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THE REFLECTIONS AND RESPONSES OF A LEGAL CONTRARIAN

Richard A. Epstein*

In writing my contribution for this symposium, it is perhaps best to begin with the obvious.¹ It is my distinct pleasure to be the honoree for the Eighth Annual Legal Scholarship Symposium at The University of Tulsa College of Law. And it is a distinct pleasure to celebrate this event among friends. It seems therefore appropriate to mix the academic with the personal, so I shall start with a few reminiscences. The roster of distinguished contributors is not just a collection of individuals drawn at random from the universe of law school professors. Of the eight papers given at the Symposium, the only one delivered by a person whom I did not know prior to this session was Tulsa's own Marla Mansfield. But certainly the seven "foreigners" who came to Tulsa to participate in the conference have all been very close to me in different ways. Let me mention how we came to meet in chronological order. Heading that list is Robert Ellickson. I first met Bob when, as a faculty member of one-year standing, I interviewed him for a teaching position at the University of Southern California in the winter of 1970. He joined the USC faculty that fall and we were colleagues for two years at USC before I left for Chicago. After that we overlapped at both Chicago and Stanford. His expertise in all things relating to land law was evident on our first meeting, and nothing in the next 39 years has dispelled that impression. Next on the list is Douglas Baird, who, as chairman of the University of Chicago Faculty Appointments Committee in 1980, I recruited to join our faculty. We have been close friends and colleagues for nearly 30 years. Third on the list is Richard McAdams, whom I met at some academic conferences in the early 1990s. In 1995 the Harvard Law Review published an exchange between us on the desirability of the anti-discrimination laws, a topic on which we still disagree, and to which he has returned at this conference.² I am happy that he became my colleague at the University of Chicago in 2007. Fourth on the list is Lee Anne Fennell, whom I met when she interviewed for a position as a Bigelow Teaching Fellow

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1. This article is an extended revision of the remarks that I gave at the Tulsa Law Review symposium held in my honor. I have extended it for two reasons. The first involves my desire to give complete responses to the various positions presented in the papers. The second is that much of the original tape was marked unintelligible, but only because I did not speak into the microphone.

2. Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003 (1995); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws are Still a Mistake*, 108 Harv. L. Rev. 1085 (1995).

in winter of 1999. Ten years later I am thrilled that she is now a faculty colleague with whom I have worked closely, most recently in organizing a conference on state and local government that will be published in the winter of 2010 in the University of Chicago Law Review. Sixth on the list is Adam Mossoff, who was my research assistant at the University of Chicago from 2000 to 2001 and a student in my patents class the only time I taught the subject in the spring quarter of 2000. He was happy to contradict me then and remains happy to question my undue utilitarian leanings today. Sixth on the list is Cathy Sharkey, whom I met on the telephone when she rang me up while I was in residence at the Hoover Institution in January, 2003 to ask for my views on punitive damages for an article that she was writing for the Yale Law Journal.³ My initial impressions of her focus, determination, intelligence, and knowledge have not diminished with time. She will become my coeditor on the Tenth edition of *Cases and Materials on Torts*, which I inherited from Charles Gregory and Harry Kalven Jr. with the Third Edition, which was published in 1977. Seventh is Michelle Goodwin, whom I met after I wrote a favorable blurb on her book *Black Markets: The Supply & Demand of Body Parts* in 2005. She and I have since worked together on numerous occasions in the effort to liberalize the prohibitions against the use of financial incentives to increase the supply of organs. I have been of course more than pleased to meet Marla Mansfield, along with her splendid dean, Janet Koven Levit, and other members of The University of Tulsa College of Law Faculty. And a word of thanks goes to the energetic Editor-in-Chief of the Tulsa Law Review, Samantha Sierakowski Marshall, and her able staff who have served as such attentive hosts for all the conference participants.

It should, of course, come as no surprise that I treasure my many friends that I have made over my academic career. But it has been remarked to me on more than one occasion that my strong instincts toward sociability are inconsistent with the individualism that is said to underlie my libertarian, or more accurately, classical liberal philosophy. That charge, however, gets my personality about right, but misses the key features of my basic position, which I will take just a moment to dispel before returning a more complete statement of my approach to academic work and a close discussion of the points raised in these conference papers. Thinkers in the broad libertarian tradition do not start with abstract views of the law. Rather, they let these judgments about the content of legal rules be shaped by their underlying conception of human nature. Accurately portrayed, that conception does not treat all persons as having the identical traits, tastes, or abilities. More concretely, it starts with two modestly optimistic propositions. The first is that the variations in key human features increase the possibility of gain through trade. The second is that the variation in temperament falsifies the Hobbesian proposition that all individuals will behave very badly all the time. Rather, the trait of self-interest is also subject to variation, and, fortunately, most people will behave pretty well most of the time.

Faced with this natural diversity, the question is how to get the most out of the good and to control the bad. In framing these assumptions, libertarian theory places a good deal of stress on the notion of personal autonomy or self-rule. But it does not do so

3. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003).

on the false assumption that most people want to live alone. Rather it starts with this baseline of personal autonomy out of the knowledge that, given limited psychological and material resources, all people will need to develop two different kinds of relationships in this world. One, the property type applies to the huge majority of human beings about whom we have to erect a giant “Keep Off” sign, signaling the need for separation among people. General relationships with anonymous individuals have to be clear and well understood. And they must require low psychological commitments given the number of persons involved. Two, that “Keep Off” sign does not mean that everyone wants to slam the door shut on all who would like to enter. Rather, it means that each person wants to choose those few individuals for whom the door will open from the remainder for whom it will remain closed. Sociability starts with the ability to select people with whom to form close and reciprocal relations. All people need that form of support and the autonomy principle is one way in which they can get it. The voluntary sorting of persons is not confined to businesses, but extends to other forms of voluntary associations, such as clubs and churches.

I have always sought to take advantage of this ability to freely associate with others who were willing to associate with me. I was proud when I started teaching at age 25 that I could make friends with people who were 25 and 30 years or more my senior, and proud today that I can become friends with people who are 25 and 30 years or more my junior. It is only a bit disconcerting that many of my friends and colleagues are, well, the age of my children. But in order to choose your friends and colleagues well, and to keep them as friend and colleagues, you have to follow principles of reciprocity. You have to learn from them; you have to treat them as your intellectual equals from whose specialized knowledge you can profit. You have, as it were, to learn to keep up to date not only by reading books and attending conferences, but also by talking in the corridors and over lunch. Intellectual depreciation is the hidden peril of the academic life, which must be resisted each and every day. Somebody asked me how I think of myself in terms of academic worth. My answer is that I am, well, sort of a rebuilt—constantly rebuilt—IBM 360 computer. That machine was state of the art when I started teaching 40 plus years ago. The academic challenge is to upgrade that large, clunky, and slow machine to allow me to both cooperate and compete with these new scholars armed with a web savvy that I cannot hope to match. Put otherwise, it is critical to avoid what I like to call intellectual glaucoma, or the constant narrowing of vision that creeps in if you do not constantly expose yourself to new challenges. Unless you are willing to make new investments in intellectual capital, you will lose your intellectual appetite and your intellectual edge. There may never be some defining moment when you gain your fundamental insights. So do not wait for inspiration. Persistence matters. You must never put yourself into the situation where you think, “Well, what is it that I’m supposed to do today?” The teacher who impressed that upon me most was the brilliant but sometimes gloomy Marvin Chirelstein, then of the Yale Law School, who had the rare ability to deflate the false optimism of the young. I can still recall when in the early fall of 1967 he came into a classroom session at the Yale Law School filled with many students who thought they wanted a career in teaching. As we eager beavers sat ready to be praised, Marvin—I can call him that now because we are still friends—stood up and

set us straight. I can almost hear his words today. "I want to tell you about what really makes the difference in your teaching career. It is the fear of the empty desk. Come into the room, start looking around, you do not have anything that you want to write about. So you fill your desk up by working on this faculty business matter or that group project. As you divert your energies, you know that the desk is really still empty because you're not doing any scholarship. Procrastination and civic responsibility can consume a career." It was pretty chilling stuff. Everyone in the room was suitably deflated.

Nor was Chirelstein alone in his somber warnings. In fact he may have learned his lesson as a law student at the University of Chicago, where he had to be exposed to my late and wonderful colleague, Bernie Meltzer, who told me when I arrived at Chicago at the ripe old age of 29, "Brother Epstein, you can't publish excuses," which, trembling, I took to heart. But producing something, scholarship, out of nothing, inchoate ideas, is a daunting process. What character traits and strategies help push the process along? Broadly speaking, there are two virtues that bear special mention, one of which is surely positive, and the second of which I regard as positive even though many other people do not.

The virtue that everybody appreciates is curiosity. One way to undermine an academic career at the outset is to be unduly instrumental in deciding what to learn. If a topic is interesting, learn something about it, and do not worry about how you will use it in later life. Let the pieces come together over time, but never place blinders on the acquisition of information. It is not possible to assess the relevance of information that you do not know.

