the question is whether this classical liberal approach can be considered a genuine form of originalism. Unfortunately, I do not think it can be, because it relies too much on political theory and too little on the ordinary materials for construing the original meaning. An orthodox originalist would look first at the meaning of the words—both the ordinary meaning and the legal meanings as articulated in legal discussions.

An orthodox originalist would also look at the law at the time, which can be relevant in a number of ways. Sometimes the law informs the meaning of constitutional rights or powers, because the Constitution can be seen as referring to existing rights. For example, a common argument is that "The Freedom of the Press" made reference to an existing right of the people. At other times, the law is a reflection of the values or beliefs of the people.

An originalist will consider political theory, but this is normally one of the lesser considerations—unless the provision can be seen as a direct reference to the political theory. After all, if a political theory is really shared by the people, then why is it not reflected in either the meanings of terms or the law? The main exception to considering the existing laws is when the constitutional provision is a reform measure, like the 14th Amendment, rather than a preserving existing rights measure, like the Bill of Rights. But even then the constitutional term will normally be part of a prior discussion that can be used for guidance, such as was true of privileges or immunities and equal protection.\(^7\)

Thus, Richard’s approach here is a kind of originalism, but one that gives too much weight to classical liberal political theory. I am not aware of any interpretive rules at the time that would allow

this. And I do not believe that this can be justified as a method for determining what the values or views of the people were at the time

D. WHICH CLASSICAL LIBERALISM?

Whenever of these three interpretive approaches Richard employs, his key move is to infer principles based on classical liberalism. But this inference is also problematic. The main problem is that there was not one political theory at the time of the Constitution. There was the agrarian republicanism of Thomas Jefferson, the puritan republicanism of John Adams, and the neo Anglo republicanism of Alexander Hamilton. James Madison was probably the closest to Richard's classical liberal theory, but he was just a single person and even his views differed from Richard's. And there were other views as well.8

Richard seeks to defend classical liberalism as the background rule by claiming that the differences among the Framers were much smaller than between classical liberals and progressives. While this argument works against progressives – certainly the Framers were not progressives – it does not tell us which of the different views held by different Framers was the correct one.

III. THE TAKINGS CLAUSE

Let me wrap up my talk by briefly discussing how Richard's methodology leads him to depart from the original meaning as to the Takings Clause. Richard reads the Clause to restrict regulatory takings. While this is one possible interpretation of the text, standard originalist methods lead one to resolve the ambiguity against his view, including the more likely meaning of the language, the meaning of the precursors of the Clause, the laws at the time, the

8 FORREST MCDONALD, NOVUS ORDO SECLORUM 57-96 (1985).
absence of concerns expressed about land use regulation, and the absence of a developed concept of the police power.⁹

Against these various considerations, Richard argues that there is no good reason to forbid appropriations of property but to allow regulations that significantly restrict property values. But that is not true. One might believe that an appropriation is in general a more serious intrusion, that not all regulations should require compensation, and that it is difficult to know where to draw the line between permissible and impermissible regulations. Therefore, it might make sense to leave the matter to the legislature. In my view, then, Richard’s view of the Takings Clause is a strong example of how the classical liberal interpretive canon leads him away from the original meaning.

In the end, despite its power and elegance, the Classical Liberal Constitution does not really provide an originalist view of the Constitution. Of course, that the book does not represent genuine originalism does not mean that it lacks value. It is a beautiful book and certainly should be considered among the best works on constitutional law. It is simply not originalism.

---