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SKEPTICISM AND FREEDOM: THE INTELLECTUAL FOUNDATIONS OF OUR CONSTITUTIONAL ORDER

Richard A. Epstein*

INTRODUCTION: OUR CONSTITUTIONAL CHALLENGE

It is my great pleasure to have been invited by the Templeton Foundation to give this lecture dedicated to the articulation of the sound principles of constitutional law. Understanding the role of constitutional theory has become one of the most contentious problems of our times, as partisans on both sides of the political aisle seek to gain the rhetorical advantage in short-term political disputes by hurling epithets—which often relate to the question of judicial restraint—against the judicial nominees and judicial philosophy of the other side. I have no personal or political stake in the outcome of these disputes. But I do think that the level of confusion that they have engendered makes this an opportune occasion to step back from the hustle and bustle of short-term conflict to take the longer view of constitutional governance. Once we do that, it should become clear that the charges of judicial activism that are bandied about with such frequency are often without firm philosophical

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1 This piece represents a written and updated version of the annual John M. Templeton, Jr., Lecture on Economic Liberties and the Constitution presented at the National Constitution Center, Philadelphia, Pennsylvania, on March 30, 2004. The Templeton Lecture showcases the best constitutional minds in the nation as they discuss economic liberties in a forum open to the public. The lecture program explores economic liberties—including, but not limited to the protection of private and intellectual property, and a rule of law encouraging individual initiative, investment, and enterprise—provided for and protected in the Constitution of the United States and by the American legal system, and how these liberties foster economic success, nurture free enterprise, and enable citizens to become—and to see themselves as—fellow owners and co-creators of American prosperity.

The Journal of Constitutional Law is honored to publish this year's Templeton Lecture. We appreciate the assistance that the National Constitution Center has given, and of course would like to thank Professor Epstein for his cooperation and participation in the publication of his lecture.

* Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law, The University of Chicago, and the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution. Thanks to Stefanie Diaz of the Hoover Institution for her helpful comments on an earlier draft of this paper; Eric Murphy of the University of Chicago Law School, Class of 2005, for his research assistance.
justification. I hope, in the course of this brief lecture, to indicate how a sound approach to the problem of constitutional governance plays out, which I then will apply briefly to some of the contentious disputes on the current litigation scene. My goal is to offend people on all sides of the political spectrum.

The place to start is with the Constitution itself. The briefest inspection of that document will reveal that its success and durability did not arise by happenstance, but were largely attributable to the simple fact that the Constitution is not a random assemblage of directives and prohibitions, but a document that works together as an integrated whole. The ambitions of its Founders were not modest. In large measure their task was to transform their insights in human nature into a framework that would allow the United States to advance in good times and to weather the storm in bad times. That this nation has endured as long as it has is in no small measure due to their ability to draw these linkages. In this lecture, I shall comment on this connection between the psychological makeup of ordinary human beings and the political institutions that best serve their needs in an effort to give some tentative answer on the proper understanding of constitutional limitations, and thus of the role of judges in implementing their awesome and controversial powers of judicial review.

In line with this general problem, Part I deals with the intersection of human psychology and political theory, and argues that the appropriate response is a cautious form of skepticism that recognizes our ability to formulate general rules of human behavior but not to predict the intensity of preferences of individuals to various kinds of social goods. In Part II, I contrast exchange and coercion, noting that the former leads to positive sum games, and the latter to negative ones. But in order for this condition to hold, I argue further that competitive losses and personal offense cannot count as harms if the efficiency of voluntary transactions is to be preserved. Part III then explains how this generalized view of human interactions is permanent enough to serve as the foundation of a constitutional order that protects voluntary exchange in the absence of coercion and monopoly, which function as the proper heads of the "police power." This police power allows the government to limit specific guaranteed liberties in order to advance the "safety, health, morals, and general welfare" of the public at large. Part IV applies this framework to some of the more contentious issues of our time, dealing with economic liberties of the so-called Lochner era, moral questions that deal with various forms of intimate and sexual behaviors such as contraception, abortion, antisodomy laws and same-sex marriages, and the current disputes over affirmative action. Finally, Part V shows how the same framework helps understand the central role that freedom of speech has in the protection of democratic institutions, which can only be implemented by using the same framework that applies to economic
liberties, moral questions, and affirmative action. Today, there is too strong an authoritarian impulse in which people who are so sure that they are right on the merits of particular disputes do not think about the need to accept limitations on their power that a more skeptical turn of mind, less sure of political absolutes, would accept. It does not matter which causes are the darlings of the left or the right, but it is important to be aware that only through experimentation are we, separately and collectively, likely to make progress on dealing with the social problems of the day. Fashionable or not, I take a consistent libertarian line that is deeply suspicious of the power of the state to limit voluntary arrangements of ordinary individuals, but which is more tolerant of state power insofar as it seeks to manage the institutions that fall within its purview.

I. MOTIVATION AND COGNITION

The centerpiece of this analysis is, as the title of my book—Skepticism and Freedom: A Modern Case for Classical Liberalism—suggests, the difficult relationship between skepticism, which is an attitude that we bring to the study of human nature and human institutions, and freedom, which for all the battering it takes at the hands of some modern skeptics, remains the central objective of political organization and life. To understand this relationship, it is necessary to have a keen awareness of the different senses that we attach to the term skepticism, and to see which of its forms we should embrace and which we should reject. Here the initial problem concerns the proper public attitude toward two ingredients of human conduct: knowledge and motivation.

On the first question, it is important to steer the middle ground. One extreme that is necessary to avoid is the view that there are no regularities in human behavior that are worth worrying about. The presumption that individual actions are forever capricious and every attempt to reduce them to law-like propositions represents a form of intellectual hubris that can only lead us astray. Thus, this form of skeptic will, in general, take the position that it does not matter much what is done in the field of governance because the same bad (or good) results will win out no matter what happens at the political level. The world is so capricious, variegated, and complicated that any effort to reduce it to regularities counts as a dead loser. On the other side of the ledger, there are those who are so confident in their judgments about how individuals behave and what they desire that they think that they can plan comprehensively large social

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organizations. They think that by incentives and exhortation they can achieve some Utopian (or in some cases not-so-Utopian) objectives that bring about some form of heaven on earth. Do not let people decide for themselves, because those who are endowed with special wisdom can make better decisions for us all. It is important to draw some line by which we retain enough skepticism to beat back the central planner, whose own endeavors have usually fallen short, but not so much skepticism that we give up on the enterprise of figuring out the proper form of political organization in the first place.