Let me give you an object lesson from my own life. Roman law has been one of my great academic passions since my wayward career started at Oriel College Oxford in the fall of 1964, where my tutor was Alan Watson. I had no idea why I had to study Roman law, but I was quite happy to presume its relevance, without knowing quite why. In the years that have followed, I have taught Roman law numerous times. As I have grown older, I have come to realize that its level of intellectual and practical sophistication is really quite phenomenal. Curiosity gave me the edge of what is sometimes called product differentiation. Through no credit of my own, I enjoy a quasi-monopoly academic position on Roman law in the United States. It is one of my quiet sources of pride that the University of Chicago students sense that it is a subject that they should learn about. This past spring I had over a hundred students sign up for a seminar that could only hold 26 students. And it was great fun to explain how the Roman emphasis on formal contracts—in particular its three different types of suretyship contracts, give us a real insight into the need for standardization for modern financial arrangements.⁴ And in speaking about the interpretation rules that the Romans brought

4. A word of explanation is appropriate here. One feature of Roman law is that there are only a few places in which it explicitly treats its basic rules as default provisions. In many cases, no such options appear, including the three different contracts of suretyship. See *Gaius Institutes*, Part 3, http://www.constitution.org/sps/sps01_2-3.htm (last accessed Sept. 27, 2009). Of these three forms two, sponsor and *fideicommissio* have the same substantive provisions which allow, roughly speaking, each guarantee to limit liability to a pro rata share of the total guarantee in the case of multiple sponsors. The two forms are necessary because contracts using the term sponsor are limited to Roman citizens, which meant that the second term was needed to extend the guarantee to noncitizens, which could be important in commercial

to their tort-like statute, the *Lex Aquilia*,⁵ they anticipated the most sophisticated views of American constitutional interpretation on the one hand,⁶ and some thorny issues on the conversion of domain names on the other.⁷ The more curious you are the more connections you can see.

The second trait that is extremely important about academics is superficiality. Why would I put forward this contrarian position as a quintessential academic virtue? It is basically a dramatic way of saying a point all of us seem to understand but sometimes fear to articulate to ourselves. There quickly comes a point when it pays for you to stop doing research and start writing. The preliminary phase of research often goes on too long and becomes a crutch for avoiding hard thought. And people constantly say, "Well, I can't begin to write until I have mastered a field." But oddly enough it takes a certain degree of courage to sit down and say, "I don't know everything about this area but I have the germ of an idea, which is distinctive. I am not quite sure where the road will lead, but I can only find that out by starting out by using my best instincts." At this point if you are attuned to your subject, you hope that some "flow" will kick in because you have overcome the inertia of remaining idle. And as the thoughts start to fall into place, research starts to have a real focus. You know what you are looking for and find that a direct inquiry to answer a particular question beats the endless collection of data by dragnet searches that happen when your topic lacks a thesis.

Superficiality is also important in teaching. One of the reasons why I think that young faculty members should teach around the curriculum is to get a broad exposure to different fields that will allow them to see connections that you cannot perceive if you concentrate all your efforts in a single field. Narrower and deeper can easily become too narrow and too deep. So even at this stage in my life I have made it a point to always try new courses, and true to form I took a shot at teaching antitrust, administrative and environmental law in the past two years.

This range of materials allows you to expand from an initial base of strength into other areas. When I started out teaching my late father, Bernard, a radiologist who wrote extensively in his field, propounded the "shingle theory of scholarship." Think of your academic field as a roof, he said. When you write your first paper, it is as if you have put your first shingle on the roof. The challenge in covering the roof is to make sure that there is some overlap between that first shingle and the second. But by the same token that second shingle has to cover some portion of the roof that was not covered by the first. And what works for the second shingle should guide you to the third. You have to constantly return to old themes and to extend your work to new ones. And the only way

settings. See *id.* The rules for *fideiussors* were different. They could not prorate. The clever point here is this: since there are multiple guarantors, a way has to be found so that once people knew how many others had signed on, they could calculate their risk. Having fixed terms helps with the notice function. And having two different forms introduces freedom of contract, not by allowing ad hoc variations, but by allowing the choice of forms. Note that modern securitization agreements also have to insist on standardization for much the same reason.

5. Justinian Digest, bk. 9, tit. 2. The *Lex Aquilia* is reproduced in full in F. H. Lawson, *Negligence in the Civil Law* 80–137 (Oxford: Clarendon Press 1950). I have used Lawson's translations.

6. For a discussion, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. Rev. 699 (1992).

7. See Richard A. Epstein, *The Roman Law of Cyberconversion*, 1 Mich. St. L. Rev. 103 (2005).

that you can increase that coverage is to invest in new ideas and areas. You can cover a lot of area on the roof if you can lay 100 shingles in a coherent fashion.

Forcing yourself in over your head with new courses is a good way in which to expand your range of discourse. It is also a good way to preserve some intellectual continuity in your work. There is no question that the Richard Epstein of 2009 does not have precisely the same world view as the Richard Epstein of 1968. The earlier version was, if anything, more libertarian than the later version. He was also more of a natural rights deontologist and less of a consistent economic consequentialist. But that said, there is the same kind of resistance to ad hoc rules that play on the admitted foibles of human nature. Both Epsteins were (and are) deeply suspicious of individuals or groups who think that their position is “special.” Because it turns out that everyone is special, and whenever we allow farmers or urban dwellers or old people or minorities or women or disabled people to force special claims on the system as a whole, their private gains will tend to come at very high prices to those who are asked, against their will, to foot the bill. It is therefore not surprising that the Richard Epstein of 1968 would have been as leery of behavioral economics as the Richard Epstein of today.⁸

Yet it is important to see some evolution and growth as well. In my case, a lot of the shift is driven by changes in the type of cases that were under review, so that the earlier work becomes, as it were, a special case within the newer work. Stated otherwise, the libertarian models work best in connection with two-party disputes, which with caution could be generated to cover somewhat more complex situations such as assignments in contracts and joint causation in torts. Subject to these caveats, the rules against aggression and in favor of cooperation covered a very large part of the relevant landscape. Cases of restitution were usually to undo the consequences of mistaken transfers and the like. But these paradigms do not carry over easily to the major collective action questions that arise in dealing with network industries and common pool problems, to which I (along with everyone else) turned after the initial burst in law and economics ran its course in the mid-1970s.

It is therefore comforting to know that the older results continue to work well in their chosen area, even if they cannot extend to more complex social systems with lots of moving parts. It would indeed be a frightening prospect if an ordinary accident or partnership dispute could only be resolved by calling out the heavy artillery of economic analysis. An ability to justify conceptually the use of simple rules to deal with these issues is a great step forward in helping the world organize itself. There is, for example, no reason to embark in an endless disquisition of the Hand formula of negligence in highway accidents when the question of right and wrong can usually be resolved by asking which party or parties have not followed the rules of the road, which are there precisely to prevent two people from crashing into each other head first at high speed. So it is more generally. It is critical to seek to incorporate new ideas, especially those from collateral disciplines, into your own work. But you do not want to always jettison

8. See e.g., Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. Chi. L. Rev. 111 (2006); Richard A. Epstein, *Second-Order Rationality*, reprinted in *Behavioral Public Finance* 355 (Edward J. McCaffery & Joel Slemrod eds., Russell Sage Found. 2006); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 Minn. L. Rev. 803 (2008).

the core results of your earlier work. It may well be, for example, that you cannot be content with the Roman appeals to *naturalis ratio*—the reason of nature⁹—to solve key problem, but it would be a mistake to assume that the inadequate defense of, say, the right to self-defense meant that we should discard the legal superstructure because it rests on rickety philosophical foundations. That is in general an unwise approach. The test of durability really matters on these affairs. Rules that have lasted a long time in all sorts of different societies have an internal staying power and logic that may escape the early lawyers who articulated these principles. But the better instinct is to figure out how to reconstruct the foundation. It is not to rip down the superstructure without having a clear idea of what should be put in its place. There are at least some cases in which abstract reason should yield to custom. And the constant effort to build applied economics into the structure of ordinary tort rules represents in my view one of the great misguided ventures of the modern age.

So much for the question of general methodology. But how does it work in individual cases? It all goes back to that word “flow,” because frankly I do not know how it is that the moving parts come together. Nor do I understand why this approach tends to lead me quickly to take contrarian positions on everything from the structure of tort law and the wisdom of anti-discrimination law to the modest hypothesis that the Takings Clause invalidates the New Deal, root and branch, which actually came as something of a surprise to me as well. But there are dangers, as well as gains, from starting an essay only to find that by page 2 you are already off on one of your many tangents. But so long as you can sing or whistle while you are working, then all is well.

I. THE PAPERS

The second task of this essay is to address the excellent papers that have been contributed to this Symposium. Needless to say, I shall acknowledge points of agreements only in the abstract and stress friendly disagreements on matters of nuance and detail. In talking about these questions, there is always the question of order. For these purposes, I shall start from the abstract and move to the concrete. In dealing with these issues, it is important to wear two hats at the same time. The first asks about how various legal institutions should be put together in ideal circumstances. That inquiry tends to be broad and philosophical. But a second question places equal demands on our imagination. Quite simply, how does one approach the difficult question of legal transitions from a set of legal arrangements that may be less than ideal as a matter of first principles? This is no small task, for it is easy in academics to underestimate the power of inertia. The people tend to cluster about the current and conventional ways of doing business, so it takes a large social consensus to move away from the status quo. Put otherwise, the United States economy is a large ship of state that does not handle well on choppy seas. Any one person or group who can alter its course by a single degree in one direction or another has had a profound impact, whether for good or evil. For the

9. See e.g. Lawson, *supra* n. 5, at 81. “So if I kill your slave who is laying in wait to rob me, I shall be safe: for natural reason allows a person to defend himself against danger.” *Id.* Note that the reference to slaves arises because the *Lex Aquilia* only protected owners from damages to slaves. The principle, however, easily survives the abolition of slavery.

conscientious scholar, the tension between these two perspectives presents a real challenge. It is important to remain true to first principles; yet it is equally important to be sensitive to the distinctive features of the present situation. Transitional justice requires a subtle mixture of high principle and contextual awareness.

