

A COMMON LAW FOR THE FIRST AMENDMENT

RICHARD A. EPSTEIN*

I have chosen a title for this article that looks, in some sense, to be innocence incarnate. On the one hand, the common law is an ancient and mostly honorable tradition. On the other hand, the First Amendment, with its protection of freedom of speech and the press, is one of the bulwarks of our current constitutional order. Taken together, the positive synergies between them should produce an intellectual structure that generates widespread political and social appeal. Nonetheless, on this score appearances are deceiving, and I shall try to explain the tension in the system. In Part I, I consider the tension between a generalized common law system of liability and the constitutional principles that underlie the First Amendment. For these purposes, I indulge in a bit of historical oversimplification by treating the common law as including both law and equity. I do so in order to consider the full range of remedies from damages to injunctions as part of a unified theory. In Part II, I explain how the tension between common law and constitutional methods results in serious breakdowns in legal doctrine. The central point should be clear. Constitutional law does not operate in an institutional and conceptual void. The successful articulation of First Amendment doctrine depends critically on understanding the private law rules that regulate speech and all forms of similar conduct.

I. THE GENERAL STATE OF PLAY BETWEEN COMMON AND CONSTITUTIONAL LAW

A. *The Labor Law Analogy*

The title of this essay is consciously patterned on the title of an article that I published in the *Yale Law Journal* some thirty-

* Laurence A. Tisch Professor of Law, New York University School of Law; Peter and Kirsten Bedford Senior Fellow, Hoover Institution; James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, University of Chicago.

four years ago—*A Common Law for Labor Relations*.¹ That article carried with it this subtitle—*A Critique of the New Deal Labor Legislation*.² That article was, and was meant to be, heretical. I had received a personal invitation to attend the conference from Eugene Illovsky, a member of the Yale chapter of the then-nascent Federalist Society. The grandees at the Yale Law School had allocated the society a single slot at the two-day conference on the celebration [sic!] of the fiftieth anniversary of the New Deal, and Illovsky wondered if I would have enough temerity to fill it.

It was no secret that the other panelists would offer, in varying degrees, support for the New Deal enterprise. Without hesitation, I offered to pay my own airplane fare, if need be, to return to my alma mater. I wished to voice my deep disagreements with the reigning policy on American labor law. Labor law was a field in which I had done no systematic scholarship, but in which I had long sensed a deep, unbridgeable chasm between my own nascent views and the conventional wisdom on the subject, introduced to me as a student by my own Yale Law School professor, the late Harry H. Wellington. Wellington was an expert in legal process far more comfortable with the New Deal synthesis than was I. So for Wellington, it was important that the major premise—the desirability, if not necessity of collective bargaining—was taken more or less as a historical given. The hard work of scholarship and debate at the time was over the proper mode of implementing the National Labor Relations Act: were its objectives best achieved through rulemaking, through judicial decisions, by a board, through arbitration, through private contract, or some ideal combination of the above? I sat in the class often mumbling to myself, “You never ask the right question, which is whether you ought to blow up this entire system and start over.”

When I returned to the Yale Law School in 1983, I decided to exact my revenge by defending the common law alternative to the NLRA in a not-so-subtle effort to blow up the entire edifice. Having done some research, my choice of the subtitle was taken, and was meant to be taken, as deeply subversive of the es-

1. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

2. *Id.*

established wisdom. Conceptually, my major thrust was a point-by-point defense of the common law system of labor relations. The high point of that exposition was my then-unthinkable defense of the “yellow-dog contract,” under which a firm and worker could agree that the worker would not join, nor agree to join, a union so long as he continued to work for his employer.³ The choice of my subtitle was a not-so-subtle allusion to my endorsement of a common law framework that was universally reviled and explicitly rejected by the major labor law reform statutes of the 1930s, including the Norris-LaGuardia Act of 1932⁴ and the National Labor Relations Act of 1935.⁵

My impassioned defense of the common law system provoked a tart and indignant response from Professors Julius Getman and Thomas Kohler. They accused me of taking a “breathtakingly simple” approach to labor law, when a more nuanced and incremental approach was desperately needed.⁶ The tenor of the reaction is evident in the following paragraph, which I quote with reluctance because it illustrates the establishment’s resentment towards the defense of laissez-faire economics:

Professor Epstein’s work does not contribute in any way to our existing store of knowledge about labor law. It sheds no light on the reality of labor relations, nor does it contribute anything to our understanding of the impact of labor law on society. Given the antiquated nature of his methodology, it is not surprising that Professor Epstein reiterates many of the same propositions, syllogisms and rationalizations of those who opposed the enactment of the NLRA and the Norris-LaGuardia Act in the first place, and without any newer evidence.⁷

Their article had its own problems. It offered no explanation as to why or how this costly system of cartelized labor relations

3. *See id.* at 1370–75. The major decision in that regard was *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), with an opinion from the astute Justice Mahlon Pitney, which I still regard as the textbook example of sound economic reasoning.

4. Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (2012)).

5. Ch. 332, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (2012)).

6. *See* Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1415 (1983).