The first job in this inquiry is to recognize the key sources of similarities and differences between ordinary individuals. Here it is critical to remember that human needs and intelligence are not solely driven by the cognitive capacities that separate us from lesser (I will use the term with a minimum of self-consciousness) animals, but also by the drives and necessity to which all living creatures are subject. On this point, the right attitude was struck by Hume when he saw the motivations for human behavior not solely as those driven by a narrow sense of self-interest whereby an individual puts himself, family, and friends (and maybe not even the family and friends) first and treats everyone else as though they did not matter. There are surely some individuals who do act in this fashion, acting with equal measures of aggression and indifference, and against them it may well be critical to amass powerful social forces. But on balance the perception of self-interest tempered by a “confined generosity” probably offers a more accurate account of how people act towards others. Empathy may be in short supply, but it is not wholly absent.

The dominance of self-interest in this account stems from the fact that every living being has to be able to wrest energy and other material resources from the environment to survive. People are machines that require calories for their operation, and the capacity for internal storage is sharply limited relative to the period of human life, so that it is necessary to replenish limited supplies on a frequent, if not daily, basis. Those individuals who are too generous in their behavior will always defer to others and in so doing fall by the wayside. The one characteristic for which evolution has to select is survival against the elements, which requires some uneasy mix of egotism and cooperation, where the latter need not be the negative of the first: cooperation between reliable trading partners will enhance the prospects that both will survive, so long as one does not defect at the critical moment. At the same time some generous attitudes have to be instilled toward one’s young offspring if they are going to make it to maturity. Hence, there are built-in tendencies that will on some occasions find it sensible to steal and to kill, and on others to cooperate. Different people will, of course, have different personalities simply as a result of the natural variation in the genetic lottery and in social upbringing. Just as some people are tall and others are short, so some will be
more generous and considerate than others. But the closer one edges back to survival, the more self-interested all individuals are likely to be.

The needs of survival doubtless influence the growth and development of emotions and intelligence, which the latest research indicates work in tandem. Often people only respond with heightened alertness when they are under the greatest pressure. To negotiate their way in the world, it is important for them to make accurate predictions of natural events and social circumstances. In so doing, they must recognize that their own limited cognitive capacity means that they are likely to make mistakes in the interpretation of complex social settings. It is only the rare person who can think his way to the solution to a complex social problem. Most individuals rely on a combination of hunch, intuition, experience, and trial-and-error to get them through the most difficult patches. No one that I am aware of can solve all the equations that are needed to catch a fly ball or a frisbee. But if one keeps an “eye on the ball” so that it approaches at a constant angle, then glove will meet ball at just the right time. But we don’t learn this skill through our higher facilities. Much of it is wired into us through the same circuits that allow dogs and other animals to make the same type of calculations with equal, if not greater, speed and reliability. And if we cannot quite think ourselves to the solution of these straightforward problems, we should be quite humble about our ability to manage and control large social settings, in which we have to take into account the willingness and ability of other individuals to avoid the consequences of adverse events or to turn them to their private advantage. On this score, moreover, altruism will not save us. Often it is selective, with respect to family, clan, and friends. It, therefore, spurs people to think that they are noble and unselfish even if those same actions result in adverse consequences to large numbers of other individuals who lie outside that preferred zone.

II. POSITIVE AND NEGATIVE SUM GAMES

This human combination of major abilities and severe limitations poses a problem for any political order. But it does give us just enough information so that we can set out the basic rules of the game even though we do not have precise knowledge of how people will respond to them. In setting out the rules, the first need is to draw a distinction between positive and negative sum games. With the former, once each party makes its own moves, on net both parties are better off than before. A fuller treatment of this subject would ask much about the distribution of these gains between the parties, but for this purpose at least it is sufficient to note that the condition that there be some net gain gives enough information to allow for a preliminary
account of a desired legal order. A negative sum game for its part is one in which the winner has lost more than the loser has gained. How that is measured is a subject of some dispute, but typically it is enough to say that the winner did not, or could not remain a winner and still compensate the loser to the extent that it leaves him indifferent between the previous and current state of affairs.

This framework helps explain the presumption in favor of the liberty of action for all persons. Most people know their own self-interest, so that the actions that they do will advance it, which should be sufficient to create some improvement unless others are left worse off in the bargain. That detriment to others will not happen systematically with ordinary actions, but it will happen, almost invariably, with various kinds of aggression that involve the use of force against other persons, the control of which was the major concern of all political theorists who saw the chief office of the "social contract" as the mutual renunciation of force between individuals who otherwise had no connection with each other.

A. Competition

This presumption of liberty requires that we have a solid account as to what counts as harm. I am quite willing to permit the definition of harm to include actions of defamation that slander innocent parties. But even if, as we must, go that far, there are at least two qualifications on the harm principle that must be part of every liberal society. First, we cannot allow the harms from competition to count as reasons to block the actions of others. If that were indeed the case, no economic activity could proceed unless each competitor were to compensate his disappointed rivals. But just the prospect of that competition would bring forth thousands of would-be competitors from the woodwork, each demanding compensation as the price for innovation. The administrative strangulation would consume more than it is worth, and would of course pay scant attention to the needs of consumers who would have to pay the cost of this freeze. We must never forget the benefits from economic innovation, even as the dislocations are brought prominently to mind. The arguments here apply with equal force in both domestic and foreign situations, and the constant calls today for new forms of protectionism, such as the claim that Indian radiologists are robbing American radiologists of their livelihood, represent in my view one of the greatest dangers to a free society. The new competitor has exposed individuals, whose services are no longer worth what they once were. To focus only on the losers of these situations is to ignore the winners, including the users of medical services, here and abroad, and to open up the system of free trade to threats of retaliation by tariff and quota similar to those which brought on and prolonged the Great Depression. These
private losses are symptomatic of larger social gains, and should, therefore, be accepted in all cases. The moment we start to make case-by-case judgments, the game is over: special pleading will always overrun more general considerations.

B. Offense

Second, we must be exceedingly suspicious of any claim to restrict the liberties of one person on the ground that his conduct offends the sensibilities of another individual. Our society has people from all different backgrounds with all different tastes. We should be rightly aware of the limitations of our collective ability to determine which of these styles and tastes are better than others: skepticism on our own powers of judgment is healthy here. We should be equally aware of the great danger of any dominant faction celebrating the sanctity of its own values, while giving no respect to those individuals who disagree with them. Once we allow simple offense, no matter how deeply felt, to dominate social discourse, everyone on all sides of any issue will have an incentive to join the fray by intensifying their dislike of what others do in order to increase the legitimacy of their claims to suppress behaviors of which they disapprove. The number of cases of physical injury or even misrepresentation is minuscule in comparison with this infinitely expandable class of supposed wrongs. Any appeals to broad statements that condemn certain conduct on the grounds that it is contrary to good morals should be treated with profound suspicion in any society that includes a wide range of different groups by politics, race, and ethnicity. The principle of liberty cannot survive if dislike and disapproval become valid reasons for the use of public force. There is no doubt that no group can argue that its own distinctive set of beliefs allow it to use force against individuals who disagree with it. That far we must go; but to go any further risks needless danger and class war even if put forward in the form of proposals for constitutional amendments. We must learn to live with our dislikes, even—make that especially —when we are correct in our judgment of the folly of those to whose conduct we take strong exception.