These thoughts are sparked in part by Cathy Sharkey's perceptive paper on the interaction between torts and administrative law.¹⁰ The topic has been brought to a head by the Supreme Court's recent decision in *Wyeth v. Levine*.¹¹ Cathy takes a view that could be read as an affirmation of the Aristotelian belief in the gold mean. Her position is the converse of the famous Barry Goldwater line that "extremism in the defense of liberty is no vice . . . [a]nd . . . moderation in the pursuit of justice is no virtue."¹² I too have to make peace on how to adjust means to goals. But in order for this reconciliation to work, it is critical to place some principled limitation on the permissible ends of government action. On this question of ends, my version of moderation is classical liberalism, which tries to steer a middle course between standard libertarian theory, which thinks that there is no collective action problem that human ingenuity cannot solve by voluntary arrangement, and large state social democratic politics, which treats income and wealth distribution as one of the many ends that the modern state is free to pursue.

The virtue of classical liberalism is that it justifies state action that goes beyond the prevention of the use of force and fraud by allowing for a limited but vital class of coercive transactions whereby the state imposes general regulation so long as its action leaves the individuals so coerced *better off* by their own lights than they would have been if the state had limited itself to the traditional libertarian tasks of controlling force and fraud. For this condition to be satisfied, it is critical to find some desired social end that could not be achieved by voluntary private agreements, no matter how cleverly constructed. That condition will never be satisfied in a world of private competition, which tends to drive resources to their highest valued uses. It is for this reason that non-regulation in labor markets is such a high priority for social reform in a society that is rife with intrusive regulation. Private agreements can create joint gains for the parties and increase the opportunities for beneficial exchange enjoyed by third persons. Put otherwise, competition works extremely well in situations where private improvement by contract generates systematic positive externalities in the form of greater opportunities to third persons.

Such is the way in which matters ought to operate in a first best world, which suggests that there is a relatively small scope of action for the Food and Drug Administration. We are not, of course, in that world, and the question is what should be done to move us closer to that ideal, against, I might add, the powerful political forces that push heavily in the opposite direction. It is here that the tactical difference between Cathy and myself become apparent. My attitude is to declare war on the offending

10. Catherine Sharkey, 44 *Tulsa L. Rev.* 677 (2009).

11. 129 S. Ct. 1187 (2009).

12. Barry Goldwater, Speech, *Presidential Acceptance Speech at the Republican National Convention* (San Francisco, CA, July 16, 1964) (available at http://en.wikisource.org/wiki/Extremism_in_the_Defense_of_Liberty_Is_No_Vice).

institutions of the administrative state in order to bring them down.¹³ I am accordingly systematically unimpressed by arguments of the type that point to some inevitable imperfection in a world of voluntary arrangement. That result is simply a consequence of the law of large numbers. Any scheme that governs the behavior of thousands of individuals will be subject to that kind of criticism. The issue, however, is not the *existence* of these imperfections. The *frequency* and *severity* of the consequences of those decisions is the acid test. As my late, great colleague Wally Blum used to say on matters of legal administration of complex social institutions, 95% correct is perfection, which is the maxim is used when I dedicated my book *Simple Rules for a Complex World*¹⁴ to his memory. Quite simply, any effort to correct that pesky five-percent error rate runs the risk of unraveling all the good work that the basic rule does for the other 95% of the cases. Hence I tend not to take “pragmatic” solutions that seek to circumvent bright-line solutions.

So herein lies the difference between Cathy and myself. I always start with first principles, knowing that I could very well go down in flames, and she cautions me that the no court will buy my theory, even if correct. She thus sensibly concludes that it is critical for the diligent advocate and scholar to present halfway houses in which the court can comfortably reside. The difference here cashes out neatly with the preemption issues in *Wyeth v. Levine*. My view cashes out into a rigorous defense of the “field preemption” theory, which states in a word that the extensive regulation over drug labels in the FDA should rule out state tort causes of action based on the inadequacy of any drug label. The correct way to reach that result is *without* any detailed analysis of the content of the label or of the level of internal review that the FDA gave to the choice of label.¹⁵

Cathy, of course, has taken exactly the opposite position about these warnings. Sensing that the “field preemption” I defend is a dead loser in the case—Wyeth’s lawyer disclaimed any reliance on so toxic a theory—she turned to the more modest approach that allows the warning to stand on proof, not of its adequacy, but of a demonstration under her “agency reference model”¹⁶ that the FDA had seriously addressed the risk that arose in the case at hand, which surely should have been sufficient to justify a directed verdict for Wyeth against Levine. My concern with her approach is that it generates too many fact-dense inquiries to work well in hard cases. But at this point the differences between Cathy and myself seem small when set against the rousing boost to state tort law that Justice Stevens provided. I regard his decision as a great step backwards. Unfortunately I do not think that any word that either Cathy or I wrote could have slowed down the Stevens express. And the irony is, now that we both lost big, it is remains uncertain whether we are better off with my high risk/high return strategy or with Sharkey’s lower risk/lower return strategy—which is why federal preemption remains such a hot-button issue.

13. See e.g. Richard A. Epstein, *Against Permittitis: Why Voluntary Organizations Should Regulate the Use of Cancer Drugs*, 94 Minn. L. Rev. — (forthcoming 2009).

14. Richard A. Epstein, *Simple Rules for a Complex World* (Harv. U. Press 1995).

15. Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 Nw. U. L. Rev. 463 (2009).

16. Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 Nw. U. L. Rev. 437 (2009).

Cathy followed these same themes in speaking about the famous case of *Intel v. Hamidi*¹⁷ on which I have written perhaps too much,¹⁸ including an amicus curiae brief in defense of Intel, which was in fact the focal point of many of Justice Wedegar's comments in the case. My position throughout was that injunctive relief should be routinely available against any party who sought to enter a web site without the permission of its owner. To me the case was simply a matter of the right to exclude unauthorized users, which should extend from real estate to web sites. My argument was that these web sites should be considered fixed bases of operation that are connected to the network elements in cyberspace, much like buildings are connected to streets. In so doing I got embroiled in disputes with the dominant academic opinion, represented by Mark Lemley, which found that the older concepts did not travel well into the new context.¹⁹ Here again, the process of analogy should not be done uncritically. No matter how closely one looks at the situation, it is not possible to pinpoint some breakdown in applying the land-based distribution between private and common property to the Internet. Even with the strong injunctive protection, all persons on the web can get from one site to any other over the common elements that are protected within the system. The ability to exclude is the ability to coordinate private activities within the confines of the site, which itself frequently has many users. The intense day-to-day disruption of business at Intel as a result of Hamidi's email blasts count as real social losses, even if their amount could not be quantified in dollars. Indeed one standard justification for issuing an injunction is that it allows for the protection of property rights in just these difficult circumstances where damages are known to be large but hard to calculate. It is most unwise to mechanically apply the traditional rule that denies injunctive relief for trespass to chattels. The rare case that declined to award injunctive relief against trespass to chattels involved such activities as pulling the ears of a dog which can be whisked out of harm's way.²⁰ It takes a peculiarly rigid mind to think that this type of case should dominate the huge structural issues about the coordination of voluntary activity in cyberspace.

Judge Wedegar made yet another key mistake in *Hamidi* by misstating the relationship between injunctions and self-help. Two common situations in which injunctive relief is not awarded for physical damages involve airplane overflights and spectrum transmission over land. But there is a good reason for those rules, which is that the holdout potential from multiple ground owners would kill the operation of both the transportation and communication systems—which, of course, was never at stake in *Hamidi*. Indeed the key point of distinction between *Hamidi* and these cases is that in *Hamidi*, the court extolled the virtues of self-help, but no one in their right mind would ever allow self-help that would allow landowners to jam radio signals or fly drones in their upper-airspace. With transportation and communication, the law flips the property rights completely over to produce a large social gain. We deny self-help because we

17. *Intel Corp. v. Hamidi*, 71 P.3d 296, 309–11 (Cal. 2003).

18. Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace*, 1 J.L., Econ. & Policy 147 (2005); Richard A. Epstein, *Cybertrespass*, 70 U. Chi. L. Rev. 73 (2003).

19. See *Intel Corp.*, 71 P.3d. at 310–11.

20. *Restatement (Second) of Torts* § 218 cmt. e., illus. 2 (1997).

deny the injunction, and vice versa. In *Hamidi*, we allow self-help and should for that reason allow the injunction as well. The two remedies should always work in tandem. In *Hamidi* they are set needlessly at odds with each other.

These abstruse remedial questions relate to the central theme of Sharkey's paper. Reasonableness is a fine philosophical state of mind. But it does not work well in concrete situations in those contexts in which sharp boundary lines will allow the separate domains to function side by side. This insight quickly leads to a powerful theorem derived from economic theory: in general, you want boundary lines to set the initial allocation between parties. Reasonableness comes in as a *second order* matter only after *both* parties deviate from the original rules of the game. Consider the rules of the road. If one driver knows that a second has violated a traffic norm, he must adjust his conduct to take into account her dereliction, which can be done because the choices are made *sequentially*. Hence the last clear chance rules.²¹ But in most cases the parties proceed independently and in ignorance of what the other has done. In those cases, compliance with the rules of the road is all that can be demanded. When both parties comply there is no accident. When one party complies, the other is fully responsible. Where both are in breach, they divide the loss, usually equally. Since the rules are well established, you do not have to face the implicit Coasean problem that every case is really one of joint causation. So the simpler approach lets you 98% of the cases right. That said, you can live with some margin of error in the other 2% of cases, most of which will not be brain teasers in any event. In most cases being reasonable is being categorical. The wisdom comes in knowing how to fashion the right categorical rules, and when to deviate from them.

