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Classical Legal Tradition

Richard A. Epstein

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In this brief paper I want to address the influence that the classical legal tradition has had upon the development of public law in general, and modern American constitutional law in particular. In so doing, I shall concern myself with this question as it relates to the protection of private property and economic liberties. In some sense it might seem improbable to chart a course from the early Roman and classical writers to the present day. But I do think that the journey can be made, and that it discloses some interesting, if unanticipated insights, along the way.

Very often there are demands for a revival of the classical legal tradition in modern public law. I am skeptical of these demands because I think that they call for the revival of a classical tradition that has never been. In order to show why this is the case, it is necessary to examine both the strengths and weaknesses of the classical law tradition. The central conclusion that emerges from that examination is that the classical law theorists themselves stopped short exactly where the very important questions of political theory—limited government and entrenched individual rights—begin. In making these arguments I shall direct my attention, not primarily to my own normative views on the subject,[1] but to the way in which classical thinkers themselves regarded their own work.

Speaking globally there are two ways to look at the classical law. One is to read the great modern thinkers about classical law, of whom Friedrich Hayek would surely count as one.[2] The other way is to read the original great classical texts themselves in order to learn how the early writers understood the operation of their own system. Here I propose to avoid the first course, with its immediate appeal to grand political theory, and to adhere more closely to the second, that is, to the more mundane views that the classical writers had about their own tradition.

My greatest familiarity is with the Roman law, and so I will concentrate most heavily upon it. With the Romans, and with many

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1 On which see, e.g., R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

2 *See, e.g.*, F. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

early common and continental lawyers, there seems to be a near boundless confidence in the power to organize the legal doctrines that govern social life. It might be that the origins of these legal rules were customary, so that no one could quite figure out where they came from. But the classical writers possessed an indomitable belief in their ability to domesticate and systematize these rough customary impulses. When one reads, for example, the standard Roman text—and here the only complete text we really have is Gauis's Institutes—one is struck at the outset with its firm and self-confident architectural structure.

Classification is the key technique for the Roman lawyer. He will divide the world into the law of persons, the law of things, the law of property, the law of obligations, and so forth. Then each of these categories will in turn be divided further, so that the law of obligations becomes the law of delict (or tort) and contract, while the law of contract becomes the law of consensual, real, stipulatory, and literal contracts. The consensual contracts are then broken down into sale, hire, partnership, and mandate. Then, for each contract, the roles of all parties are analyzed among themselves and to the rest of the world.

As a rough generalization, the classical lawyer armed with this methodology will find some appropriate pigeonhole for each and every routine transaction. At first appearance, the system is static, complete, exhaustive, and elegant. It does not project the image of ceaseless evolution and customary change, but rather that of a kind of timeless, Cartesian stability. It stands outside the forces of history and circumstance. Nor is this achievement idle, for many of the Roman classifications (such as those which relate to the law of bailments[3]) do endure down in to modern times in the English, and I dare say continental, systems of law. Some of the high opinions that the Romans had about their own legal system and legal abilities were indeed true.

In part the success of the Roman system rested upon the Romans' concern about its dominant structures. To their credit, Roman lawyers were always looking for the core, and not the penumbra. They spent little time worrying about the classification of marginal cases, so long as they were confident in the basic soundness of their categories. Nonetheless, it is not as though they reasoned to these categories from some more general political or legal theory. Rather they took those categories as indisputable and axiomatic, for they had an unquestioned belief in the power and justice of vested rights. Their great strength was their ability to reason

[3] See, for the English incorporation, Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704).

from accepted premises and established categories in order to show how complex transactions could be navigated through the system that they created. Their ability to deduce in a formal way particular conclusions from accepted principles is really quite inspiring and a model which modern lawyers could do well to emulate.

On closer look, however, just how good is this architectural structure and its doctrinal sophistication? The question is troublesome indeed if it turns out to be impossible to justify the base on which the structure must rest. There is a second side to the Roman classical vision, which is not so optimistic, unified, comprehensive, serene, or secure as the initial impression may suggest.

First, there are embarrassments within the Roman system of classification, and often times these are hinted at by the Romans themselves. For example, when they divide the law of property into matters human and divine, they come face to face with the critical question of how to classify city gates and city walls—the standard form of a public good. They refuse to put them clearly into either category, and yet they were forced to develop a series of rules which governs their possession, use, and disposition (of this last, there in practice could be none). The rules were sensible, for social survival was at stake. But the doctrinal foundations were very shaky. The reference to things held as a "corporate body" ("per universitatem") were as uninformative and weak in the original Latin as in its problematic English translation.[4]

The second sign of weakness in the Roman system is revealed by the use of the word *quasi*, especially as it appears in the Roman law of obligations. In modern times, we instinctively recoil when we hear reference made to matters of institutions that are quasi-administrative or quasi-judicial. Yet we tolerate the use of these terms because we are somewhat unhappy about the rigid division between legislative, executive, and judicial power as set out in the first three articles of our Constitution. The *quasi* gives us a little room to maneuver, but at the cost of some needed intellectual precision.