C. Trade

This framework not only allows us to take into account conduct of single individuals, but it also allows us to understand how to deal with ordinary cooperative efforts, whether by simple exchange or prolonged cooperation, all of which proceeds in one form or another by the mechanism of contract. The basic arguments are easily stated for two-party situations, but they easily generalize to voluntary arrangements of larger numbers of individuals: since the consent of both
parties is needed for a transaction to go forward, self-interest (even broadly defined) has to be advanced on both sides of the transaction. Thus, looked at from the point of a two-person universe, the voluntary transaction is a social improvement over previous states of the world, at least as a first approximation. We can make this judgment, moreover, without looking at the particulars of the transaction and thus have reason to think that the value to the two parties should be, as Hobbes said in *Leviathan*, what they are content to give, precisely because they will consider those choices very carefully. Thus, we should be skeptical of our ability to trace out the gains and losses of the individual transaction, but by the same token should recognize that our general framework makes it highly likely that these gains will occur. This is most definitely the case for even though people may all value certain goods up or down, they will do so with different intensities, so that our general knowledge makes the likelihood of joint gain highly probable even if we cannot identify its sources. And when we realize that trade allows for specialization, which improves production across the board, the presumptive case for the protection of contracts is secure, independent of our knowledge of any larger cultural or social framework. Less information gives more desirable results.

Now this position in itself hardly justifies the conclusion that all contracts should be enforced because there are two types of defects that, broadly speaking, have to be taken into account. First, there are defects in the formation of agreements that are strong enough to offset the presumption of mutual gain, and these include the risks of duress, fraud, and incompetence of one of the parties. It is a large business to sort through these issues, and the remedies imposed could be in some cases worse than the disease, as with the elaborate disclosure requirements found today under the Securities and Exchange Commission. But the problem is inescapable and any constitutional order that incapacitated government from dealing with these issues would be woefully weak in response to serious social problems.

The second problem has to do with the external consequences of these transactions on third persons, which raises for two or more people the same kinds of considerations just considered in connection with ordinary actions. There is a tendency on the part of many people to think that all externalities will be negative in form, but this is in general a mistake. The one sure consequence of most agreements is that they make both parties richer than before, which, without more, increases the options of third persons. These externalities are positive, and thus offer a strong reason to increase the process of contracting. But there are negative externalities that have to be taken into account as well. Contracts to kill third persons or to emit pollution have negative externalities in the sense that they amplify the negative consequences of actions already judged wrongful when undertaken by a single person. Now the language of contracting
rightly turns negative so that we have to think about conspiracy and combination and not about cooperation and gains from trade. But if I am correct in my arguments about competition and offense, it follows that state power should not be used to redress grievances of either sort.

The situation also switches over with respect to monopoly because no longer is the argument one that goes to the disappointments suffered by individual competitors. Instead, the claim now is that overall social resources are compromised when an individual seller is able to raise prices above the competitive level. The choice of responses is a difficult subject, for in some cases an antitrust remedy that prohibits certain kinds of monopoly or cartel arrangements suffices. But in other cases, such as those which involve common carriers and public utilities (now grouped together as network industries), the economies of scale may be so great that some form of regulation counts as preferable. Here again it is hard to be dogmatic about which solution is best and why. It is, of course, possible to be deeply committed to some regulation of these network industries while remaining cognizant of the deep social danger that comes from converting competitive industries to monopolistic ones through government action.

We thus have a state that encourages autonomy, private property, voluntary exchange, and competition, but worries about force, fraud, and monopoly. Yet we know that the general knowledge that allows us to make these judgments does not allow us to decide what counts as better or more desirable conduct for other individuals. The stage is set for the constitutional analysis.

III. CONSTITUTIONAL IMPLICATIONS

A. Of Permanent Relationships

The point of this entire exercise to date is to indicate that it is possible by using some very general considerations to derive a good deal of information about the preferred forms of social activity even if we as outsiders can understand little or nothing about the sources of value to other individuals. The question then arises whether this framework is sufficient to allow us to make some statements about the choice of constitutional structure. Here I think that we can. A constitution is a kind of permanent charter of government. If it tries to respond only to the particular crises of the moment, it is sure to fail in its primary mission because the fixed solutions of the document remain even after the conditions that gave birth to the problem disappear. It would be no good for a constitution to set the price of milk. It is important for the constitution to set a framework in which milk is priced by competitive forces no matter what the immediate short-term conditions of supply and demand. Stated otherwise, if
these principles about the importance of positive sum games, liberty, property, consent, and harm are as durable as I have argued in light of the permanence of the human condition, it is possible to set out a constitutional framework that can endure in light of our knowledge of these general truths. I shall postpone for the moment the question of how the government should be organized, which is a vast theme in and of itself. The arguments thus far have been directed to the kinds of society that this government should preserve, and it is to that issue to which I shall first turn before coming back to the structural issues that loom so large in the practical discussions of statecraft.

B. Life, Liberty, and Property

The first point to note here is that if this argument is indeed correct, we have good reasons why we should give generalized protection to life, liberty, and property. Of course, our Constitution gives this protection in a number of provisions. Here I will start by mentioning what these are: the protection of freedom of speech and religion under the First Amendment; the protection of the various privileges and immunities of citizens of the several states; the protection of private property; and elsewhere the protection of life, liberty, and property, against deprivation without due process of law; and the guarantee of the equal protection of the laws. Each of these clauses' specific guarantees is consistent with the overall framework that I have talked about. What is quite extraordinary about the situation is what I call the rise of "necessary" history in connection with these various provisions.

The first task is to define the nature of the protected constitutional interest. Here there is no reason why these should be read narrowly. Thus, if we start with the idea of liberty, the basic argument above established the point that all forms of human action advance the interests of those who engage in them, so that there is no good reason to start with the presumption that liberty guards against only one type of government intervention. Therefore, it misreads the document to hold that the idea of liberty should be confined only to situations where the government imprisons individuals or otherwise restricts their freedom of motion. Liberty of motion is certainly part of the concept of liberty, but so too is the idea of liberty to engage in other forms of behavior, both commercial and personal. On this topic, the view of the classical writers was correct when they held that liberty of contract counted as a protected interest under the Constitution. But they fell short of the situation when they refused to acknowledge that liberty of a more intimate, even sexual, variety is covered by the concept as well. The modernists are no better, and are every bit as inconsistent (and often as intolerant) but in the opposite direction. They are willing to celebrate the individual liberty of
intimate associations, but are deeply suspicious of the rights of individuals to engage in ordinary trades on whatever terms and conditions they see fit. Each side is persuasive with respect to the interests that it protects, but less so with respect to the interests that it regards as falling outside the constitutional framework.