My approach does not only run into trouble from the defenders of the modern administrative state. That outlook also takes heat from scholars like Adam Mossoff, whose own views are, if anything, a bit more small-state than my own. My admiration for Adam dates from the time he wrote his first paper for the *Hastings Law Journal* about the role of patents in the formative English period, where they had functioned to create monopolies in the *importation* of goods that were first invented elsewhere.²² In addition, he has forcefully put forward the proposition that the modern protection of copyrights and patents are profound expressions of John Locke's labor theory of value, which he reads in the natural law and not in the utilitarian tradition.²³ It is always important to examine the history and the philosophical foundations of any social institutions as Adam does here. Indeed one reason why I sometimes despair of recent Supreme Court decisions on intellectual property, of which *eBay, Inc. v. MercExchange, LLC*,²⁴ is perhaps the leading example, is the common impatience that they show toward any effort to link decisions in intellectual property to property rights anywhere, a dangerous attitude that Mossoff has rightly called "Internet Exceptionalism."²⁵ Not surprisingly, there is an

21. See *id.* at §§ 479–80.

22. Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 *Hastings L.J.* 1255 (2001).

23. See Adam Mossoff, *Is Copyright Property?* 42 *S.D. L. Rev.* 29 (2005).

24. 547 U.S. 388 (2006).

25. Mossoff, *supra* n. 23, at 29.

erie similarity between the *Hamidi* and the *eBay* decisions. Unfortunately for *eBay*, as the reluctance to issue injunctions increases, the disruption of voluntary markets continues apace, so much so that it becomes difficult to maintain a comprehensive program of nonexclusive licenses if injunctions cannot be issued as a matter of course against infringers who obtain competitive advantage by daring a patent holder to sue.

One bad consequence of the reluctance to protect patentees who license products for production by others is to force them to change their mode of doing business by vertically integrating in order to keep their right to injunctive relief. Conversely, a key advantage of the strong injunction rule is that it does not distort the incentives that any firm faces in deciding whether to make or license a product, which allows firms who have comparative advantages in invention and design to specialize in that work. No one claims, of course, that injunctions should always issue on proof of patent infringement. There are cases where the infringing patent is a small stone in a large mosaic, and in these cases the mark of prudence calls for two limited deviations from the automatic injunction rule. The first of these is to let all sold units remain in the marketplace. The second is to delay the injunction against future use to allow the firm to design a workaround—or to negotiate a favorable license by making the threat to do so. The parallel rule on land encroachments does not rip down huge buildings because one tiny bit located in the middle of the structure is owned by a party of whom the builder did not have knowledge. We can balance equities to allow for these cases, but should do so against the strong background presumption that treats the injunction as the remedy of course unless and until strong circumstances for deviation are present.

Adam's distinctive contribution in this article relates to the role of antitrust prohibitions against the enforcement of the (patent) monopoly. As usual, my view is that there is no reason to think that patents should be subject to special rules that do not apply to other kinds of horizontal and vertical arrangements.²⁶ So we should start from the view that horizontal restraints—price fixing and territorial divisions by players at the same level of distribution—should be subject to strong presumptions of illegality given the social losses from monopoly. Horizontal mergers are a closer case because they often give rise to operational efficiencies that offset the increased monopoly power. But the monopolization theories under Section 2 of the Sherman Act apply to vertical behaviors, i.e. different functions from production through distribution undertaken by a single firm. In dealing with these integrated operations, the question is whether it is possible to identify the *unilateral* conduct of single firms as a source of social distortion. This preoccupation is far too much in vogue today and often leads to government actions that produce the types of anti-competitive activities that the antitrust laws were intended to prevent. To give but one example, vertical integration among complementary goods is likely to have an enormous competitive advantage in eliminating the so-called double marginalization problem, whereby the holdout position of successive patent monopolies produces the same counterproductive results that one observes with endless toll bridges on the Rhine River: too little travel. So, unless we understand the economic differences

26. For an extended discussion, see Richard A. Epstein, *The Disintegration of Intellectual Property*, 62 Stan. L. Rev. __ (forthcoming 2010).

between horizontal and vertical arrangements, we shall never get our public policy right.

In light of these arguments, I am pleased to learn that the nineteenth century history of patent pooling tracks the arguments that I have given. The one source of difference, arguably, between Mossoff and myself is whether the application of any antitrust liability itself will cloud the area, as he suggests. My inclination is to think not. The current antitrust pooling rules stress that pools that cover complements are desirable because they reduce holdout problems. In contrast, pools that include substitutes are not desirable, precisely because they increase the risk of monopolization.²⁷ Complex pooling arrangements always present close cases. Nonetheless, in this context the strong acceptance of these rules on all sides is at least some testimony to their general soundness. The successful integration of an antitrust law into ordinary property and service arrangements suggest that the same should be possible as well with intellectual property.

My colleague Douglas Baird discusses yet another useful way to look at legal analysis, which takes its cue from Oliver Wendell Holmes, Jr. and his famous talk, "The Path of the Law."²⁸ Holmes's wonderful metaphor urges us to evaluate legal rules from the point of view of the "bad man" who is anxious to evade their constraints. His form of super-realism suggests that the sole function of legal rules is to block unwanted behavior, not to guide individuals who wish to do the right thing even if it goes against their short-term interest. Within the framework of contract law, the tension often plays itself out in connection with the modern literature on so-called efficient breach, where the argument is made, following Holmes, that the only sanction that the law should impose on the breaching party is to pay expectation damages that leave the innocent party as well off as he would have been through performance. Otherwise, if there are gains to be made from breaching, they belong to the breaching party. One side, we are told, is left as well off as before, and the other is left better off, so we have a strict Pareto improvement. What's not to like?

Frankly, everything. The first drawback of this approach is that the law of expectation does not have the matchless precision claimed for it by defenders of efficient breach theory. There are all sorts of damages that are impossible to estimate, involving potential profits on resale and loss of good will, which are commonly excluded from contract damages as too speculative. The situation only gets worse when multiple contracts work in series, because one breach cascades whereby party after party cannot deliver its outputs because it has not received its inputs in timely fashion. No one needs to foster the disintegration of valuable social networks, which is why the social sanctions against deliberate breachers are so strong.

That same sentiment is evident in the drafting of contracts as well. It is clear that most parties do not adopt expectation measures of damages in many contexts but choose

27. For a recent review, see Gerald F. Masoudi, Dep. Asst. U.S. Atty. Gen., Address, *Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct* (Arlington, Va., Oct. 11, 2007) (transcript available at <http://www.usdoj.gov/atr/public/speeches/227137.htm> (last accessed Sept. 14, 2009)) (SDO stands for standard development organizations).

28. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). Its most famous modern exponent is Richard A. Posner. See Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 Mich. L. Rev. 1349 (2009).

other formulas, often having some component of liquidated damages. In addition, the willingness to grant specific performance in some cases, e.g. land contracts, and injunctions against the breaching party from working elsewhere, e.g. service contracts, shows that the Holmesian position is not an accurate barometer of the positive common law, at least understood to include the *in personam* remedies once issued by courts of equity. In effect these remedial choices in contract parallel the earlier discussion of *Hamidi* and *eBay*. Prevent the train from running off the rails if at all possible rather than using hopeless damage remedies to clean up, at great public expense, the mess after the train has been derailed.

These observations do not mean that we should ignore the problem of the bad man. As Douglas makes it clear, anyone who designs a contract has to prepare for the worst even as he hopes for the best. We must, as it were, stress test our contracts, hopefully in a more efficient way than the government stress tests our banks. To be sure, the first line of defense is the choice of a suitable contracting partner. But that is not enough to do the trick by itself. Indeed the entire law of real and personal security is predicated on the melancholy proposition that those who hope for performance will improve the odds by preparing for breach. So each of us, confident in our own virtue, prepares for the worst in our fellow man; some of us are right about ourselves some of the time, but only some of the time. There are people who will stay up nights to perform a losing contract because it is right to do so, and there are those who will always eagerly look to find ways to skirt their obligations even when they would otherwise come out ahead. Holmes should be thanked for keeping that issue on the table. Baird should be thanked for keeping it in perspective.

Let me next turn to the paper prepared by Robert Ellickson, my long-time friend from our days together at the University of Southern California. Bob and I have the habit of bringing what we think to be different philosophical outlooks to problems only to discover that we usually agree on outcomes nonetheless. Over twenty years ago Bob and I participated in a conference on real property held at the Washington University School of Law. There we both wrote on the topic of adverse possession.²⁹ Bob did a wonderful job in explaining the tension that we have between the desire to prevent sound titles from being upset by frivolous claims while still allowing invalid titles to be subject to their attack. In so doing he took a leaf from a famous early article by Henry Ballantine, which made it clear that the great purpose of adverse possession lay not in the detailed rules used for resolving particular suits to recover real property. Rather its "great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and to correct errors in conveyancing."³⁰ A similar ability to get to the institutional heart of an arrangement is something that makes Bob's scholarship so strong and systematic.

In his contribution to this volume, Bob starts off by noting the four different strands of conservative-libertarian thought, which he denominates as libertarianism,

29. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667 (1986); Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 Wash. U. L.Q. 723 (1986).

