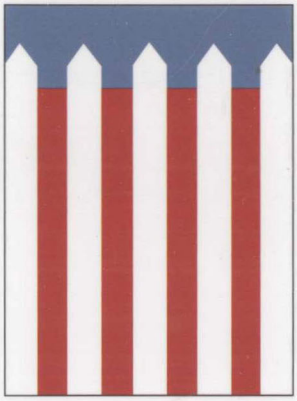
RICHARD A. EPSTEIN

Design for Liberty



PRIVATE PROPERTY,
PUBLIC ADMINISTRATION,
AND THE RULE OF LAW

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Richard A. Epstein

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Design for Liberty

To the third generation—

Bella and Noah Pianko

In hopes for a better world

Preface

My initial inspiration for writing this book came at a meeting of the John and Jean De Nault Task Force on Property Rights, Freedom, and Prosperity at the Hoover Institution. On multiple occasions thereafter, I presented portions of this book to my Task Force colleagues, from whom I always received intense but constructive criticism. The book's intellectual mission precisely maps the concerns that have animated my work for most of the forty-three years that I have spent in academic work. The matters covered in this book include a set of problems whose importance seems to have grown over time. In working through the details, I would like to thank the indefatigable Lynn Chu for pointing out in a thousand small ways how I might make this manuscript more accessible. I should also like to thank Samantha Bateman, Stanford Law School, class of 2010; Melissa Berger and Jeana Bisnar, New York University Law School, class of 2010; and Isaac Gruber and Sharon Yecies,

University of Chicago Law School, class of 2011, for their patience and precision in reading, correcting, and commenting on the many drafts of this short book. I have presented different parts of this work in many speeches over the years, including at the University of Chicago Law School, at the University of Michigan, and in the Czech Republic and Slovakia. Evidently, the appeal of this issue is well-nigh universal. My thesis is that the current worldwide malaise is reflected in each of the three constituent elements of the title. The protections of private property have eroded. The massive expansion of the public sector has in turn placed heavy demands on public administration, which can be met only by wide-scale disregard of the rule of law. Major changes are needed to reverse the downward trend in civil institutions in the United States and elsewhere. This book contains my diagnosis of the ills, and recipes for the cure.

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Introduction

From Small to Large Government

Without question, the most profound domestic change in the United States from the beginning of the twentieth century through the present time has been the vast expansion of government under the influence of the progressive worldview that received its highest expression in President Franklin D. Roosevelt's New Deal. Progressive thought was no small perturbation from the views of government that had previously defined the American legal tradition. Indeed, the progressive movement defined itself in opposition to once-dominant classical liberal theories of government that stressed the dominance of private property, individual liberty, and limited government.

The first burst of progressive energy took place during the presidency of Woodrow Wilson, between 1913 and the entry of the United States into World War I in April 1917. Wilson's 1885 book *Congressional Government*[1] was perhaps the most important academic precursor of the

progressive political movement. In 1914, nearly thirty years later, Professor Wilson, by then President Wilson, was responsible for creating the Federal Trade Commission, which was meant to add federal heft to individual consumer protection.[2] That same year, Congress passed the Clayton Antitrust Act,[3] which strengthened enforcement of the 1890 Sherman Antitrust Act against businesses, while pointedly exempting both labor unions and agriculture from the antitrust laws.[4] All these statutes increased the number of civil and criminal sanctions that could be brought against ordinary people and firms, for an ever-broader range of offenses.

After the major dislocations of the First World War, there was a temporary abatement of progressive initiatives during the 1920s. However, the 1929 stock market crash quickly ushered in a second wave of reforms that began in the Hoover administration and carried on unabated through Franklin Roosevelt's New Deal, until they were once again cut short by the Second World War. Before then, the notable Hoover landmarks of the early 1930s included the passage of the Smoot-Hawley Tariff,[5] which introduced a worldwide round of protectionist measures; the Davis-Bacon Act of 1931,[6] designed to prevent Southern black laborers from upsetting white union domination in the North; the massive tax increases of the Revenue Act of 1932,[7] meant to close worrisome government deficits; and the Norris-LaGuardia Act of 1932, which limited the power of employers to obtain injunctions in federal court against union activities in labor disputes.[8]

These measures presaged the great structural reforms of Roosevelt's New Deal, including the National Labor Relations Act,[9] which introduced a system of collective bargaining throughout all American industries; the Agricultural Adjustment Acts,[10] which were intended to keep crops priced at cartel levels; the Securities and Exchange Act,[11] intended to rid capital markets of fraud and deception; the Fair Labor Standards Act,[12] which regulated minimum wages and overtime pay, and of course the Social Security system, which sought to introduce a measure of income security for older Americans.[13] Without exception, all of these

statutes increased government control over the economy, particularly by strengthening labor and agriculture cartels until they became a fixed feature of the American economy.