The Romans are no better when it comes to the use of *quasi*, be it with tort or contract. Nonetheless, what alternative is there when you are committed to a basic division between contract and tort, and then have to find a home for the law of restitution, a body of law which simply does not disappear because its foundations are unclear? Any obligation to pay for benefits conferred upon you by another does not rest on contract, because there is no promise; and it does not rest on tort, because there is no infliction of harm upon a stranger by the use of force.

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4 *See, e.g.*, G. INST. 2.8-2.11.

Yet this category of obligations, while fluid, is hardly empty. Quite the contrary, quasi-contract covers a wide range of actions done by mistake or through necessity. It can arise whenever someone receives goods by mistake that were meant for another; or whenever one person pays by necessity the public authorities, taxes owed by another; or where one person by mistake makes improvements upon the land of another. Instead of trying to work out the systematic theory of where the obligation of restitution begins and ends, the Romans made marginal adjustments to their accepted categories of contract and tort. But they paid a price. They dissolved their neat classificatory system, and they never did explain why the theory of restitution was needed, what it did, or how it could be justified or extended. Instead, as one pushes harder on the lines, the Roman law tends to converge with the more incremental, less systematic methods of our own common law. As we shall see, this weakness in the theory of restitution has important public law implications.

These classification difficulties are perhaps symptomatic of the greater weaknesses of the Roman methodology. The Romans skirted the problem of finding ways to justify the first principles in which they so strongly believed. Typically when the Roman wants to admit that he has been caught on fundamentals, he does not yell "ouch." Instead he introduces the word "natura" or "ratio naturalis," or natural reason, into the discourse. If the Romans want to defend the rule of first possession, how do they do it? Well it is obviously the "natural" mode of occupation or acquisition.[5] If they want to speak about the obligation of a parent to a child or a master to a slave, again the reference is to an obligatio naturalis, natural obligation.[6] If they want to justify self-defense, it is because ratio naturalis comes to the rescue.[7] It turns out that in place after place within the Roman law, the soft underbelly lies in its resort to appeals to natural rights, without any systematic account as to how these rights might be justified or developed. They are just given.

The weakness of their understanding about their own system had a profound influence on how far they were prepared to push their general conceptions. When the Roman lawyers applied their rules, they usually addressed small number situations similar to those which common law judges typically faced. The typical hard problem might involve a contest between the original owner of property and the good faith purchaser who acquired that property from a thief. They made no effort to deal with complex large num-

5 *See, e.g.*, G. INST. 2.66.
6 W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 55, 552 (P. Stein 3d ed. 1963).
7 DIG. 9.2.4.

bered situations, such as taxation or comprehensive social regulation. To the extent that Romans achieved clarity it was because they were able by judicious selection to identify a narrow tractable subject matter for analysis. It is no accident that their analysis of bailments is probably as serviceable today as it was in Roman times, for that is not the kind of issue in which one expects enormous transformations upon the rise of the welfare state. The law of bailments is not targeted for revision by any conscientious social planner.

The key question for public and constitutional law is this: were the Romans willing to make trumps out of their private law rules? In thinking about their private law system, especially the law of property, did they view it as a break upon the power of government, or just as a set of default provisions that continued to apply until the emperor or legislature decided to do something more drastic? The Romans clearly took the cautious and restrained view. Private law was not a barrier against state action. To see the point, look at a passage which talks about the status of "dominium," that is the most powerful form of Roman ownership, by W.W. Buckland—no critical legal studies exponent he—but the leading exponent of Roman law in the English tradition in the years between, say, 1890 and his death in 1946:

> We have now to consider what is meant by *dominium*, . . . Moderns describe ownership as *ius utendi fruendi abutendi*. But whether the right concerned is *dominium* or one of the inferior modes it is practically never so unrestricted as this. All civilizations lay down restrictions on what a man may do with his own. An owner might not cruelly treat his slaves. The law might forbid him to build above a certain height, or within a certain distance of his boundary. He might not, for purpose of profit, pull down his house. Thus the principle is subject to such restrictions as the State may impose. And the owner can restrict his right by conferring rights on others, e.g. a right of way, without ceasing to be owner.[8]

I think that some of you who have looked at either the early police power cases[9] or various California land use restrictions[10] would see something familiar here. In particular, any statement that the principle "is subject to such restrictions as the state may impose" means that the classical lawyers regarded their legal constructs as nothing more than default rules in a world dominated by legislation. It is hardly a principle that speaks to the need to pre-

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8 W. BUCKLAND, *supra* note 6, at 187.