30. Henry Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135, 135 (1918).

utilitarianism, Burkeanism, and federalism. The first two of these are surely the dominant motifs in my thinking because they are the tools by which we decide on the proper set of legal rules that we would like to have in an ideal society. Early in my career I was more impressed with the differences between libertarianism and utilitarianism than with their similarities. Thus in my 1973 article, *A Theory of Strict Liability*, I stressed these differences in connection with the duty to rescue—noting that no one has ever used either a strict liability system or a Hand formula negligence approach to impose tort liability for the failure to rescue.³¹ But with age comes some change of heart, and my more recent efforts, as Bob has noted, involve efforts to use the utilitarian theory to explain the dominance of libertarian theory in ordinary small number cases—recognizing its limitation in network industry and common pool situations.

I think that this emphasis is correct, because the first task of legal theory is to explain where we should go. Only then can we turn to the question of how to get there. Burkeanism (which is not part of my repertoire) is in fact a theory of transitions from less to more desirable states, and thus says little about the desirable end points. In general I am sympathetic to Burke's basic point of view, but I have usually addressed the same concerns by speaking of the role that custom has in cases of torts and contract,³² and by defending a general Hayekian position about the importance of the evolution of norms within a field.³³ But even here there are further elements of caution, for the Hayekian model is often unable to deal with rapid shifts in external order that require a prompt response.³⁴ In addition, a theory that helps explain incremental changes in closed systems does not work as well on a larger social canvas, where often more conscious forms of legal change—think the United States Constitution—are required.³⁵ That said, no one can gainsay the role of custom and evolution in legal affairs. The only hard questions are to figure out where it works poorly or well, and why.

I have a similar attitude toward federalism. It is a second order consideration, which makes sense only after one understands the ultimate ends for which a government is established. Precisely because of its instrumental nature, it is a two-edged sword. In some instances federalism is a virtue, in that it promotes competition between states in the provision of government services, which tends to curb the risk of abuse. And in other instances federalism is something of a vice, because it allows a single state to use direct regulation or various taxes to disrupt nationwide networks in transportation and communication. One reason why I have been such a consistent defender of the pre-1937 constitutional interpretation of the Commerce Clause is that it seemed to understand both the weaknesses and the strengths of the federalist system, by acknowledging the need of a federal government to keep channels of interstate communication and transportation

31. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Leg. Stud. 151, 198–200 (1973).

32. See Richard A. Epstein, *The Path to the T.J. Hooper: Of Custom and Due Care*, 21 J. Leg. Stud. 1, 1–2 (1992).

33. See Richard A. Epstein, *The Uses and Limits of Local Knowledge: A Cautionary Note on Hayek*, 1 N.Y.U. J. L. & Liberty 205 (2005); Richard A. Epstein, *Hayekian Socialism*, 58 Md. L. Rev. 271 (1999) [hereinafter Epstein, *Hayekian Socialism*].

34. See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 Va. L. Rev. 85 (1992).

35. Epstein, *Hayekian Socialism*, *supra* n. 33, at 282–83.

open while preventing needless federal regulation of such activities as manufacture and agriculture where state competition offers a vital bulwark against the risk of government sponsored monopoly.³⁶ It is an ugly truth that the two major cases that solidified the modern expansion of the Commerce Clause both maintained destructive private cartels through national intervention. Thus *NLRB v. Jones & Laughlin Steel*³⁷ worked this transformation in American labor law, and *Wickard v. Filburn*³⁸ did the same for agriculture.

In his contribution, however, Bob does not ask about the direct power of the federal government to regulate. Instead he asks a question that relates to the proper relationship of the Takings Clause to state action, here in conjunction with the most notorious takings case in recent years, *Kelo v. City of New London*,³⁹ in which the Supreme Court refused to invoke the public use language of the Takings Clause to block the City of New London's efforts to condemn homes for undifferentiated redevelopment purposes. Bob's own stated position relies heavily on federalism because he thinks that it is appropriate for a state court to apply its own constitutional prohibition to limit local land use abuses, but less so for the federal government to intervene in state affairs, given its tendency to disrupt the decentralizing forces of federalism. His position has an honorable tradition, and was invoked years ago by Ernst Freund in his critique of *Lochner v. New York*.⁴⁰ Freund would have allowed New York courts to strike down the maximum hours legislation, but not the national government.

I confess that I am on the opposite end of the debate from Bob on this issue. The first point to note here is that the federal interference with local affairs under the Fourteenth Amendment is of a different order from the federal role under the Commerce Clause. The Commerce Clause challenges were initiatives of federal government to regulate local affairs, which necessarily pushed aside all state regulation under the Supremacy Clause of the Constitution. That form of national control does facilitate the use of monopoly power, as just noted. But Fourteenth Amendment challenges leave the state free to initiate its own reforms and only intervene when those efforts cross constitutional boundaries. In real estate cases, for example, the Fourteenth Amendment never lets the federal government order the condemnation of local lands or levy taxes to fund the compensation. Those remain exclusively state functions.

Nor is there any reason to think that this federal oversight of state affairs is not authorized under the Constitution. Section 1 of the Fourteenth Amendment contains three broad clauses that allows both Congress and the courts to limit the exercise of state powers over local persons. The Privileges or Immunities Clause applies to citizens only, while Equal Protection and Due Process apply to all persons. It is no stretch to think that the prohibitions on takings are an important part of those constitutional protections. So it is no surprise that some version of the Takings Clause has long applied to states since the 1897 decision of the Supreme Court in *Chicago, Quincy & Burlington RR v. City of*

36. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987).

37. 301 U.S. 1, 49 (1937).

38. 317 U.S. 111, 133 (1942).

39. 545 U.S. 469, 489–90 (2005).

40. Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 Green Bag 411 (1905).

Chicago,⁴¹ used the Due Process Clause toward that end.

The forms of federal intervention under the Fourteenth Amendment need not strike out in novel directions. The Connecticut trial court split the baby in a thoughtful decision, allowing the City to condemn those properties that lay in the core of the development zone while sparing those which lay on the periphery.⁴² It was only the astonishingly deferential decision of the Connecticut Supreme Court that set the stage for *Kelo*'s broad sweep.⁴³ Owing to the multiple impulses that shape our attitudes towards federalism, there is much that is attractive about the intermediate position that imposes some of the protections of the original Bill of Rights against the states. It makes good sense therefore to read identical provisions in the federal and state constitution the same way, or at least to avoid the conscious differentiation between them. Bob's strong federalism position requires a dual reading of not only the public use language of the Fifth Amendment, but of every guarantee contained in the Bill of Rights. No system of federalism should require that uneasy dualism.

Marla Mansfield has also written on a property topic, focusing on work that I have done on the temporal dimension in property law,⁴⁴ which she uses as a window for a more systematic explanation of my general views on takings. Her summary rightly captures the essentials of my position, which starts from the naïve assumption that the meaning of the phrase "X has taken private property" has the same meaning whether X is a private person acting on his own accord or the state acting on its own behalf or the behalf of its citizens. This essential linguistic parity means that people cannot engage in a form of political arbitrage whereby they hope that state action will be subject to less stringent requirements for public use and compensation than they would face if they acted through the judicial system on their own behalf, without the support of political institutions.

The next move is to note that all sorts of things that aren't quite takings are nonetheless treated as tantamount to takings under the private law. One example is the destruction of property when the government does not take title to it. Another is the wide range of strategies whereby the government takes a partial interest in land, say, by imposing a lien or a restrictive covenant on otherwise unencumbered property for which it seeks to avoid compensation. In general, I think that these efforts should receive a mixed reception. It is a mistake to insulate "mere" regulations from constitutional review on a priori grounds, as if they did not constitute a taking of private property. That was the horrific mistake of Justice Brennan in *Penn Central Transp. Co. v. City of New York*,⁴⁵ whose confused analysis has regrettably become the single most influential decision on regulatory takings in modern times. The argument that Justice Brennan put forward for using a highly deferential standard to evaluate these so-called regulatory takings is that losses from regulation should be treated as though they were equivalent to

41. 166 U.S. 226, 241 (1897).

42. *Kelo v. City of New London*, 2002 WL 500238 (Conn. Super. Mar. 13, 2002), *rev'd in part and aff'd in part*, 843 A.2d 500 (Conn. 2004).

43. *Kelo*, 843 A.2d at 569–74.

44. See generally Epstein, *supra* n. 29.

45. 438 U.S. 104, 138 (1978).

non-compensable losses from private competition.

That proposed equivalence fails in all cases because the losses from competition do not involve a restriction on anyone's use of property rights, so that the overall social situation is far better off if we allow competition to flourish than if we shut it down altogether. Restrictive covenants have a very different pedigree. In some instances they serve legitimate police power functions to prevent serious risks of health and safety to other individuals. But all too often they are simply yet another tool in the large arsenal of government devices that cause massive loss for some persons in order to obtain a smaller, but still substantial gain, for others.

The correct approach therefore is not to allow the clever demotion of air rights into some mere non-compensable expectation. Rather it is to concede that the restriction on the use of air rights infringes a private interest fully protected under New York law, and to ask whether the city has supplied either explicit or implicit compensation for its loss. The former is nowhere in evidence, and the latter is not credible in cases where individual plots of land are singled out for special treatment on what is ultimately a spot zoning type situation. There is nothing untoward in asking governments to buy air rights if it wants to keep them unused. And it is all to the social good to make the government refrain from imposing land use restrictions on private owners that cost more than they are worth. All too common is the social calculus that takes into account only the (supposed) gains to non-owners. But any complete analysis treats with equal dignity the loss to the owner and the gains and losses to outsiders. The social calculus includes the individual; it is not used solely in opposition to it.