The third wave of regulation started under Lyndon Johnson in the 1960s, and continued unabated through the Nixon years in the early 1970s. This round of legislation featured an increased level of transfer payments, both explicit and implicit, from rich to poor through such legislation as the Economic Opportunity Act of 1964.[14] It also included the Civil Rights Act of 1964,[15] and the Medicare[16] and Medicaid[17] statutes of 1965. On other fronts, this third wave of progressive legislation covered environmental protection,[18] endangered species,[19] employee pensions,[20] and workplace safety.[21]

The fourth wave of regulation has thus far lasted through the first two years of the Obama administration, most notably in the Patient Protection and Affordable Care Act ("ObamaCare"), passed in 2010,[22] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").[23] However, the Republican gains in the midterm elections of November 2010 have put a temporary halt to all major initiatives.

For all their substantive differences, each of these legislative initiatives depends heavily on the conscious use of delegated administrative power at both the federal level and the state level. Without exception, these new administrative innovations were designed to displace older legal practices that depended heavily on ordinary civil litigation to vindicate private rights of property and contract. As such, they quickly raised the question of whether or not they were consistent with the rule of law as it applied to the administrative state. No one denied that these rules were laced with all sorts of procedural protections that might apply to individual cases. But with or without protections, these rules conferred on delegated authorities the power to make substantive decisions of far greater scope than had ever been attempted before, and they did so on a massive scale. Not surprisingly, the scope of these new interventions brought forth substantial judicial and intellectual opposition from

those who asked how any set of stable property rights could be worth the paper they were printed on if they could be refashioned at any time through some combination of majority will and administrative power. How, too, could any set of individual rights be protected by administrative procedures that operated on a high-volume basis, in disregard of the distinctive position of each individual claimant?

That attack brought forth an equally strong defense by those who followed in the path of Woodrow Wilson, in the belief that administrative actors' high levels of disinterested professional expertise could discipline the passions of a popular majority while simultaneously ridding the American system of the archaic and flawed systems of property and contract that the new economic order, in large measure, displaced. The judicial decisions of the late New Deal, for example, had a near-celebratory air as they demolished one ancient relic after another by the major government initiatives in agricultural and labor markets, Social Security, and securities regulation. When the dust settled, by the onset of World War II, defenders of the older order were dismissed as intellectual troglodytes who were duly exiled to the legal periphery. The situation scarcely changed in the long run, even though the aftermath brought forth some slight retrenchment from New Deal initiatives, most noticeably in the truncation of labor's rights by the Taft-Hartley Act,[24] and more generally by the efforts through the passage of the Administrative Procedure Act of 1946[25] to rein in the discretion of the New Deal agencies.

This short-term reaction did not undo the many reforms of the New Deal. It only placed modest impediments to its operation. The wisdom of these changes is still in doubt, for many self-styled progressives today remain unrepentant insofar as they believe that only a misplaced atavism can justify any lingering affections for the bygone legal order. Indeed, today's more vocal progressive movement increasingly refers back to New Deal prescriptions on government spending as the secret for getting this nation moving again. President Obama has constantly used his favorable view of the New Deal initiatives to justify his

efforts to expand the reach of government in such areas as health care, labor law, and environmental protection.[26] The effort here has been to double-down on the original wager that higher levels of government intervention could move an economy out of its past lethargy.

It has not worked. By the end of 2010, the party was over, a victim of its own excesses. Each new layer of regulation has come on top of those that preceded it. Wholly without regard to their particulars, the law of diminishing returns has exerted its powerful hold. The first wave of progressive reform did not topple the economic system, which still left private entrepreneurs free to innovate, and each new wave of regulation has fallen prey to the law of diminishing returns. Newer schemes in each cycle have come at higher costs but promised only reduced benefits. In the final analysis, the level of economic growth has necessarily declined, and by the end of 2010 we had an economy whose many safety nets could not insulate ordinary Americans from a sustained decline in median household incomes and GDP per capita, both of which fell during 2009 and 2010.[27] Month after month, unemployment rates continue stubbornly to hold at just under 10 percent.[28] Although intended to create new jobs in the public sector, a long succession of misguided stimulus programs probably destroyed more jobs than they created in the private sector, through a combination of new taxes and heavy regulation. The recent passage of the health care bill on a bitterly partisan vote has not brought that issue to a close. Rather, the realization that the legislation will usher in an orgy of administrative regulations and criminal sanctions, on topics that go to the heart of how businesses supply and individuals receive health care coverage, has only heightened the unpopularity of the legislation. Business today remains on an investment strike in the face of mounting uncertainties in both capital and labor markets.