C. The Police Power

How then should the claims of government be analyzed? Here the conventional rubric, which serves this purpose well, is that of the police power: the power of the state to regulate individual conduct and to limit the use or disposition of private property in order to protect the "safety, health, morals, and general welfare" of the public at large. Owing to the generality of the risks posed by ordinary human behavior, it is not surprising that whenever these constitutional guarantees are taken seriously, the discussion of the police power gravitates to a consideration of the exact issues that were examined above as a matter of first principle. The definition of harm is kept narrow so that it does not slop over to embrace all forms of competitive harms or subjective offense. Yet by the same token, efforts of the state to deal with matters of physical harm, including nuisances to both public and private property, are taken very seriously, as are the dangers that duress, fraud, and incompetence pose to the operation of ordinary business transactions. The point is really quite simple: even if the Constitution turns out to be dead silent on the question of when the state may abridge the exercise of liberty and property, any responsible judge who is cognizant of the basic theory of human nature that underlies the doctrine has to read in some version of the police power for the entire enterprise to function. This is not a question of any fancy or unintelligible twentieth-century theory of interpretation; it is not a matter of judicial activism or restraint. It is simply the case that the text has to be read in light of its overwhelming purpose and structure. It follows, therefore, that the police power becomes the implicit constitutional constant that hovers over all individual clauses of the doctrine, even though it is part of none of them.

How then should the police power be interpreted when there is no textual guide as to its content? Well, the first part of the inquiry turns out to be that of ends, and the second turns out to be that of means. The "easy" cases, if such there were, are those in which the state seeks to act for an end that does not fall within the confines of the basic theory. The harder cases are those where the ends are permissible, and the only question is whether the means are appropriate to the ends in question. The former inquiry is one of conceptual analysis, and should for the most part be capable of clear answers as a matter of principle. The second is one in which it is necessary to recognize that every form of regulation, including ordinary common
law suits for damages, has dangers of under- and overinclusion, so that the ultimate judgment is empirical and asks how much of one kind of error (imprisoning innocent people) is tolerable in light of the dangers of the other side (allowing terrorists to blow up Grand Central Station or worse). The issue then is how do we approach both of these questions.

IV. APPLICATIONS

A. Economic

It is useful to consider several cases in tandem because it shows the difficulty associated with this mission. Exhibit A is a case that deals with rate regulation, in this instance the case of the minimum prices that may be charged for milk, approved in *Nebbia v. New York.*\(^2\) To set the background, the classical nineteenth-century doctrine had no qualm about allowing the state to take steps to prevent or limit the operations of monopoly. The antitrust laws were upheld over a challenge that they infringed the liberty of contract of their participants. That limitation on contractual freedom certainly takes place, but it is one justified by the concern with monopoly behavior in light of the classical theory stated above. Exactly what should be done with monopolies is a hard question, and long discussions could be had, and were had, over the permissible systems of rate regulation: how, for example, does one determine the rate base on which some permissible rate of return is calculated? But rate regulation was in principle allowed on the ground that the industry was "affected with a public interest."\(^3\) The reason why the milk cases should have been easy is that there was no thought that the minimum prices were intended to control the dangers of industry cartels. Quite the opposite, the entire operation was really justified on the ground that protection to dairy farmers justified the suspension of ordinary competitive principles. But that is a justification that should be dismissed categorically as a matter of constitutional law precisely because it fails categorically, based on the analysis of the theory of government under which our Constitution is based.

Remember the police power is an implied, if necessary, exception to basic protections of liberty and property that our Constitution provides. The terms "judicial activism" and "judicial restraint" offer no sensible guidance if the only question is whether to cut back on the size of that implied exception. Is it restraint to read implied exceptions broadly or narrowly? The whole debate is otiose because in this

\(^2\) 291 U.S. 502 (1934).
\(^3\) *Id.* at 531.
context there is a substantive theory that guides the deliberation. It is for that reason that the entire New Deal doctrinal structure is flawed at the level of ends, before we reach any delicate question of means, because it does not give the decisive constitutional edge to competition over monopoly, and instead is prepared to use public resources to advance what is an inherently asocial end. Courts could show a good deal of deference in whether, and if so how, to attack the problem of monopoly when it occurs. But there is no reason for any judicial deference at all when the state sets sail in the wrong direction. The presence of the difficult cases should not obscure the fact that easy cases are decided incorrectly.

This same analysis can be carried over to what counts as one of the most controversial cases in the history of United States constitutional law, *Lochner v. New York*.\(^4\) This decision is so reviled in some quarters that it has become an epithet to describe an entire era, the *Lochner* era, which covers roughly (and for what it is worth, inaccurately) the period between 1865 and 1937, when the New Deal philosophy had consolidated its choke hold on American constitutional interpretation. At stake in *Lochner* was a simple regulation that limited the hours that certain kinds of bakers in New York could work to 10 hours per day and 60 hours per week. One question in this criminal prosecution was whether the statute infringed on the liberty of the baker and his employees to enter into contracts for their mutual convenience. Here the *Lochner* Court sustained that challenge by a narrow five-to-four majority. The first part of the analysis was that it held that liberty of contract was, in line with the arguments made earlier, included in the liberty that was protected under the due process clause. The entire case, therefore, turned on the scope of the police power. Here the *Lochner* Court found that the words “safety, health, morals and general welfare”\(^5\) would cover a fair number of state actions that limited freedom of contract, such as those that monitored the level of exposure to toxic substances on the job. But in this case, it held that the hours statute in question was a poor proxy for a health statute because as a “labor” statute, it was passed with collateral motives, namely, to give a competitive advantage to unionized firms in the region whose workers had shorter hours. In most cases the change in hours could be regarded as a loose proxy for the level of toxic exposures, but this context (and perhaps more generally) did not fall within the general rule because part of the hours of *Lochner*’s workmen were taken up with sleeping in separate quarters on the job. In contrast to the union shops that worked on two separate shifts, the nonunion bakers worked longer hours to bake the

\(^4\) 198 U.S. 45 (1905).

\(^5\) Id. at 53.
bread at night and gather it up in the morning, with sleep in be-
tween.

Now someone could argue that the health justifications were still
strong enough, and today it could well be that this statute would be
negated on an "as applied" basis, leaving the statute in force in cases
of direct long exposure. But for our purposes the key question is not
whether this close decision was wrong on its facts, but whether it em-
ployed the right or wrong analytical framework. On that issue, the
strongest criticism comes from those who believe that *Lochner* as de-
cided conceded too much to state power in that it purported to pro-
tect workers against hazards of which they were aware and could have
taken into account. That argument too is subject to challenge if the
hazards in question could be treated as though they were latent, and
thus outside the ken of the workers when they made their contract,
which seems possible, but to these eyes unlikely. The point here
though is that eight of the nine justices, including Justice Harlan, ac-
cepted, as do I, this basic framework that distinguished between
health and labor (i.e., anticompetitive) statutes.