7. *Id.* at 1416.

outperforms competitive markets.⁸ It failed to anticipate the level of decline in union membership in the years that followed.⁹ It made no reference to the unprecedented improvement in human welfare in the United States that took place during the period of 1870 to 1940 when laissez-faire synthesis predominated¹⁰—which, as Johan Norberg chronicles, only a program of market liberalization could duplicate worldwide.¹¹

Their response prompted my equally pointed reply that, while their insistence on carefully studying incremental changes is an effective way to avoid serious intellectual inquiry, it offers no theoretical defense of the body of law that has come under attack.¹² My war cry then, and my war cry now, is that “it takes a theory to beat a theory,”¹³ and defenders of modern legislation, and modern constitutional theory, too often consider implacable outrage at older common law systems to be a refutation of that system’s central premises.

In fact, the use of the yellow-dog contract was a well-conceived private effort by employers to preserve competitive markets in labor.¹⁴ Competition works as well for labor as for goods, so these contracts should be welcomed as a matter of public policy. At the time, this point was recognized when the unanimous 1908 Supreme Court decision in *Loewe v. Lawlor*¹⁵ rightly applied the antitrust prohibitions of the Sherman Act to

8. See Richard A. Epstein, *The Progressives’ Deadly Embrace of Cartels: A Close Look at Labor and Agricultural Markets, 1890–1940*, in *THE PROGRESSIVES’ CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE* 339 (Stephen Skowronek et al. eds., 2016).

9. See James Sherk, *Labor Unions: Declining Membership Shows Labor Laws Need Modernizing*, HERITAGE FOUND. (Jan. 22, 2013), <http://www.heritage.org/jobs-and-labor/report/labor-unions-declining-membership-shows-labor-laws-need-modernizing> [<https://perma.cc/D2ZA-WRYH>].

10. See ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* (2016). Gordon never, however, correlates that development with the dominant labor law regime in place at the time. See Richard A. Epstein, *The Real Cause of American Growth*, *DEFINING IDEAS* (Hoover Institution, D.C.) (Feb. 29, 2016), <http://www.hoover.org/research/real-cause-american-growth> [<https://perma.cc/E2EC-BXSA>].

11. See generally JOHAN NORBERG, *PROGRESS: TEN REASONS TO LOOK FORWARD TO THE FUTURE* (2016).

12. See Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 *YALE L.J.* 1435, 1435 (1983).

13. *Id.*

14. *Id.* at 1437.

15. 208 U.S. 274 (1908).

labor organizations, prompting the passage of Section 6 of the Clayton Act after the progressive Woodrow Wilson was elected president.¹⁶ Applying separate common law rules to labor and goods was one sign among many of the weakness of the progressives' position.¹⁷ There is no deep gulf that separates sound principles for labor markets from parallel principles that work for goods, real estate, or insurance, and a proper theoretical framework should reflect that.

Decisions such as *Hitchman Coal & Coke Co. v. Mitchell*¹⁸ and *Loewe* are consistent with a general theory of social welfare. The initial move of the common law can be simply stated: contract is good but coercion is bad. The explanation of this starting point is simple enough. Contracts improve the lot of both parties, and in general improve the opportunities of all third parties. Coercion restricts individual choices and thus produces losses that exceed the gains. Coercion also negatively affects third parties by hobbling or removing potential trading partners. There are of course both complications with, and limitations on these rules, most of which I cannot discuss here. But the critical move is to constrain contracts between people to use force against third parties, for these agreements are deeply subversive of social welfare. It is not enough to make these contracts unenforceable because informal norms allow them an extended time in which to wreak destruction. The synergistic gains from cooperation increase the likelihood of negative externalities if third persons will be subject to violence or forced to enter into transactions against their will. It is precisely because the negative externalities are so large that we develop a

16. See Clayton Act, ch. 323, § 6, 38 Stat. 730, 731–32 (1914) (codified at 15 U.S.C. § 17 (2012)):

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

17. For a longer discussion, see RICHARD A. EPSTEIN, *HOW PROGRESSIVES RE-WROTE THE CONSTITUTION* 89–99 (2006).

18. 245 U.S. 229 (1917).

body of law that punishes conspiracies to rob banks or kill innocent persons.

The dangers of conspiracy spill over, albeit less dramatically, into monopoly situations where parties enter into contracts in restraint of trade whereby they hope to become a single supplier of goods or services—the major target of the Sherman Act of 1890.¹⁹ It is a well-established practice that a single supplier of key goods and services, as with public utilities and common carriers, is required to serve its customers on fair, reasonable, and nondiscriminatory terms.²⁰ The logic here is that breaking up these corporations is not feasible because the single supplier can serve the market more cheaply than multiple suppliers, given the need for heavy front-end investment.²¹ So the next-best alternative is a cautious regime of price regulation, with an effort to bring those prices down to competitive levels. Socially, it is too costly to allow any party to refuse to deal with customers who have no market alternatives: the holdout position is just too strong.²²