Marla gives a faithful account of my general skepticism about the excessive use of the "reasonable investment-backed expectations" language in *Penn Central*.⁴⁶ The term has no textual pedigree at all, and its use in this case is intended to create the false equivalence between the technical expectancy that an heir has in an inheritance, which could be cut off at any time by the future testator, and a property in air rights that no single person could unilaterally extinguish. After this introduction, she segues back to the temporal element in private property. That move brings to center stage the time-honored problem in both nuisance and takings law, namely, whether there ought to be a defense keyed to some notion of assumption of risk when the defendant's noxious use is established prior in time to the plaintiff's. This one issue goes a long way to shape the property rules that govern interactions between neighbors. After all, if the actions of the first to build establishes the reasonable expectations of those who come later, the state has a powerful weapon to curb development without facing financial exposure.

I think that this effort to build state regulatory power on the coming-to-the-nuisance is something of a mistake, because it misapprehends the way the defense operates in the private law when it takes these temporal elements into account. The starting point in the cases is *Sturges v. Bridgman*,⁴⁷ which critically turns on the very

46. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *Stan. L. Rev.* 1369 (1993).

47. 11 Ch. D. 852, 862–63 (1879). The case was the subject of analysis in Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1, 8–10 (1960). For a more complete version of this argument, see Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books

type of temporal analysis that Marla supplies. Consider a defendant's factory that emits noises and fumes onto vacant land owned by the plaintiff. What possible reason is there to enjoin activities that provides benefits on one side but causes no harm on the other? We do have to be aware of the risk of permanent physical damage to the land, which could happen from fumes, but rarely from noise. We also have to worry about harms to third persons, who might have their own standing to sue. But these complications were of no consequence in *Sturges*, which involved vibrations at a party wall. The real risk to the plaintiff in a *Sturges*-like scenario is that the statute of limitations will run, so that when the plaintiff commences a beneficial use of his own land, the traditional protection of the nuisance law will be lost. What Master of the Roles Jessel did in *Sturges* was to negate that risk by announcing that the statute of limitation did not run until the actual conflict began. That move allows the short term gains to be achieved without creating the long term exposure. And by the time that the plaintiff does convert his land to a normal, but sensitive use, the defendant has had the opportunity to retrofit his factory or perhaps switch to some other use that is more compatible with the activities within the neighborhood. I see nothing wrong with this particular pattern of development, which in its own way follows the same use of the delay when injunctions are issued in patent cases.

It is, however, important to recognize that these small adjustments at the margin do not require a wholesale revision of the basic system of property. In particular, they offer no solace to anyone who thinks that public land use regulation should be able to go beyond the limitations of the private law of nuisance and restrictive covenants. Those tendencies to excessive regulation are uniformly value-reducing. The ability to impose real losses without paying compensation gives too much power to the political branches. Their power to initiate changes by government coercion is something that no private party possesses. We can assume that it is needed to overcome the high-transaction costs barricades that often arise in land use situations, given the large number of private owners that could be influenced by a given initiative. But the creation of one extraordinary power in the government is quite enough. Those powers turn quite mischievous if they are not hemmed in by a duty to pay compensation to the individuals whose rights are taken. That of course does not require the government to compensate when it stops activities that the aggrieved private parties themselves could also stop as-of-right. Which is why the nuisance law is so important, because it affords the only means to demarcate the two classes of cases. If we let any more elaborate calculus take over, the delicate balance of eminent domain will be broken, with the adverse effects that are all too common in many communities today.

Lee Fennell's perceptive essay raises yet another set of critical issues for any legal system.⁴⁸ In two separate essays, written over 20 years apart, I have critiqued the various egalitarian efforts to use state power to cushion the adverse consequences of bad luck.⁴⁹ The starting point for this analysis is that it is perfectly appropriate on all sorts of

1998).

48. Lee Fennell, *Odds and Ends: An Epstein-Inspired Look at Luck*, 44 *Tulsa L. Rev.* 779 (2009).

49. Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 *Theoretical Inq. L.* 309 (2008) [hereinafter Epstein, *Decentralized Responses*]; Richard A. Epstein, *Luck*, 6 *Soc. Phil. & Policy* 17

moral and economic grounds to allow the state to assert its power to make one person pay for the harms that he inflicts upon another. These actions usually take place under the rubric of a simple corrective justice model, which can be fully defended for the social consequences it brings about in deterring harmful forms of behavior. Giving a remedy against the use of force to A, who has been hit by B, does more than advance the individual interests of A. It also advances a powerful social interest by protecting all third persons who were dependent on the injured person for economic support and personal happiness.

The same confident conclusion cannot be reached, however, for government actions that simply seek to rectify the consequences of bad fortune brought about either by an individual's own neglect on the one hand or natural events on the other. These are much more frequent than tort-like behavior, and one should always be cautious about major interventions that seek to undo the effects of bad fortune through government coercion. Private forces stand ready to help those persons in need through no fault of their own, as is evident from private food drives and rescue efforts for people hurt in natural disasters, where no one is worried about moral hazard problems: people do not fake hurricanes or rush into their paths to get emergency relief. The same is true of the outpourings of support for persons born with birth defects or who suffer from childhood diseases. These private efforts may not be ideal, but government intervention is likely to cause more harm than good. There is the constant risk of capture by interest groups and the ever present risk of massive government incompetence of the sort that was all too prominent in the aftermath of Hurricane Katrina.

Lee's paper shows some sympathy with my skeptical position and notes, correctly, that my position rests on empirical assessments of the costs of intervention and not on some categorical rule that just treats all changes in individual or group positions based on luck or misfortune as being out of bounds. She then proceeds in two stages. The first is to indicate some ways in which my analysis of luck is (necessarily) incomplete. The second is to impose a novel twist on the work of Guido Calabresi in *The Costs of Accidents*.⁵⁰ As she constructs the social welfare function, the task of a legal system is to minimize the sum of the costs of "unbuffered luck" plus the costs of rectifying it through government intervention. It is clear that we are both working in the same church, and equally clear that we are not sitting in the same pew. Let me address both parts of the issue.

On the former, Fennell is surely correct when she outlines the devastating effects that adverse consequences can have on individuals who are ill-prepared to meet them. People suffer from insufficient liquid wealth to meet short term needs which in some cases they fail to anticipate. The real challenge is to evaluate the range of available responses. In approaching this problem, I think that the first step is to recognize that many government actions are counterproductive because they block an intelligent sharing of risk.

In particular, there is nothing about a coherent system of tort and contract law that

(1988).

50. Guido Calabresi, *The Costs of Accidents* 26-31 (Yale U. Press 1970).

prevents ordinary individuals from either retaining or laying off risk. Lee discusses the important case where sometimes individuals are forced to take the risks that they might not prefer to bear, which she discusses under the provocative title of “reverse insurance.”⁵¹ The key point to note here is that the corrective justice system starts with the protection of strangers against aggression, harm committed, as the Romans said, *corpore corpori*, or “to the body by the body.” But assumption of risk is a defense that is as old as the basic *prima facie* case, and in cooperative ventures nothing is more common, or more desirable, for individuals to take the risk of some harms in order to pave the way to the receipt of greater gains. Or they could do the opposite, by reducing uncertainty through contract in both good and bad states of the world. Indeed one of my constant criticisms of the modern system of law is that it so cabins the notion of assumption of risk, either by conduct or contract, that the legal system on such key issues as medical malpractice is locked into a high risk/high return system of liability that goes against the contractual grain, which is far closer to the workers’ compensation model of broad coverage and lower damages.⁵² So ironically, a stronger dose of market institutions can help dampen the adverse effects of bad luck, not only through ordinary insurance contracts, but through the risk-sharing devices that are found in ordinary contracts.

The use of contracts to control for bad luck does not cover the entire waterfront, for the financing and operation of public institutions, as Lee rightly insists, form an important piece of the overall picture. Lee is right to point out that no set of private practices can expunge the role of luck in public affairs. Police forces, she notes, defend both the strong and the weak alike, and do so when supported by public taxes, which are levied alike on those who have taken strong steps to make themselves self-sufficient and those who have let down their guard precisely because that public protection is there.⁵³ This point is surely correct because the police protection is a public good that has to be extended to one if it is extended to all. But it hardly counts as a condition that should be perpetuated if we can find better ways to price in the differential risks. Thus insurance programs that set the same rates for all individuals are badly designed schemes, which is why private insurance programs give deductions for people who install burglar alarms or take other precautions against loss, a point which she acknowledges.⁵⁴ Lee is also correct to note that prudent investments can go awry because of bad luck, but present public bailout proposals to ease the burdens of these financial reversals are so fraught with the risk of political abuse that it is better to let them slide. There is little reason here to speak at length of the Chrysler and General Motors bankruptcy, but it is worth noting that both featured persistent efforts by the United States Treasury to enrich the position

51. Fennell, *supra* n. 48, at 801 (citing Robert Cooter & Ariel Porot, *Anti-Insurance*, 31 J. Leg. Stud. 203 (2002)). As she explains it, this involves giving up the right sue for actual or punitive damages in exchange for a lower price for a product.

52. See Richard A. Epstein, *The Historical Origins and Economic Structure of Workers’ Compensation Law*, 16 Ga. L. Rev. 775 (1982) (noting the deviation from the tort model). See also Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. Legal Stud. 105 (1989) (arguing that *ex ante* maximization under contract often precludes *ex post* use of the expectation measure of damages).