9 Block v. Hirsh, 256 U.S. 135 (1921) (rent control); Welch v. Swasey, 214 U.S. 91 (1909) (height restrictions sustained); Mugler v. Kansas, 123 U.S. 623 (1887) (prohibition on manufacture and sale of liquor).

10 *See, e.g.*, Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980).

serve private property against the depredations of the state. In essence the early brand of constitutionalism implicit in this world view is captured by the maxim, *Quod principi placuit legis vigorem habet*—that which is pleasing onto the prince hath the force of law. The private law could be wiped out by the imperial edict or any form of legislation.

This view was not held uniquely by the Romans. John Locke in his second treatise on government offers a powerful defense of property, and of legislative supremacy, but he does not so much as consider the institution of judicial review. In his *Treatise of Human Nature*, David Hume takes a similar view. He develops at great length the rules of justice that have stood mankind in good stead over the ages. These rules number three.[11] There is first the rule of first possession; there is second a rule which allows the transfer of property by voluntary exchange; and there is third the rule which requires individuals to keep their promises. There is no theory of restitution in Hume, and no part of his message explains what set of social institutions could be developed to insure that these rules of conduct will be respected by all citizens, or by the state. His failure to address that question stems from the same problem that bedeviled the Romans. He did not see any tight connection between the rules of property and right conduct, on the one hand, and the principles of public law that govern the formation and operation of the state on the other. More specifically, because he, like the Romans, did not adequately understand the law of restitution, Hume could not see how any system of forced exchanges, including those resting upon a "just compensation" principle, could be used to account for the state and to limit its powers. His was the basic weakness of all social contract theory: too great a reliance upon the private ideal of voluntary contracts coupled with an insufficient understanding of forced exchanges.

The transformation to modern constitutionalism could not be more stark. Our view of the subject is that certain rights are trumps over legislative will. It is no longer possible to say, blandly, that all forms of taxation and regulation, or modifications in systems of liability rules, are subject to the legislative decision.[12] In fact the common law conception of private property is captured in the constitutional command of the fifth amendment that says that "private property shall not be taken for public use, without just compensation." On its face this provision appears to ask the courts to

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11 D. HUME, A TREATISE OF HUMAN NATURE, bk. III, pt. II, §§ III-V (L.A. Selby-Bigge ed. 1888).

12 *See, e.g.*, Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOODE HALL L.J. 433 (1982).

discharge exactly the same task the classical lawyers were unwilling to undertake, by using a set of principles—those of restitution—which they were least able to develop. The constitutional text asks judges to determine which portion of the system of private property survives at a constitutional level. Yet it is on this very question that the classical lawyers were willing to say nothing at all.

It is not surprising therefore that many of our greatest lawyers could be steeped in the classical tradition of private law and still take a very narrow view of the scope of protection that the constitution gives to common law rights of property and contract. That surely was the position of Justice Holmes, a master of the common and Roman law tradition, who yet emerged in his dissent in *Lochner v. New York*[13] as the leading constitutional skeptic on matters of private property and freedom of contact.

There is, I think, a surprising, negative linkage between classical private law and modern constitutional law. The classical lawyer dealt with small numbered situations and default rules. He was most comfortable in imposing obligations where the defendant had acted, whether by making a promise or committing a tort. Restitution, which involved forced exchanges not based upon personal wrongdoing or promises, was at the margins of his system.

Constitutional and public law come into play where classical law was weakest. It deals with entrenched individual rights, not default provisions. It requires a sophisticated treatment of large numbered situations, such as those involved with taxes and regulation. Finally, it requires that special attention be devoted to the most difficult extensions of the law of restitution, for once private property can be taken upon payment of just compensation, then there is a complex network of forced exchanges on whose validity the courts must pass.

In the end therefore I think that the radical separation of constitutional and private law championed, or at least accepted, by the classical lawyers cannot be maintained. Still a good deal of work must be done before the connections between the two bodies of law can be forged. Thus it is necessary to rebuild the system of natural law from the ground up on far firmer foundations. It is also necessary to make explicit the very linkages between public and private law that the classical lawyers did not understand, or could not explicate. These tasks are daunting because there is enormous skepticism about any natural law reasoning, and there is a great willingness to accept public intervention in all areas of economic life. Although I cannot attempt the demonstration here, I think that the new accounts of property and contract, at bottom, will have to

13 198 U.S. 45, 74 (1905).

be functional and utilitarian. They will have to explain why violence is a social evil and competition is a social good.[14] They will have to consider the role of bargaining breakdown and high transaction costs. I believe that this work can be done, but it will require far more sophistication, and a much more powerful arsenal of tools than have been bequeathed to us by the classical private lawyers. But once that task of reconstruction is done, it should become clear that the classical lawyers built better than they knew.

14 For a short account, see Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 154 (1987).