This obligation to serve does not extend to competitive markets, including labor markets. In these settings there is no forced business, and therefore the earlier decisions of *Adair v. United States*²³ and *Coppage v. Kansas*²⁴—striking down the collective bargaining statute—were not, *pace* Getman and Kohler, some ancient curiosities. Rather, they presented the sound approach. Then, in basic market settings, the traditional tort of

19. Sherman Antitrust Act, ch. 647, 26 Stat. 209, 209–10 (1890) (codified at 15 U.S.C. §§ 1–7 (2012)).

20. See, e.g., Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments*, 74 ANTITRUST L.J. 671 (2007). The rules here are a carryover from those that start with rate of return regulation for public utilities. See generally *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

21. For a classic exposition, see Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968); see also Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

22. This issue is one that has kept me occupied for years. See RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD*, 279–318 (1998); Richard A. Epstein, *Hayek's Constitution of Liberty—A Guarded Retrospective*, REV. OF AUSTRIAN ECON. (2016); Richard A. Epstein, *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345 (2013).

23. 208 U.S. 161 (1908).

24. 236 U.S. 1 (1915) (like *Hitchman*, written by Justice Pitney).

inducement to breach of contract is a counterweight to union power that helps preserve competitive bargaining on both sides of the market. Hence the case for the yellow-dog contract alluded to above: if you ask workers on a job who are not union members to come out in unison when called, it's inducement to breach of contract, which is tortious, and you can enjoin them and hold them responsible. All of this makes economic sense: the employer gets stability and the workers get protection against both work instability and union pressures to covertly join their ranks. Damning these contracts has become an article of faith for a church from which only a few people, like myself, decline membership, both today and during the New Deal period between 1932 and 1940. But, if my view is right, the National Labor Relations Act, the Norris-LaGuardia Act, and the Fair Labor Standards Act, which regulates minimum wage and overtime,²⁵ should go the way of all flesh. They have to be rejected on political grounds, and in my view should be struck down on constitutional grounds as well, as in *Adair* and *Coppage*.

B. *Free Speech Without the First Amendment*

This lengthy and ominous introduction relates very closely to my chosen topic, for the same approach of working off the common law rules yields large dividends in understanding what is right, and all too often, wrong in modern American First Amendment law. The current law is often quite confused. Sometimes it does not extend its protection far enough but, sadly, in too many contexts it cuts too wide a swath. The remarks that follow are designed to expose its endemic weaknesses.

The key analytical starting point is that the common law does not relegate speech to one box and conduct to another. Thus the discussion of these labor law cases has to address the question of what kinds of human activities, broadly conceived, should be regarded as tortious. One is inducement of breach of contract, already encountered in connection with the yellow-dog contract in labor markets and applicable everywhere else in principle. Well, inducement almost always involves speech,

25. Fair Labor Standards Act, ch. 676, 52 Stat. 1060, 1060 (1938) (codified at 29 U.S.C. § 201, et seq. (2007)).

or at least pantomime. So the key question is, if it involves speech, why is it not protected by the First Amendment, with its categorical statement that Congress shall make no law abridging the freedom of speech? Consider also the common carrier who refuses to deal with a customer. Is that spoken or written refusal protected by the First Amendment against government regulation? Conversely, where there is no monopoly power, the refusal to deal offends no common law principle. How then is it possible for the state, consistent with principles of free speech, to say that expressing a refusal to deal is not protected under the First Amendment?

These are not idle questions, and at the very least, they raise the following puzzle. Aren't matters exactly backwards if speech that is tortious at common law turns out to be protected under the Constitution, and speech that is protected at common law turns out to be punishable under those pesky, but all-too constitutional, New Deal statutes? Just asking that question should demonstrate that the juridical shift from the older system of common law entitlements to the newer system of labor relations is no mere marginal adjustment in the evolution of the law, but a fundamental inversion of basic relationships. It's like taking a ship that has been sailing due north, and turning it around so that it now sails due south, saying all the while, "We haven't done anything except a modest course correction."

Thus, one ought to rethink the analysis of any topic relating to freedom of speech that separates speech from all other forms of human conduct. That approach should caution you to scrutinize any claim that affirmatively differentiates between pure expression, pure conduct, or, like billboards and signs, some mixture between the two. Why worry about these classifications as a matter of constitutional law if they don't work as a matter of common law theory?

But why worry about the common law? For its internal coherence and good sense. The set of common law rules should not be understood as some arbitrary assemblage of rules, but as a comprehensive world-view that seeks, however haltingly, to understand the proper spheres for cooperation and coercion in diverse settings. Put otherwise, common law is not just a process for incremental decision-making. It is also a deep normative commitment to the basic rules of property, contract, tort, and restitution. Efforts like that of my Chicago colleague, Da-

vid Strauss, to keep the process and junk the substantive commitments give far too much leeway to the directionless actions of judges and legislators in every area of law.²⁶

Against this backdrop, one must develop a deep and permanent skepticism toward attributing fundamental significance to classifications that don't work. So long as speech can be innocent or tortious, and conduct can be innocent or tortious, the real task is to discern which speech and which conduct fall into which category, and why. That is ultimately a social inquiry that asks whether protecting particular forms of speech or conduct optimizes social gains. Speech that moves social behavior toward competition meets that test, and that which facilitates monopoly does not. One cannot put both pro-competitive and anti-competitive speech into the same box, when they have opposite social consequences. The theoretical gulf between these two forms of speech cannot be papered over.