53. Fennell, *supra* n. 48, at 792.

54. *Id.* at 793.

of present and former members of the United Auto Workers against other individuals who were similarly situated.⁵⁵ Of course it is nice to help some individuals whose pension funds are strapped. But it is not so nice to remove the protection from secured creditors, which often represent the investments of other pension funds whose members have been stripped systematically of their protection. Empathy towards all does not answer the question of how priorities should be set when there is not enough to go around to satisfy all creditors simultaneously. At that point the preexisting distributions should be protected, which cannot happen when a weak system of protection for private property—the takings problem again—allow too much room for political intervention.

Obviously, I rate the collective action problems of political behavior higher than she does. At one point, she notes that *before* the current housing meltdown, I took the position that market mechanisms could effectively deal with the hedging of risk.⁵⁶ But on this point the jury is very much out, given that key government policies on easy money, subprime mortgages, and mark-to-market accounting compounded any problem that private institutions created.⁵⁷ It does seem ironic that the cascade effects that can result from mark-to-market accounting could well require higher reserve requirements than would be needed in their absence.

Given the structural weaknesses of public intervention, the proper response to bad luck is twofold. Some individuals should diversify their portfolios, and others should take greater care to protect their non-diversifiable assets, of which human capital is the most prominent. Lee is also correct to show that the decentralized mechanisms that I have proposed cannot work in all cases, which is why this problem is so vexed to begin with. Private charity does have the advantage of *ex post* examination of the conduct of those who are in need and may well do this job better than government agencies charged with the same task. But Lee is right to note that these institutions are not infallible in their operation and that all individuals do not have equal access to them at all times.⁵⁸ So we are again forced to make an empirical estimate, and mine runs this way: if forced to choose between only government intervention or only private intervention (without public obstacles) in a major catastrophe like Hurricane Katrina, I would choose the private intervention. Individual cases of need might fall under the radar but hurricanes and tsunamis do not.

Michelle Goodwin's contribution to this volume places some balm on a raw nerve. I have long been a staunch defender of the proposition that no form of state paternalism should ever be allowed to block the sale of organs between private persons.⁵⁹ I am

55. Peter Whoriskey, *U.S. Gets Majority Stake in New GM: Firm's Investors Cry Foul Over Bankruptcy Plan*, Wash. Post A1 (May 1, 2009) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053101959.html>).

56. *Id.* at 780 n. 82 (citing Epstein, *Decentralized Responses*, *supra* n. 49, at 312–13).

57. See John B. Taylor, *Getting Off Track: How Government Actions and Interventions Caused, Prolonged, and Worsened the Financial Crisis* (Hoover Inst. Press 2009); Richard A. Epstein & M. Todd Henderson, *Marking to Market: Can Accounting Rules Shake the Foundations of Capitalism* (U. Chi. L. & Econ. Olin Working Paper, No. 458, April 15, 2009) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1385382).

58. *Id.* at 784.

59. Richard A. Epstein, *Altruism and Valuable Consideration in Organ Transplantation*, in *When Altruism isn't Enough: The Case for Compensating Kidney Donors* 79 (Sally Satel ed., AEI Press 2008); Richard A.

happy to say that Michelle writes with considerable fervor in the same tradition. The key element to voluntary exchange is mutual gains to the parties, which can take either affective or financial return. The most casual examination of the empirical evidence tells of the unnecessary loss in human life and comfort that comes from today's prohibition against the transfer for "valuable consideration" (of which money is only one form) found in the National Organ Transplant Act.⁶⁰ The most vital organs are kidneys for two interrelated reasons. First, it is the area of the greatest need for organs, with over 75,000 individuals on the list controlled by the United Network of Organ Sharing. Second, it poses the least risk to donors, with that of death being less than 3 in 10,000, and the odds getting better with each advancement in surgical technique. Yet one person dies every 18 minutes for want of an organ. So here is the bottom line: give an organ and you lose on average a week of life, at most. Get an organ from a live donor, and you can gain up to 20 years of high-quality life. Surely there has to be some way to capture that gain from trade. Altruism is not enough, as Sally Satel (who benefited from altruism when she needed a kidney) rightly stresses, because the costs here are real, perhaps in the neighborhood of \$50,000 per person, give or take. But the gains are measured in the millions, a 20 to 50 fold difference. Surely we can find some way to allow transfer payments or other financial incentives to overcome that hump. In the United States, we already spend around \$25 billion offering dialysis to people who suffer from end-stage renal disease. Use a fraction of that cash and you can buy both better kidneys and better lives. I understand that people are uneasy about these transfers. But letting that unease solidify into a social prohibition is a different matter altogether. Michelle sees this point clearly and notes how a similar logic applies to other intimate relationships, such as those with foster care. Anything that spurs the velocity of these transactions is welcome, especially if we have to work within the current crippling framework, which is why I endorse whole-heartedly her plea for an expansion of private choice in what she aptly terms intimate markets.

The last of the papers on which I shall comment is Richard McAdams' discussion of employment discrimination laws. Although the topic of his paper is employment discrimination law, it does share one important theme with Michele's. Both topics highlight the risks that occur whenever government action disrupts voluntary arrangements which produce mutual gains to the transacting parties. Before addressing various forms of discrimination in employment law, it is useful to step back for a moment to speak about the role of the nondiscrimination principle in law more generally. The hard-line libertarian approach sees no reason to worry about private discrimination at all so long as they do not involve the use of force and fraud. The historical development of the common law, however, sees a useful place for the principle as a counterweight to the exercise of monopoly power. Doctrinally that position was long tied in English law to the notion of property "affected with the public interest,"⁶¹ which

Epstein, *The Human and Economic Dimensions of Altruism: The Case of Organ Transplantation*, 37 J. Leg. Stud. 459 (2008).

60. National Organ Transplant Act, 42 U.S.C. § 274e(a) (2006).

61. *Allnut v. Inglis*, 104 E. R. 206, 209 (K.B. 1810) (relying on the earlier work of Sir Matthew Hale, *De Portis Maribus*, cited therein). This material later works itself into the fabric of American law in the famous

included ports over which a party had received either an exclusive franchise from the crown or over which it ignored a natural monopoly. The basic instinct behind this principle is that the refusal to deal, which is strictly necessary in competitive markets, carries with it ominous consequences when the defendant's monopoly position leaves the party refused nowhere else to turn.

Thus far the argument has shown only that a system of rate (or wage) regulation may make sense whenever one party has monopoly power which cannot be quickly eroded by free entry. That general proposition in turn quickly leads to the adoption of a nondiscrimination principle to prevent a circumvention of the rule. "Yes, you may come to my dock but only if you pay ten times as much as anyone else." To avoid this principle, the standard formulation of the duty of the monopoly party speaks in terms of "reasonable and nondiscriminatory rates." The first part of the expression prevents the monopolist from demanding a supra-competitive return. The second prevents the monopolist from playing favorites among its customers. I shall pass by all the complications here to note that the principle applies in any labor context which unions are given, by statute, monopoly power as the exclusive bargaining agent of their workers, which includes both the Railway Labor Act⁶² and the National Labor Relations Act.⁶³ The ability of the union to favor one group at the expense of another has led to the judicial development of a duty of fair representation, which historically has been of great importance in race cases. The important 1944 decision in *Steele v. Louisville & N R. Co.*⁶⁴ gives ample testimony on the importation of the anti-discrimination norm in the employment context. The union could not use its powers to advance the interests of its white members to the exclusion or disadvantage of its black members, a regrettable pattern that was unmistakable on the record.

There is, however, a vast chasm between the imposition of these duties on monopolistic unions and their imposition on ordinary competitive firms that have received no statutory boost. It was, however, characteristic of the 1964 mindset that the distinction between competitive and monopoly markets was not salient in labor markets, which were said to be inevitably rife with various forms of bias and irrationality that prevented minority workers and women from being deployed at their highest value use. That argument, of course, is not an argument about the transition from a segregated system with heavy state controls to a market that removed all these state-imposed restraints. Nor was it an argument about union monopolies under the labor laws. Rather, it was a statement about permanent features of the market that justify a full-fledged commitment to an anti-discrimination law, not only for race, but also sex, religion, national origin, age and disability.

In my 1992 book, *Forbidden Grounds: The Case Against Employment Discrimination Laws*,⁶⁵ I challenged the common view that employment discrimination

case of *Munn v. Illinois*, 94 U.S. 113 (1876) until the demise of that doctrine in *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding minimum milk prices). For a discussion of this evolution, see Richard A. Epstein, *supra* n. 47, at 282-87.

62. Railway Labor Act of 1926, 45 U.S.C. § 152 (2006).

63. National Labor Relations Act, 29 U.S.C. § 159(a) (2006).

64. 323 U.S. 192 (1944).

65. Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harv. U.

laws of any sort, kind, or description are needed in competitive labor markets. The basic point is that competitive markets will generate the highest gains overall, so that *any* set of legal restrictions on voluntary exchange will reduce the overall efficiency of the market without being able to secure greater opportunities to workers as a class or even so-called “protected” workers as a class. One sobering vindication of my view revolves around the legal opposition to affirmative action programs, which do not square well with the color-blind language found in Title VII, which extends its protection to “any individual,” not just some subset of the overall labor markets. That model of social organization was in vogue in 1964 and out of favor within one or two years, particularly after the race riots in cities like New York, Detroit, Newark, Washington, and Los Angeles. But rigid statutory commands cannot be changed on a dime, so efforts to implement affirmative action programs had to fight an uphill battle, which was resolved only by judicial sleight of hand in *Steelworkers v. Weber*.⁶⁶ The indirect costs of banning affirmative action dominate any distributional gains that come from helping particular workers win individual lawsuits against employers who fall prey to the basic statutory command. So repeal the statute and the affirmative action programs no longer need special justification. They are simply a manifestation of the principle of freedom of association. If other organizations want to form all white or all male organizations, let them. The competitive alternatives are too numerous for their behavior to matter.