In the context of this continued grim news, the intellectual synthesis that seemed so solid at the height of the New Deal is no longer impregnable. At this point, it becomes appropriate to renew the challenges to progressive ideals raised by critics of central planning, such as those

posed by Friedrich Hayek in his book *The Road to Serfdom* (1944),[29] and by Milton Friedman in *Capitalism and Freedom* (1962).[30] Both men, and others like them, saw lurking dangers to both political liberty and economic efficiency in the now-dominant social arrangements. It is therefore time for a fresh look not at the particular institutions of our time, but at the intellectual framework that is used to justify our institutional arrangements.

This short book offers one effort to resurrect the twin pillars of an earlier structure. On the substantive side, it urges a return to the classical liberal views on property and contract. On the procedural side, it cautions that the expansion of the administrative state, with its civil and criminal sanctions, is deeply in conflict with traditional values of the rule of law. Over the years in which I've elaborated this agenda, my own views have evolved in ways that turn out to be more sympathetic to government administration than I had once supposed. No amount of devotion to a system of legal rules can eliminate the need for sound discretion in the management of both private and public affairs. Rules may set the framework in which private and public actors make decisions, but when these rules are in place, some degree of discretion must be exercised by those persons in charge of running offices and making the many management decisions that are inherent in taking those executive positions. It is an idle pipe dream to think that even the most ardent devotion to the rule of law can allow government agents and government agencies to dispense with discretion in the day-to-day operation of their business. It is in recognition of that fact that I expanded the title of this book (originally *Private Property and the Rule of Law*) to speak to the vital relationship of public administration to both private property and the rule of law. Over and over again, it has become clear that any system of governance requires government officials to make life-and-death decisions on such questions as who should be charged in a criminal proceeding and who should be hired to perform some critical government job. As a matter of basic management theory, no superior can oversee more than a tiny fraction of the decisions of his or her direct re-

ports, and it is futile to engage in a course of prolonged micromanagement to up that ratio.

The trick is to develop management practices that allow for the needed discretion to be invested in the right individuals, subject to the right level of supervision and control. Therefore, the key point in dealing with the rule of law is to make sure that the tasks that are given to government are both limited and well-defined, and to let the people who are in charge have the degree of flexibility needed to carry out their task. If there is one feature of public administration of law that I attack in this book, it is the peculiar reversal that takes place when courts are willing to "defer" to administrative agencies in the interpretation of the legal language found in statutes and regulations, but feel compelled to flyspeck any government administration decision on where to put a road or to open a school, under the conceit that any decision that does not consider all the right factors, and that ignores all the irrelevant ones, is, in virtue of this fact alone, arbitrary and capricious. No system of extensive judicial oversight of management decisions can displace the need for the sorts of internal checks that good management organizations develop on their own.

In the end, my plea is to marry a set of strong property rights with a system of sound public administration, and much of this book is intended to explain how to satisfy these two imperatives directly. In dealing with these issues, moreover, we must recognize that it is analytically impossible to say that only private-property regimes of classical liberal vintage are logically compatible with the rule of law: all the virtues of neutrality, generality, clarity, consistency, and prospectivity could, in principle, apply to the commands of a well-lubricated administrative state. But, in practice, the thesis of this volume is that this supposed happy equilibrium cannot long sustain itself. Quite simply, the levels of discretion that modern legislation confers on the organs of the administrative state make it impossible to comply with those neutral virtues captured in the rule of law. The point here is not meant as a categorical rejection of all government action, let alone all legislative action; rather,

it advocates a sharp recalibration and retrenchment in government's function. The government that can stop the use of dangerous equipment on private construction sites or issue drivers' licenses for the operation of motor vehicles on public roads need not be given the power to plan comprehensively what buildings should be built where and for what purposes people shall take the highways. What it does say is that the more ambitious the government objectives, the more likely it is that the program will result in failure.

To develop this thesis in full, I proceed as follows. Once these philosophical preliminaries are completed in Chapters 1 and 2, I turn to a discussion of the way in which the natural-law and utilitarian traditions approach the question of the rule of law. My point in this discussion is to explain why the insights of the natural-law tradition are essential for outlining the basic conceptions of law, but insufficient to that task. Chapter 3 therefore seeks to explore some of the strengths of that tradition, while Chapter 4 discusses its limitations in forging a comprehensive legal system that melds together both procedural and substantive virtues.

Once these preliminaries are completed, I offer in Chapter 5 a systematic account of the key features of private and common property, in an effort to show how these relatively simple rules work, and how they make it more possible for public institutions to adhere to rule-of-law values, chiefly by controlling the levels of political discretion. Chapter 6 carries this inquiry forward, with a more detailed examination of each of the three major sticks in the bundle of rights—possession, use, and disposition. Chapter 7 then examines how the constitutional limitations on the power of eminent domain dovetail with the understandings of private property under both the classical liberal and progressive conceptions. Chapter 8 extends that analysis to deal with the parallel question of freedom of contract under both systems. Chapter 9 then asks the question of how the various constitutional rules should apply in order to maximize the gain to all parties from those projects that do count as social improvements. Chapter 10 then completes the tour of the sub-