At this point we can see the built-in advantage that the common law enjoys over a constitutional analysis that tries to compartmentalize and separate all speech and all conduct. The common law's goal was to protect voluntary transactions in (as it turns out) competitive markets, and to stop coercion in the other. As we look at that question once again, the supposed line between speech and conduct breaks down.

It is helpful to define coercion. The obvious case is the use of force. Common wisdom suggests that force is not speech, but this is oversimplified, for coercion also involves the *threat* of the use of force. No matter how clever you are with words, you cannot come up with a credible argument that threats are not a form of speech. You might insist that certain bodily movements are not speech, but even that is an idle gesture. Where there is a desire to protect benevolent forms of speech, no one argues that pantomime is not protected because no words are spoken. Indeed, the inexorable doctrinal move from freedom of speech to freedom of expression is a silent tribute to the view that speech under the Constitution must encompass more than speech. But the intellectual move that words includes expression cannot ignore bad expressions either. Both words and ex-

26. See David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. REC., Fall 2010, at 8, <http://www.law.uchicago.edu/news/living-constitution> [<https://perma.cc/93YA-CTXD>]; see also Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL'Y. 583, 593–99 (2016).

pressions are speech, and both warrant parallel treatments. Matters don't get any easier when we return to the problem of the common carrier who lacks the luxury of the refusal to deal. He does not threaten force against others, but his general monopoly power has long created the general duty to serve, as noted above.

We have seen that there is no fundamental distinction between conduct, on the one hand, and speech, on the other, both normatively and positively as a matter of common law. The next question concerns which forms of conduct are protected, and which are not. Let's begin with a very naive premise—that generally speaking, people know their own self-interest. And so, if they decide to do a particular action, the reason we favor freedom for them—that is, all of them—is we now know that somebody is better off, and we don't have any information as to whether or not, either episodically or systematically, anybody else is worse off. So there is a Pareto improvement under the familiar definition. Generally speaking, the older I get, the harder it is to find some supposedly free-standing moral objection to a move from some initial state of nature that works a Pareto improvement. Who should hold that trump card, and of what does it consist? There are all sorts of reasons to think that simple egoism is indefensible because it implies that I don't care what happens to anyone else so long as I am better off. A rule of that sort, generally applied, leads to social conflict and worse. I have not seen anyone construct a credible moral theory for the unvarnished moral claim that a rule that works to the advantage of all is for some unspecified reason unacceptable. It is perfectly permissible to say that what one person wants could be morally impermissible because of its effect on other parties. But if *everyone* shares the same view that externality problem disappears.

The reason that I speak of this as a presumption is that we must reject it in some circumstances to forestall the possibility of anarchy. That point was expressed in the older language of political theory by drawing a distinction between *liberty* and *license*, where the former is keenly aware of possible externali-

ties on third persons, which the latter systematically ignores.²⁷ Now these externalities are of two sorts. There are some that are positive, which are extremely important but tend to be ignored in legal analysis because they usually don't result in legal action. The few but important exceptions arise in cases of unjust enrichment where someone provides direct assistance to another person, by protecting person or property when that person cannot protect himself. I shall talk about these somewhat, but for the moment it is sufficient to observe that in legal and political theory the first order of business is not to subsidize positive externalities. Instead, it is to make sure that negative externalities, properly defined, will be effectively controlled so that mass mayhem does not upset the peace and good order of society.

Thus the libertarian says, and says rightly, that the use or threat of force is not a part of any system of protected liberty, because, if systematically engaged in by all persons against all other persons, it would lead to the war of all against all, in which nobody is better off. This is not a very difficult empirical judgment, either before or after Thomas Hobbes's *Leviathan*.²⁸ And so what you must do is to find a way to yoke together certain forms of speech and other conduct that can then either be equally permitted or prescribed under some general formula.

Now the libertarian recognizes that force has a kid brother, which turns out to be some form of misrepresentation. We talk about force and fraud. There is a nice relationship between fraud and (innocent) misrepresentation, in which the statement is not known to be false to the person who makes it. The latter has the capacity to hurt, but generally carries a different valence for two reasons. First, people who make innocent misrepresentations often try to correct them, and second, these misstatements, being less purposive, usually carry less serious consequences. So if we concentrate on fraud, we get most of the universe except perhaps in such recondite areas as security registration statements, where liability tends to rest on negligence

27. See, e.g., Alexander Rosenthal-Pubúl, *Reflections on Ancient and Modern Freedom*, MODERN AGE, Winter 2016, at 35, https://home.isi.org/sites/default/files/MA_58.1_Rosenthal-Pubul_Web.pdf [<https://perma.cc/4VLR-67TE>].