Only Justice Holmes departed from this view, and for reasons that
are as instructive as they are incorrect. He held that our Constitution
did not embody any particular theory, including that of laissez-faire.
On narrow grounds he is correct, but only if laissez-faire is treated as
a genuflection to freedom of contract that does not even allow the
state regulation of monopoly. But that extreme view of laissez-faire
never permeated our Supreme Court. Rather Holmes was, and is,
profoundly wrong in thinking that the Constitution is a document
that is indifferent to the eye-popping contrast between a (sensible)
theory of laissez-faire and the "organic relationship" between the in-
dividual and the state. The entire structure of the document strongly
rejects the latter view and nowhere contains any intimation that any
piece of legislation that gets through a (faction-ridden) legislature
must necessarily pass constitutional muster. The fact that the Consti-
tution must govern people from divergent backgrounds is not an ar-
argument for deference to political institutions, but the opposite. The
constant clash of interests makes it all the more unlikely that a frac-
tious legislature could reach collective solutions that solve all prob-
lems. The only workable solution is to hew doggedly to the line that
mere offense about the behaviors of others, including their economic
arrangements, does not count as a reason for state regulation. It is
too easy for someone to say that I do not want to live in a society in
which dishwashers earn $2.00 an hour, while others say that I do not
want to live in a society where the state prevents poor people from ek-
ving out a subsistence income. Resentments teem on all sides. In vir-
tue of their frequency, they should all be ignored because they all
depend on an insupportable account of what is a harm that should be
recognized by the state.
The differences between the Holmes and the Harlan position were made evident in the subsequent decisions of *Adair v. United States*¹ and *Coppage v. Kansas,*² where the question before the Court was whether the United States or the states could require employers not to discriminate against employees by virtue of their union membership. The duty to retain union members under statutory fiat was in clear conflict with the principle of freedom of contract. Nor could it be justified on the ground that the railroad as a common carrier had a duty to take all workers, for any special duties (stemming from the railroad’s monopoly position) ran only toward customers and not toward employees. Justice Harlan did not think that any of the health issues from *Lochner* carried over to this situation and struck down the statute as an arbitrary infringement of contract, in what I regard as an eminently sound position. Justice Holmes again dissented but did so on a theory that is inconsistent with the underpinnings of the liberal state. His view is that freedom of contract depends in some sense on a parity of economic power between the two sides: the state could thus intervene “in order to establish the equality of position between the parties in which liberty of contract begins.”³ Since that condition of liberty is universally absent in ordinary cases between employer and employee, routine regulation of the terms and conditions of employment or other business transactions seems to be the order of the day. But the position is at odds with the basic premise that contracts work to the mutual advantage of the parties.

Regardless of their initial wealth positions, all persons advance through exchange, and none more so than those who have little wealth initially. To impose a condition that restricts choice on that ground is profoundly misleading. Yet to give anyone a monopoly position, which is what these statutes do, is to exclude others from competition with the protected group no matter how great their needs. Labor protection is no better than trade protection, and both should be subject to a categorical constitutional denunciation. It does not take much more to indicate that I carry this position all the way through to modern forms of labor regulation. These regulations include the minimum wage under the Fair Labor Standards Act, collective bargaining under the Railway Labor Act or the National Labor Relations Act, and the entire range of antidiscrimination laws that seek to dictate who should do business with whom in ordinary, which is to say, highly competitive, labor markets. Forced associations do not work for cooperative ventures. Here again, it is not the purpose of these bans to allow me to substitute my judgment for those of the

¹ 208 U.S. 161 (1908).
² 296 U.S. 1 (1915).
³ Id. at 27 (Holmes, J., dissenting).
individuals for whom these decisions are so vital. It is to make sure that political governance, which has a full plate in dealing with the inevitably collective decisions of state, does not itself intrude into ordinary business decisions of individuals who are better able to make their own judgments, and who benefit from the range of choice that is facilitated when the full range of entry barriers is eliminated.

B. Morals

Thus far I have applied this approach to economic affairs, where it may well earn me the title of an arch-economic reactionary. But the same framework has great traction in dealing with the full range of social issues that currently beset the courts, where I am confident that I will earn a different epithet, that of judicial revolutionary. No mind: here I speak about the range of questions that covers everything from contraception, abortion, nude dancing, antisodomy laws, gay marriage, and polygamy. On these questions, the old Court took a very different approach from that which governed its decisions on economic matters. Its basic view was that tradition was the dominant source of political authority, so that the state could continue to legislate on matters of personal morals, notwithstanding any of the substantive guarantees under the Constitution. The morals head of the police power was given a consistently broad construction in ways that might surprise even its supporters today. To be sure, there were cases within that heading that fit within the narrower conception of the police power that comes from the basic analysis of the political state. Laws that prevent children from being forced into arranged marriages count as the protection of infants against the advantage taking of their parents. And rules that try to regulate the conduct of prostitution and bathhouses, for example, may well be justified on the ground that these are devices that help prevent the spread of disease and contagion. In light of what was said above, the examination of these means/ends questions can often be statute specific, and thus does not give rise to any broad declarations of principle.

The morals head of the police power, however, extended far beyond the cases of tangible risks to minors or to outsiders. The idea that laws were appropriate for the state to prevent various abuses that were contrary to good morals has had great traction in this area, even when there is no connection with any of the more specific kinds of harm to which the police power is properly addressed. Laws against bowling were sometimes upheld under the morals head of the police power. But in the critical cases pertaining to sexual conduct, the standard plea to tradition will not give rise to much tension so long as moral beliefs within a culture remain both stable and uniform. The massive public satisfaction will relegate the unhappiness of the afflicted few to a footnote of history. Courts will join with majoritarian
institutions to preserve the common values system against the challenges of outsiders. The morals power may be the most diffuse, but it also represents the glue that keeps a society together as an organic whole. Or so the theory goes. I choose the word “organic” because it was a Holmes favorite. Nonetheless, I think that one should be deeply suspicious to the appeals to tradition as a warrant for the exercise of political authority. The traditions here are not industry customs that bind only those who decide to enter a trade or business, and even then only when parties to a specific transaction have not stipulated to the contrary in their agreement. Here the tradition is asked to do far more work than the custom insofar as it binds dissenters to the will of the majority even when there are deep philosophical differences as to the ultimate truth of the propositions on either side.