This view does not command wide acceptance today any more than it did 30 years ago. But the current employment situation gives rise to a sense of unease in the defenders of Title VII that all has not quite gone according to plan. Richard McAdams’ thoughtful paper does a useful job in identifying some of the sources of unease. His initial proposition is one that I think merits serious attention. The current laws may consecutively list the various forbidden grounds of discrimination, but the social justifications for these laws may well vary from area to area. In one sense, this position is inconsistent with my view that condemns the entire enterprise on categorical grounds. But there is nonetheless this element of overlap in the two positions. What Richard calls our attention to is that these laws operate in a very different fashion, and have quite different allocative and distributive contexts. For those people who accept the high level

Press 1992).

66. 443 U.S. 193 (1979). Here the key judicial move by Justice Brennan was to truncate the statutory provision that limited preferential treatment.

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this title *to grant preferential treatment to any individual or to any group because of the race, color, religion sex or national origin of such individual or group on account of any imbalance which may exist with respect to the total number or percentages of persons of any race, color, religion or sex, or national origins employed by any employer.*

42 U.S.C. § 2000e-2(j) (2006) (emphasis added). Justice Brennan first noted that the statute did not contain the words “or permit” after the words “to require,” which is true enough. *Steelworkers*, 443 U.S. at 206. But he does not insert them into the statute, leaving everything else unchanged. That would lead to the absurd conclusion that the statute would permit “an employer to grant preferential treatment to any individual or any group because of the[r] race, color, etc.” 42 U.S.C. § 2000e-2(j). What a nice way to repeal Title VII! So the italicized words have to go. Aware of this absurdity Justice Brennan strikes them from the statute and replaces them with the following proposition. “This title shall be interpreted to permit voluntary affirmative efforts to correct racial imbalances.” Easy.

of imperfections in labor markets, this inquiry boils down to a case-by-case analysis of the various prohibitions to see which of them create more dislocations than they eliminate.

From my point of view, these differences play out in a different fashion, which goes to the question of transitional justice that was one theme in Cathy Sharkey's paper. None of these various differences in discrimination by type would justify the imposition of the laws in the first place. But once those laws are in place, the sensible strategy is to attack those laws that create the *greatest* deviation from the competitive equilibrium, which is the rule that most disrupts common practices used in voluntary markets. By that standard, perhaps the main target should be the age discrimination laws.⁶⁷ Prior to the passage of the statute it was not possible to find any well-run firm that did not key its hiring decisions, at least in part, to the age of its various employees. A mandatory retirement age is only the most conspicuous of these rules. The ubiquity of the practice could be treated as evidence that all firms suffer a kind of delusive disengagement of the hidden values of senior employees. But it is far more likely that the various rules represent an efficient way to transfer power and authority across the generations. The firms who let good talent go to waste pay the price, which historically they were willing to pay for everyone from junior employees to the CEO. So let them. Remember, no firm has legislative authority when it imposes a mandatory retirement policy. Other firms can, and often do, decide that it is in their interest to hire, perhaps on term contracts, persons who have been forced to leave their prior business. The background information about age is still relevant, but it is far easier for an outsider to make an independent judgment about how those factors fit in with particulars of the individual case. So mandatory retirement is not state consignment to employment purgatory. The rule lets people opt back in to the market, and thereby gives them an insistent incentive to perform at a high level at their current job if they wish to secure post-retirement work elsewhere. The massive disruption of the orderly movement in labor markets is particularly disabling for universities where the slow turnover of senior faculty hampers the intellectual revitalization of faculties, a point that I predicted just before the rules on mandatory retirement were scrapped.⁶⁸ The political chances of getting through a repeal of the Age Discrimination in Employment Act is precisely zero today, given the huge political strength of the senior lobby. But it is important to sound the clarion call about the tangled political coalitions that keep these arrangements in place.

There is scarcely time here to explain why the other forms of anti-discrimination law misfire, each in its own way. But a few cryptic remarks are in order. Clearly the market dislocations from disability discrimination are high, especially with respect to the maintenance of facilities. Distinctions on national origin often matter in complex organizations, but may well enter into the equation as a plus and not a minus. Sex differences count for construction workers, dare one say, more than for office workers, so that the dislocations are high in the one area and not in the other. Race differences matter as well, but in a different way, as the recent struggles over affirmative action

67. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (2006)

68. Richard A. Epstein & Saunders MacLane, *Keep Mandatory Retirement for Tenured Faculty*, Regulation 85 (Spring 1991).

programs have shown. Matters of sexual orientation are hard to gauge as employer preferences often run both ways. It is therefore almost impossible to generalize across different types of discrimination. Interestingly enough it is even hard to generalize *within* particular types of discrimination given the huge variation in employment relationships. The bottom line on all this is that the analogy between (passive) passengers on common carriers and (active) employees in all sorts of firms does not work. It is easy to have rules that require common carriers to take all comers who do not misbehave. It is impossible to fashion analogous rules for labor markets, whose huge complexities make anti-discrimination laws erratic and counterproductive.

The difficulties with these laws are not confined to issues of categorical organization. Richard is right to stress that one of the key issues in all these cases is getting information that allows for accurate judgments to be made about employees. The central concept in this discussion is that of statistical discrimination. There is much evidence in the literature that firms that do not have precise information about individual workers tend to resort to categorical judgments which necessarily hurt able members of groups in categories whose average workers have historically not performed well. There is no question that all rational firms will resort to weaker proxies if they cannot get reliable direct information. But the point here is that this practice has been *aggravated* by the anti-discrimination laws since the unfortunate Supreme Court decision in *Griggs v. Duke Power Co.*,⁶⁹ which, like *Weber*, performed a miracle of statutory construction by taking a provision intended to insulate professionally prepared tests from scrutiny under Title VII and converting it to a prohibition against all tests except those justified by business necessity, narrowly construed.⁷⁰ The statute thus blocks all efforts to get that concrete information by erecting barriers on its collection. The inability to test hurts the efficiency of firms and reduces the effectiveness of initial job assignments and subsequent promotions. It also induces a regrettable tendency to lump individuals together because of the bar. Imperfect information reduces the effectiveness of exchange in all markets. The anti-discrimination rules are no exception to that proposition.

Matters are a lot better in an unregulated labor market. No firm has to jump through legal hoops to initiate its own affirmative action program, for good reason, bad reason, or no reason at all. Nothing therefore prevents the unregulated firm from undertaking both tasks simultaneously, perhaps by the use of racial quotas, or by giving additional points for membership in certain racial groups. It is not my job here to defend any or all of these practices. It is to say that private businesses should have to defend them not to the law, but to their shareholders and other employees. In the public sector

69. 401 U.S. 424 (1971).

70. The basic statute provision reads as follows:

[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h). The decision in *Griggs* italicized the word “used,” ignored the rest of the sentence, and converted a section that banned only those tests that were created or used to manipulate outcome into one that required no disparate impact. *Griggs*, 401 U.S. at 433.

the recent attention to *Ricci v. DeStefano*,⁷¹ the New Haven firefighters case, shows that the same tension exists. The test that was administered to the white, black, and Hispanic firefighters up for promotion to Lieutenant and Captain. These tests were thoroughly vetted and tested for relevant skills. If the test were applied to two persons of the same race, it would constitute a reason to prefer the candidate with the higher score to the one with the lower score. They could not be regarded as containing no useful information. So when the case came to the Supreme Court the hard question was whether a public agency had to deliberately discriminate against the successful white applicants in order to avoid a disparate impact test under a codified version of *Griggs* from its disappointed minority applications.⁷²

Setting up the issue in that fashion shows the flaws of Title VII. Its two basic imperatives are inconsistent with each other. On the facts, I am confident that the city should not have backed down on the test once it was completed. The test was eminently defensible both in its design and execution. The reliance interest matters. But by the same token it is tragic to let Title VII perpetually force local governments or private firms into a hapless corner. Some degree of discretion has to be allowed to both public and private firms on issues that pertain to managerial discretion. And oddly enough the best way to get to the messy middle positions is to scrap Title VII, even in the public sector, to allow the debate to proceed in ways that allow for political compromise. The government, as a business actor buffeted by multiple pressures, cannot be sensibly held to the type of colorblind standards that are rightly required of it in dealing with the sanctions against criminal defendants. It is again the failure to understand how employment markets work that spawns inefficiency in labor markets, and discord in political markets. We can do better by scrapping the entire statutory edifice, and working to create ways in which good faith compromises become possible. We do not need the polarize public sentiments by squeezing these disputes into the inappropriate confines of Title VII.

CONCLUSION

There is really very little to be said in conclusion except for this. The classical liberal model is often greeted with suspicion in the abstract. But once its features are tested against concrete situations it tends to do better than alternative systems of political governance. Its first feature calls for strong boundaries between neighbors, which usually translates into a preference for injunctive relief against the physical invasion of tangible property or the infringement of intangible property. It is difficult to have the same level of enthusiasm for specific performance of labor contracts, but even here the possibility of injunctions against working for a competitor will do much to stabilize business relationships. Huge amounts of material can be organized around the proposition that voluntary arrangements outperform state coercion, both for tangible and intangible forms of property. The experiences that we have had with takings law, with organ donations, and with the anti-discrimination law show the power of this

71. 129 S. Ct. 2658 (2009).

72. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

proposition. And the ability to fashion a coherent antitrust law of modest performance indicates that other state actions could help protect and nourish competitive markets which still remain in this age of frenzied legislative activity, our last, best hope for a decent society.