28. THOMAS HOBBS, *LEVIATHAN* (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

in England²⁹ and on strict liability in the United States.³⁰ Once again, no great genius could credibly claim that fraudulent speech or fraudulent conduct should be regarded as something other than speech. Yet nobody would want to defend the propriety of fraudulent behavior as a matter of course, even though there are many times where lying may be perfectly justified, as in self-defense, or to preserve privacy against a snoop. Of course, lying is less risky than menacing behavior because it is easier to walk away from the former than the latter so that all lies do not achieve their objective, given the relative ease of self-help. You can lie *to* someone, and it is his reaction that determines whether you have deceived that person, by establishing the needed causal link based on some combination of materiality³¹ and reliance.³² But when the deceit works, it can be deadly, such as when it leads someone to eat poisonous food or walk into a hidden trap.

Those lies turn out to be even more dangerous, even deadly in the context of defamation, where *A* states a falsehood to *B* about the position of *C*. If I lie to the king and he executes the person on the strength of my representations, defamation kills. And while the king may check out the story, he is unlikely to exercise as much care in the defense of *C* as he will of himself. In more prosaic situations, a false statement to a business person could lead him or her to refuse to conduct business with a third person. That loss of a business opportunity or a social association can have very large consequences, which is why defamation has always been actionable as a species of interference with advantageous relationships.³³ It is also worth noting that the deliberate use of force against a third party can achieve similar results with even more powerful effects, as exemplified by the famous example of the schoolmaster who frightens away his pupils by shooting at them when on the way to a

29. See, for the English experience, *Directors Liability Act, 1890*, 7 CAPE L.J. 253 (1890), which expanded liability to a negligence standard after *Derry v. Peek* (1889) 14 App. Cas. 336 (HL) (appeal taken from Eng.).

30. See 15 U.S.C. § 77k(a) (2012).

31. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

32. See RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

33. See *id.* § 559.

competitor's school.³⁴ There was no force against the rival schoolmaster, but the pupils found it prudent to stay away at low cost, ruining the rival schoolmaster's business through the loss of his customers. So it is no wonder that in dealing with these interference cases, force and fraud tend to be substitutes for each other, where the former is more potent, but the latter more common.

It is here, moreover, that we start to see cases where the extensive protection of the First Amendment understates the risks of misrepresentation. The older common law accommodation held that political figures could bring actions for false statements of fact, even if statements of opinion were absolutely protected.³⁵ But how to draw the line between them? The best response is that a given statement, say that X is a thief, looks like a statement of fact if made as a bald assertion. But the position changes once the speaker outlines, truthfully, the facts on which those allegations are based, so that the audience can judge for itself the truth behind the inflammatory allegation.³⁶ Unfortunately today, false statements of fact, often with devastating consequences, are only actionable with proof of actual malice, that is, knowledge of the statement's falsity or reckless indifference to its truthfulness.³⁷ That rule was introduced in *New York Times v. Sullivan*³⁸ to spare the *Times* from a set of outrageous jury verdicts in Alabama that could have bankrupted the paper. But that Alabama judgment was deficient on so many grounds—its wild-high estimate of general damages was ludicrous, for example—that there was no need

34. For an account, see *Keeble v. Hickeringill* (1706) 103 Eng. Rep. 1127 (KB), dealing with the Schoolmasters' case decided in the reign of Henry IV. Note that Lord Holt drew the correct distinction between competition and the use of force:

This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.

Id. at 1128; see also *Tarleton v. M'Gawley* (1793) 170 Eng. Rep. 153 (KB).

35. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

36. For the best exposition, see Van Vechten Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 419–20 (1910).

37. *N.Y. Times Co.*, 376 U.S. at 279–80.

38. 376 U.S. 254 (1964).

to remove an essential protection for reputation in typical cases that do not come up through a segregationist system in the old South.³⁹ It is not that the common law offers no protection for the freedom of speech. Rather, the best way to look at the constitutional dimension is to say that the First Amendment prevents the *contraction* of the common law protections, but does not require their systematic expansion. The loss of the correlative rights has poor consequences of its own, by making individuals less likely to participate in politics if they can be exposed to that form of abuse without adequate means of legal remedy in the case of serious defamation in cases when counterspeech cannot be invoked in time: think of the candidate for public office who is defamed on the eve of an election. Counterspeech the next day will not change the vote. A damage remedy might deter the conduct. The protection of reputation therefore also advances the free and robust debate that *New York Times* sought to protect.

By putting these pieces together, it is possible to determine which kinds of behaviors are worthy of protection and which are not, *without* invoking any kind of general constitutional doctrine. But it turns out that the constitutional mistake in *New York Times* is replicated in other areas as well. It is useful to play out this theme with several further examples.