Precisely because the question of truth proves so elusive as a moral matter, the proper political response seems clear: each side should be forced to stay its hand in dealing with the other unless or until it can show the kinds of harm that would activate the police power under, as it were, the Lochner standard that looked only to third-party harms above and beyond mere offense or various kinds of advantage-taking in the course of private relationships. Our own Supreme Court has had such trouble finding a stable resting place in these matters precisely because its knee-jerk rejection of Lochner has forced it to jettison the only workable framework for balancing the collective against the private interest. If one hoists the flag of judicial restraint up on the banner of economic liberties, then how is it possible to lower it immediately when so-called rights of intimate association (e.g., sex) are on the table? Why should the word “intimate” be forced to do so much work in constitutional discourse? The intellectual inconsistency between the two positions on associational freedom, economic and moral, is so jarring, that now it is the pundits on the right of the political spectrum who make charges of judicial activism, which are correct when measured against the previous state of the world. However, as a matter of first principle, the radical judges have the best of the argument, not because they are right in their moral judgments, but because each side should pull back from turning its moral judgments into law.

To see how this plays out, consider some of the major issues against the framework raised here. In Griswold v. Connecticut an unhappy Supreme Court struck down a statute that forbade the use (and, by implication, the distribution) of contraceptives. That decision seems correct on the framework set out here, even if we do not indulge in the “penumbra” of rights for which Justice Douglas has

9 381 U.S. 479 (1965).
been so frequently ridiculed. The liberty interest in contraceptive use seems to be undeniable. The right to purchase contraceptives or to take advice about their use seems to follow from the initial right: for what one may do alone another may assist. The externalities in question cannot be identified, and no one could make a credible claim that the users or buyers of contraceptives are incapable of making their own decisions. To be sure, Griswold tried to parry any broad Lochner-like implication of its decision by restricting this use of contraception and associational right to married couples. But before long what started out as a right of some persons dependent on a state-created status became a right of all persons as individuals only a few years later in Eisenstadt v. Baird,\textsuperscript{10} which in retrospect was the opening salvo against the preferred position of marriage within the state. And Justice Brennan had a fair point with which to combat precedent: the right of association did not depend on how the partnership was created but on whether it was created at all. In short time, the right of intimate association, including the use of contraception, attached to all individuals. In essence, the new framework called for the creation of strong liberty interests in intimate associations. The framework that was used for this designated class of rights followed the classical liberal analysis exactly. Clearly, monopoly was no part of this story, and any adverse consequences to health had to be explicitly proven. The disapproval that outsiders had of certain practices, either within or outside marriage, did not count, in line with the general thesis here, as a reason to impose legal sanctions against it.

The abortion cases are subject to the same analysis, but in this context the police power limitations do bind because of the obvious claim that the state has to protect the lives of unborn children, which could fall easily, as I believe it does, within the general health and safety rationales. That said, it should become clear the extent to which Roe v. Wade\textsuperscript{11} is and is not like the earlier decisions. It is like Lochner in that it follows the same intellectual framework. But it differs from Lochner by presenting a case with a far stronger health and safety claim, which some might say even impels the state to act, not just allows it. It follows, therefore, that one could mount an impressive attack on the Roe decision without embracing any doctrine of judicial restraint. The use of a neutral paradigm does not precommit us to one side or the other of the political spectrum.

The basic framework also extends to the modern cases that deal with sodomy, and soon, and without question, to the issue of same-sex marriages that has exploded on the scene. Here the initial foray of

\textsuperscript{10} 405 U.S. 438 (1972).
\textsuperscript{11} 410 U.S. 113 (1973).
the United States Supreme Court into the issue in *Bowers v. Hardwick*\(^{19}\) was dominated by a respect bordering on reverence for tradition. So long as there was an unbroken skein of laws that regulated sodomy under the morals head of the police power, the legislature had to decide whether to deviate from that pattern or not. The method of analysis assumed that what had long been done could continue to be done, so that any appeal to an evolving Constitution fell on deaf ears. But one does not have to invoke that dangerous and elastic concept, open to the possibility of abuse, to take issue with the synthesis in *Bowers* in light of the general framework here. The sole form of harm that anyone identified in the sodomy cases was that of violation of the general rules on good morals. No one claimed that the practices in that case involved a risk of health, either to the partners or to third parties. No one even claimed that others had to watch these actions in public places, as a form of cognizable visual harms. At this point, the argument based on tradition fails because that tradition has been imposed on those outside the pale by those within it. The argument for liberty is far stronger as a matter of principle.

This analysis of *Bowers* sets the stage for an analysis of two other decisions that bear on the question of associational freedom. Many of the sharpest critics of *Bowers* are also strong supporters of so-called human rights legislation that prohibits private associations from discriminating against individuals on grounds of their sexual orientation. The obvious connection between the two decisions is that both help to advance the cause of gay rights. But to put the question in that form misstates what the issue is: the rights of free association are not dependent on whether they advance the interests of this or that cause. Thus, in the recent decision of the Supreme Court in *Boy Scouts of America v. Dale*,\(^ {15}\) the question before the Court was whether New Jersey was within it rights to pass a human rights statute that required the Boy Scouts to admit an openly gay man as a scout troop leader. The purpose of the legal system is not to take sides on the case for or against gay rights, but to implement in consistent fashion the two central propositions that guide human affairs: don’t block voluntary associations, and don’t force unwanted associations. The New Jersey statute ran afoul of the second proposition, and the Supreme Court struck it down on the ground that the Boy Scouts, which had a clear moral mission, were entitled to the protection normally granted expressive associations. The Boy Scouts could run their organization as they saw fit, and those who disagreed with their policies could decide to form or join other organizations if they disagreed with their policy. The offense and indignation that people hold

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\(^{19}\) 478 U.S. 186 (1986).

\(^{15}\) 530 U.S. 640 (2000).
against this policy are certainly reasons to redirect private loyalties and support, but they are not reasons that allow outsiders to determine the composition of organizations, and to create internal strains that are not voluntarily assumed.

This decision, however, raises two other points of note. First, it is a mistake to think that the privilege of association should be tied only to some class of expressive associations that claim the dissemination of some message as part of their general mission. I see no reason why the same rules on organizational freedom should not apply to beer distributorships, dancing clubs, or even universities. The defense for various individuals who are excluded from some organization is their ability to form or join others that are prepared to take them in, not to disrupt the internal affairs of the groups that do not wish to have them. Second, public officials are not permitted to retaliate against any group for its own internal policies. Thus, it is in my view inappropriate for the United States government to deny tax exemptions for which the Scouts would otherwise qualify on the ground of the discrimination that they practice. If organizations that admit and exclude gays stand in equal dignity before the law in a nontax world, the imposition of the tax should not switch the relative balance between them. Either both organizations or neither is entitled to the benefits in question, but the state can no more impose burdens of selective taxation than it can impose direct membership requirements. The same rule applies when the Scouts seek to obtain licenses and permits to use various public facilities. If these are open to rival groups for their activities, the relative balance in the nongovernment world cannot be switched by the state putting its thumb on the scales in favor of one side to the debate relative to the other. If the total prohibition is out, the selective tax or subsidy is out as well.

As I have stressed before, the grounds for this decision are simply the dominance of human freedom in connection with ordinary affective organizations. It is not to lend tacit support to the rules of one side or another in various cultural debates. Thus, it is easy to expect that many of the supporters of the right of the Boy Scouts to exclude a gay scoutmaster are strong backers of the traditional prohibition against sodomy or the traditional restriction of marriage to a sexual union between a man and a woman. But if the general principles defended here govern, the recent Supreme Court decision in Lawrence v. Texas\textsuperscript{14} should be regarded as consistent with that basic position. Of course, that decision marks a major transformation in judicial attitudes, for the Lochner paradigm now dominates all matters of intimate association, even if it has no weight in economic forms of association.

\textsuperscript{14} 539 U.S. 558 (2003).
that are every bit as important to human happiness and fulfillment. The decision, to be sure, raised many eyebrows because it totally invalidated the Texas law on the strength of the rational basis test—so long as anyone can find any reason to support this law, it passes muster—which, as stated, has been widely understood as a death knell to any constitutional claim. But in this case, the statute was said to flunk even this generous test. This mystery should disappear once the earlier distinction between means and ends is taken into account. Questions of ends require the articulation of a permissible object, and are capable of clear conceptual answers. Hence, the standard of review does not matter, as it would for the questions of means with its concomitant questions of under- and overbreadth.

In response, it was said that the decision regarding the sodomy laws will lead to the invalidation of the prohibition of same-sex marriage, contained in the definition of marriage as the union between one man and one woman. And so it will. The problem here is whether the state can exercise its monopoly power to confer a set of advantages on some individuals while excluding it from others. Just as the state has considerable power to block private monopolies, great care must be taken to see that it does not use its monopoly power to favor one version of the good over another. Such is part of the sound sense of skepticism that looks with distrust on collective judgments of what is right or wrong for other individuals. One solution is to open up the legal institution of marriage to all comers. But a second is to get the state out of the business altogether. It can insist on obligations of support for children under its traditional police powers. But it has to leave the question to the private sphere of whether certain practices qualify individuals for charter membership in a church or are grounds for immediate excommunication. On this score, I differ from most of the defenders of same-sex marriages by thinking that this right is only one of a capacity to contract, not the ground for some protection of gay (or straight) persons against discrimination by others. Unfortunately, all too often in this area, we witness two forms of dogmatism, for those who are convinced of the soundness of gay marriage on libertarian grounds will haul out the heavy state lumber in the form of an antidiscrimination norm that forces those who disagree with them into line. But again we need a social truce. The strong moral convictions that some individuals have against these unions is sufficient warrant to allow them to exclude others from their associations, whether intimate or not, but not to ban their practices. The only way to preserve any chance of civic peace on this issue is to allow people to go their separate ways.

And once the same-sex marriage issue is tackled, we can move on to polygamy. Justice Kennedy in his Lawrence opinion wrote as though freedom of (intimate) association was a game that only two could play, but in that he was misguided relative to the basic theory.
persons are entitled to this protection as well, so long as the usual rules apply: no coercion, no monopoly. The offense that others bear is no reason to stop the practice. It is up for other civil institutions to exclude them in the exercise of their own associative freedom, but only if they so choose.

C. Affirmative Action

In pushing this position, I hope that I have said enough to cause offense to just about everyone. I shall now finish this quick tour of the social issues by addressing the question of affirmative action. For private institutions, the case is easy: the antidiscrimination laws should not block any private form of association for universities or the Boy Scouts of America. The universities should be able to manage their own affairs as they see fit. The interests of outsiders are all too weak to overcome that judgment for the reasons set out above in dealing with external harms. State universities are a different kettle of fish because they involve forms of state action that require more detailed analysis. But here it is not correct to treat all state actions as though they were of the same piece whether they involve the operation of a police force or the running of a university. In the former case the state is using coercion. In the latter case it is trying to run a business. Carte blanche is not the right attitude to state businesses, but we have to find a way to benchmark their performance that still leaves them some discretion in how they allocate resources and preferences. On this matter, I think that the right approach is to lower the standard of review, perhaps to rational basis, where that term is given more specific content. The object of the enterprise is to make sure that no public institution strays beyond or outside the boundaries of what ordinary private institutions do.

The prevalence of affirmative action programs in public institutions is, therefore, a good sign that state universities should be allowed the same option as private universities, at least if they do not go overbroad. Oddly enough, on this framework the strongest argument against that conclusion is that state legislatures will bully faculties into having these programs, so that I would condition this right on the judgment that it was not made by legislative command or tied to legislative appropriations. The Supreme Court, therefore, reached the right conclusion in *Grutter v. Bollinger* but by the wrong means. It claimed that these programs met a standard of strict scrutiny in one breath only to defer to the state’s judgment in the next. That is a

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pure rational basis strategy that would have been more persuasive if candidly acknowledged.

I recognize that my unconventional defense of affirmative action programs offers a distinct second-best solution, for it does not rest in any way on my own belief that the practice is worth having. That is a judgment that I think is appropriate to make for any faculty of which I am a part but not elsewhere. And those who reject the constitutional challenge to these programs should not be precluded from vocal opposition to them on a wide variety of substantive grounds. But short of the elimination of public universities, whose privatization I strongly support, this is on balance the best that we can do. First best, as it were, is to remove the universities from state control where they will benefit far more from their freedom of management than they will lose from the cessation of an ever more paltry state subsidy. For those who doubt this position and think that the call for colorblind universities is preferable, I urge them to look a second time at Title IX, which imposes a general nondiscrimination duty on universities on grounds of sex. The provision reads like a sex-blind requirement, but through its administrative extensions it has led to the most coercive federal intervention on the autonomy of all private and public institutions. It is no accident that Maureen Mahoney (a Chicago grad, I am proud to say) both defended affirmative action in Grutter and attacked Title IX in Cohen v. Brown University, where she was badly bloodied, but for no good reason. What lends coherence to her position is that she sought to defend university autonomy against state regulation, and for good reason. Placed in the wrong hands, even the formal guarantee of colorblind or sex-blind policies in running a complex institution holds out the risk of tyrannical actions—and I cannot say in which direction—that the current view of decentralization eliminates.

V. FREEDOM OF SPEECH

The thesis of the first two parts of this paper should now be clear. The arguments in favor of the primacy of liberty subject to restraints that deal with (a) transactional risks, (b) negative externalities, and (c) monopoly form a robust framework precisely because they are not tied to any particular set of facts. Rather, they depend solely on the sensible use of generalizations about human conduct that do not require, and in fact do not allow, us to make collective judgments about the preferences and values that individuals have in their own lives. It is now important to note one important shortfall about this analysis,

1991 F.2d 888 (1st Cir. 1993).
which is that it does not give guidance on the way in which some genuinely (that is, unavoidable) collective decisions should be made. Thus, while it is both possible and proper to say that the wages that any given employer pays to any given employee should not be treated as a public matter, the same cannot be said about thousands of critical decisions that go to running a complex state that has a military, police, and security apparatus, and must decide whether to wage war or to sue for peace. And the same applies to decisions about the location of roads, the funding of courts, and the provisions of general public goods that the standard theory of laissez-faire reserves to the state. These pressing issues cannot be solved by arguing for a minimal state because they fall within the province of the minimal state. How then should they be approached?