The model that I have developed thus far has omitted very important issues that must be brought back into the equation. Sometimes using force or fraud is *justified* under the circumstances. Now there are people who want to deny this, one of the most famous illustrations coming from Immanuel Kant, which basically relegates him on this point to the class of “insane philosophers on a bad day.” The famous example arises if an intruder into your house asks the whereabouts of your children so that he can murder them. You may, Kant opines, remain silent, but you may not lie in order to throw him off the scent.⁴⁰ What an odd use of the distinction between misfeasance and nonfeasance! That venerable line has no traction here because the law of misrepresentation treats lies, concealment,

39. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

40. Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, reprinted in *GROUNDING FOR THE METAPHYSICS OF MORALS* 63, 63 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785).

and disclosures as part of a uniform system, and finds many cases where disclosure is appropriate as a prelude to a market transaction.⁴¹ The misfeasance rule gains traction only in cases that deal with the asserted duty to rescue strangers, which has traditionally been denied at common law.⁴² In practice, the issue in Good Samaritan cases is usually one of rash rescues leading to death or serious injuries.⁴³ The distinction has no place in dealing with verbal interactions with people, where an omission can often arise from a duty to speak—a point that is lost in the Kantian account of lying.

This odd position on the status of justifications is supposed to follow from the Kantian categorical imperative, binding on all sentient beings out of some “absolute necessity” that is said to follow from Kant’s conception of pure reason.⁴⁴ This mindset seems to have some appeal among modern philosophers, who recoil from the difficulty of the stated example, but who nonetheless limit the kinds of maneuvers that people can use to weave a web of deceit to throw the murderer off the track.⁴⁵ The concern is that excessive duplicity interferes with the system of trust that honest communication requires.⁴⁶ But that intermediate position shares, albeit in reduced form, the same vice as the Kantian view, tolerating at least some cases in which the killings take place when the allowable ruses have not worked. Of course, trust is critical in relationships of confidence, for example, in such matters as medical information, trade secrets and national security. But the appropriate steps in these areas are not impaired in the slightest by taking maximum resistance to guard against the harms by potential thieves and murderers. Nothing in moral theory or under the First

41. See, e.g., *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817).

42. See, e.g., *Buch v. Amory Mfg. Co.*, 44 A. 809 (N.H. 1898).

43. See, e.g., *Wagner v. Int’l Ry. Co.*, 133 N.E. 437 (N.Y. 1921). The futile effort of the plaintiff to rescue his cousin, already dead, was justified by the famous phrase “Danger invites rescue.” *Id.* But the rescue was already being undertaken by the conductor and his staff, so that the plaintiff’s needless intervention put both himself and everyone else at risk. *Id.* at 438. The danger of futile rescues really matters, given the large number of deaths and injuries that follow. See David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 712 (2006).

44. KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, *supra* note 40, at 2.

45. See SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY AND THE LAW* 5–46 (2014).

46. *Id.* at 46.

Amendment blocks or hampers these efforts to counter fraudulent schemes or practices. Half measures will not do.

The carryover between public and private law runs as follows: think of the substantive guarantees of the Constitution as creating a set of prima facie cases—prima facie you're allowed to talk—and then you can overcome that by showing force or fraud, followed by the allowance for justifications. And it turns out, even the most ardent textualist will only be able to make sense of the substantive issues by introducing these exceptions, often under the rubric of the police power to make the system cohere, long a major topic of constitutional adjudication, although the words appear nowhere in the document.⁴⁷ And Justices like the late Justice Antonin Scalia, wary of implication within their originalist framework, will commonly make serious mistakes in putting the pieces together, as was surely the case with Justice Scalia's takings decisions.⁴⁸ Sooner or later, probably sooner, the issue of how you introduce justifications and tease out their implications is going to be a central part of your overall system, which means that textualism properly understood is a constitutional norm that answers a few questions directly, and then commands you to develop a comprehensive theory of liability, excuses, and justification.⁴⁹ If you're a good common-law pleader, you know that confession and avoidance do not exhaust all possibilities, which is also the case with the police power. There are replies to these defenses and further pleas down the road.⁵⁰ By the time you're done, there are strong parallels between the short texts of ancient law and the modern constitution. Thus, the simple command of the *lex Aquilia*—that one not kill unlawfully the slave or herd animal of another person—generates a hugely sophisticated account of tort law that deals with hard problems of causation, consent,

47. See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Little, Brown, & Co. 7th ed. 1903); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886).

48. See Richard A. Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 BRIT. J. AM. LEGAL STUD. 109 (2017).

49. See Epstein, *supra* note 26.

50. See Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

self-defense, necessity, and much more.⁵¹ As I have long stressed, constitutional interpretation follows exactly the same logic. The differences between Latin and English, between Rome and America, and between then and now play virtually no role in any side by side comparison of the Roman text with the Constitution.⁵² But the element of surprise should be reduced when it is recalled that the notion of a constitutional republic begins with Rome, and many of our constitutional terms, for example senator and republic, are direct takeovers from the Latin.⁵³ Historical myopia is dangerous intellectual business. Nothing is more dangerous than seeking to understand constitutional law of the First Amendment or indeed anything else, within this type of historical void.