The best way to answer this challenge is to note that the nature of human motivations and judgments does not simply shift when individuals are handed the power of the state. Instead, the question is what set of institutions will minimize the risk that they will turn public office to private advantage? Here the basis for the concern comes from the close analogy that public institutions have with private voluntary associations, all of which tend to develop their own rules on separation of powers and independent boards in order to forestall the risk of self-dealing. It is no accident that the collective solutions advanced in the United States Constitution adopt this same general approach (with the addition of a judiciary), given that they too have to address the questions of the fiduciary duties of public officials. Indeed, if anything, the restraints that one finds in our Constitution are more extensive than those found in ordinary corporate charters and for good reason. First, nations do not get to choose their citizenry in ways that corporate promoters get to choose their shareholders. The diversity of the regulated citizens poses a great challenge to the creation of a cohesive national policy. Second, the exit option is more expensive to exercise insofar as one has to do more than sell shares, but also has to abandon a whole set of personal and business associations. Hence the level of protections that are needed is more extensive. What form should they take?

One striking feature about our Constitution is that it does not seek to impose requirements of courage, insight, integrity, or judgment on the people who hold political office. It is not that these moral or intellectual qualities do not matter, when often they are the difference between a nation that succeeds and one that does not. But these matters cannot be made the sensible subject of litigation or legal rule, so they must be vetted in the political process. But our general sense of what people are and how they behave gives a strong nod to the view that fragments power. We thus have a system of separation of powers, of checks and balance of enumerated powers, of federalism, all of which start from the premise that too much ease in the
creation of legal rules is a bad thing. I will not elaborate here how well they have worked, save for a few general remarks.

These structural limitations remain strong so long as courts hold some suspicion about how governments will behave. But they then tend to be eroded the moment that courts think that all is well in the world. The conceptual frame, moreover, is identical to that which is used in individual cases. Thus, the question of how federalism should operate depends on concerns about interstate externalities, cartels, or network industries. The success of given doctrines, such as the dormant Commerce Clause, rests on their explicit adoption of this formula. The removal of the limitations on the power of Congress to act comes from the most illiberal of traditions: the desire to implement cartels at a national level in both agriculture and labor, which are antithetical to the basic classical liberal position. For whatever it is worth, the traditional reading of the Commerce Clause did better on this test. It allowed Congress to control what happened with network industries, even those that were created long after the Constitution was adopted, without allowing it to deal with manufacture or agriculture, where local regulation would work, so long as access to national markets was preserved.

Yet it would be a mistake to assume that structural guarantees alone carry the day. The protection of property and contract is meant to clip the wings of government, but these institutions have, as the guardian of all rights, only an indirect role to play in facilitating criticism of government on critical questions of public policy. That criticism is essential for strong and principled divisions of opinion are likely to emerge even if we keep, as we should, the definition of what counts as a public issue to those nonexclusive goods like defense policy and social infrastructure that affect us all up or down. Here the sensible form of skepticism is that people in power do not have a monopoly of wisdom or goodness on any of these questions. Hence, when there is no right answer, we should care deeply about the processes by which policies are formulated. We know that a state must act on political issues with a single voice. There is no way that half the nation can be committed to a foreign war while the other half sits it all out. But we also know that such decisions are highly divisive. These collective choices are not like supplying a lamppost for a dark street from which it is plausible to assume that all benefit and for which all should be required to pay. Rather, some people will know, inevitably, that their tax dollars, and perhaps their lives, go to policies that they strenuously oppose. In this kind of framework, it seems clear that dissent is a necessary counterweight to public decision, precisely because we are skeptical that any single individual possesses one truthful vision to which all other individuals must accede.

At this point, I think that we can see the difference between the skepticism of Holmes in *Lochner* and his skepticism in *Abrams v. United* ...
States, which involved spirited leaflets that attacked the American participation in the First World War. It is difficult now to recreate the sheer horror that the activities of these protestors inspired in national loyalists. John Henry Wigmore wrote at that time what could only be described as a hysterical denunciation of Holmes’s Abrams dissent. But it is the dissent that endures, not the critique. Here it is well to ponder the conflict with Lochner. There on economic matters, Holmes took the position that there was no theory of government that emerged from the struggle between rival views. He did not see where his own moral skepticism should have led, which is to a defense of liberty against the power of democracy, and not the other way around. But in Abrams he took exactly the opposite tack. There is no point in substituting my words for his, so I shall just give the quotation in full.

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

There are lessons here that matter. The entire defense of freedom of speech is phrased in terms of tests and markets. There are no dogmatic truths, but there are empirical regularities. There is no automatic refuge for the winds of change, only ways to play the odds. There are no prepackaged answers on what governments should do, only risks we have to face. The effort to stop some dissent may be far riskier than allowing people to have their say and fail, not because government steps in but because they cannot persuade an audience that hears many sides at once. But how far do we then allow speech to go? And here again we recreate the same sorts of arguments that were used to analyze the structure of private relations. Criticism is critical, but violence is not. On the former it follows that it is never possible to suppress speech on the ground of the offense that it causes to others, a principle that was rightly affirmed in the flag burning cases where the outrage that many rightly felt at the burning of the flag was not regarded as a justification to punish or limit the speech in question. But, without question, the flip side of the coin is that even the threat of force is an object against which state power may be properly directed. But on that question we have to worry about the means chosen to prevent the risks. In particular, this prudential

17 250 U.S. 616 (1919).
18 id. at 630 (Holmes, J., dissenting).
judgment gives rise to two kinds of errors, so that we have to resort to the identical kinds of balanced judgments that are made in deciding whether one ordinary person can use force in self-defense. If you wait too long, then it may be too late. If you move too early, then ordinary protest is suppressed. Here is not the place to say exactly how the balance is drawn. But it is the place to say that the kinds of inquiry that talk about the limitations on state power refer back to the same conceptual framework that is set out above. In essence the circle is complete. If we start with a clear vision of human motivation and cognitive limitations, we shall gravitate in all matters to a classical liberal position that protects autonomy, property, and exchange within the framework of limited government that directs its power only against coercion and monopoly and calls it a day. Only this framework allows us to avoid nihilism on the one hand and dogmatism on the other. By finding this middle path we can turn our skepticism in support of freedom, which should improve the odds of social success in good times as well as bad.