At this juncture, we need to push ahead a little bit further and say, what else is there about common law that must be addressed after going through the prima facie case justifications and exceptions? The answer is that it is critical to understand how the law of remedies fits into the overall analysis. Good libertarians tend to start their analysis in the ex post world where a single discrete causal action has taken place that links together two parties. The only question they like to address is rectification for past harms, under the model Aristotle put forward in abbreviated form in the *Nicomachean Ethics*.⁵⁴

Aristotle's analysis is in many ways the starting point for serious discussions of legal rights and duties. It accomplishes two major points. First, it insists that the link between the two parties is the trigger for any remedy between the two parties.⁵⁵ Second, it holds that the actions themselves, not the general merit or demerit of the parties, determines their rights and duties. A good man can be liable for harm inflicted on the bad man, as

51. See DIG. 9.2.2 (Gaius, Ad Edictum Provinciale 7).

52. See generally Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992).

53. *Id.* at 705.

54. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 126 (R.W. Browne trans., 1853) (1132a2–6) (“[I]t matters not whether a good man has robbed a bad man, or a bad man a good man, nor whether a good or bad man has committed adultery; the law looks to the difference of the hurt alone, and treats persons, if one commits and the other suffers injury, as equal, and also if one has done and the other suffered hurt.”).

55. *Id.*

well as the reverse.⁵⁶ But beyond that, Aristotle's account is skimpy on issues of liability. There is no discussion of the basis of liability—strict liability, negligence and intentional harms—and their interaction. And the issue of defense receives no systematic treatment.⁵⁷ The Roman law addressed both deficiencies.⁵⁸ These issues must be fleshed out, and in my view the general relationship between strangers is one of strict liability, subject to affirmative defenses typically based on either the plaintiff's own conduct or the assumption of the risk of loss.⁵⁹ That strict rendition maps well into explicit constitutional guarantees. The First Amendment speaks about abridging freedom of speech, and does not require that the limitations be intentional, even though in most cases they are. The question of defense is always brought back into the law through the discussion of police power justifications for the abridgment of these rights based on the famous quartet of health, safety, morals, and the general welfare, each of which requires extensive separate analysis.

There is also a second serious difficulty with legal analysis that is endemic to all legal systems—namely, how to deal with the difficult problem of uncertainty. It is very commonplace for people to engage in actions that may or may not turn out to be harmful, and the law must decide whether to supply an *ex ante* remedy, an *ex post* remedy or, as is commonly the case, some combination.

The choice among *ex ante* remedies is exceedingly complicated. They have a temporal component to them; just how far back does the law go before it intervenes? In physical injury cases, the common law tended to wait until harm was actual or imminent before injunctive relief was supplied.⁶⁰ First Amendment cases rightly follow that view, so that early censorship is not used except where profound interests of national

56. *Id.*

57. *See id.*

58. *See* Epstein, *supra* note 52, at 706–12.

59. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

60. *See, e.g.,* Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).

security are at stake.⁶¹ But timing is not the only issue. Injunctions could have conditions attached, or the rules could be crafted so as to minimize their effects on third parties.⁶² They are also subject to revision on the basis of new information.⁶³

The ex post world of damages has its own set of complications. There is no unique measure of damages within a corrective justice system. Putting the injured person back in the position that she occupied before the wrong occurred is impossible in death cases, and often unwise in cases of serious injury like quadriplegia, where no amount of money achieves the objective of restorative justice, and excessive payments could rob the defendant of resources needed to conduct essential life-saving activities. The public law faces the same question as to how to calculate the fines applicable to different sorts of violations—and this must be answered. But you can stare at the constitutional text as long as you want, and you will discover not a word in it that explicitly addresses these remedial issues. As good First Amendment lawyers, we start hearing that you do not allow prior restraint, except in the few cases when you do. So you have to figure out why the presumption is set one way rather than the other, and what is needed to overcome it.

This exercise follows the same standards as those developed by courts of equity centuries ago. In the exercise of their inherent discretion, they often delayed injunctions knowing that people took needed precautions, and damages and injunctions are available down the line. The error costs of moving too soon are high, because an injunction could turn out to stop too much activity that turns out to be innocent. One early manifestation of this tendency is found in the old English case of *Turberville v. Savage*,⁶⁴ in which the plaintiff said, “If it were not assize-time [that is, if the judge were not in town], I would not take such language from you.”⁶⁵ The court held that the words, “if it were not assize time,” did not constitute an assault, given the absence of an intention to commit the assault. Hence the defend-

61. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (no injunction against release of Pentagon papers).

62. THOMAS CARL SPELLING, 2 A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1032 (2d ed. 1901).

63. *Id.* § 1033.

64. (1663) 86 Eng. Rep. 684 (KB).

65. *Id.* at 684.

ant could not interpose the assault of the plaintiff as a defense. But if in fact the blow were struck, the words would no longer matter, and the self-defense privilege would have then been activated.

That case is a stripped-down protocol of modern cases like *Schenck v. United States*,⁶⁶ *Abrams v. United States*,⁶⁷ and *Dennis v. United States*,⁶⁸ in which the stakes are obviously raised because of the uncertain prospect of the violent overthrow of the United States. But even though the stakes are vastly higher, the correct analytical techniques are the same as those used to deal with simple assault. *Ex ante* relief cannot be ruled out, but there are serious issues as to how early in the cycle that intervention takes place, and the choice of remedy once some intervention is justified. And to add to the mix, charges of aiding and abetting or conspiracy are also appropriate for crimes that deal with speech as much as with anything else. The impassioned views of Justice Brandeis in *Whitney v. California*⁶⁹ about the dangers of government overregulation of speech were not part of some passionate attack on government misbehavior. Rather, they were delivered in a *conurrence* that upheld the conviction for conspiracy, while warning against pushing the envelope too far outward.⁷⁰ But what makes this area so difficult is that it is often easy to state the choices, but difficult to pick the right damages.⁷¹ The standard used for remedies in all contexts is the unavoidable test that relies on the “sound discretion of the trial judge,” subject to the usual forms of judicial review.⁷² How that discretion should be exercised, and what standard of review is appropriate are the kinds of questions in which errors of over- and under-intervention must be simultaneously addressed, which is why empirically it is sometimes difficult for people who agree on an analytical framework to reach a consensus on

66. 249 U.S. 47 (1919).

67. 250 U.S. 616 (1919).

68. 341 U.S. 494 (1951).

69. 274 U.S. 357 (1927).

70. *See id.* at 379 (Brandeis, J., concurring).

71. Richard A. Epstein, *The Fundamentals of Freedom of Speech*, 10 HARV. J.L. & PUB. POL’Y 53, 57–58 (1987).

72. Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711, 717 (1985).

the facts of any given case.⁷³ Needless to say, the fact-specific nature of each determination makes it hard to develop per se rules that can confidently guide the extension of the basic rule from one case to the next. The choice of remedies in national security cases⁷⁴—what kinds of wiretaps and surveillance tools are permissible—is but a modern manifestation of an age-old problem.

The moral should by now be clear. The same kinds of interpretive commitments that are required to make sense of our constitutional guarantees are identical to those used in ordinary private law disputes. As in private law disputes, the more complicated the case, the more contested the remedial choices. And so, the logic of the argument shows that the higher stakes of constitutional litigation can easily put judges squarely into the unhappy position where they have to exercise their sound discretion on remedial issues.

This situation is, to say the least troublesome, especially for someone who wrote a book with the title *Simple Rules for a Complex World*.⁷⁵ But it is also unavoidable for this reason: it is easy to know what to do when everyone abides by the rules of the road. So the great office of the positive law is to lay out that map, which then reduces the likelihood that people will go astray. But once they deviate off the main road, it is not possible to catalogue in advance all the subsequent moves that other parties will, or should, make in response to the initial mistake in unanticipated ways.

C. *Sound Discretion and the Rule of Law*

The harder question is whether the use of discretion at the remedial level is in some sense fatal to the rule of law. The answer to that question is a confident no. Before getting worried

73. See Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 49 (2000); see also Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 470 (1986).

74. Richard A. Epstein, *Let's Not Kill All The Lawyers*, FORBES (Mar. 16, 2010), <https://www.forbes.com/2010/03/15/al-qaeda-lawyers-combat-opinions-columnists-richard-a-epstein.html> [<https://perma.cc/Q9HK-PQCR>]; see also Richard A. Epstein, *Security, Uncertainty, and the National Security Administration: The President Should Defend, Not Revise, Current NSA Procedures*, JUST SECURITY (Jan. 28, 2014, 10:35 AM), <https://www.justsecurity.org/6424/guest-post-richard-epstein/> [<https://perma.cc/YZ54-8Q3T>].

75. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

by complex doctrinal variations, the first question you must always ask is: what is the real-world frequency of occurrence of the difficult hypotheticals that judges and law professors raise in the abstract? In one of my Eureka moments in law school, I was sitting in a class on civil procedure taught by the late Fleming James,⁷⁶ who doubled as a distinguished tort professor.⁷⁷ I had just finished my English education, reading all of the variations on causation across the entire range of tort law that H.L.A. Hart and Tony Honoré had discussed in their masterpiece *Causation in the Law*.⁷⁸ Much of that subtlety was lost on James, an old railroad lawyer, who had this to say about the doctrine of proximate cause: "Do you know what this stuff is about? Somebody (usually a train) ramming into somebody else." And he then said "pow," as he struck his right fist into his left palm. His point was that most of these cases are collision cases for which it is necessary to know who hit whom and who had the right of way.⁷⁹ That test works especially well with trains. If ninety-eight percent of the cases turn out to be like that, any worry about the difficulties of causation and the duty of care in cases like *Palsgraf v. Long Island Railroad*,⁸⁰ addressing as it did the unintended consequences of knocking an unmarked package of explosives from the arms of a boarding passenger, will have little consequence of the day-to-day operation of the law.

Indeed, as an instructive aside, cases of far-higher salience often have little effect. When I worked as a consultant to the

76. See FLEMING JAMES, JR., *CIVIL PROCEDURE* (1965).

77. See FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* (1956).

78. H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* (1959). At the time the book was the best treatment of the subject. By the time of the second edition in 1985, it no longer held pride of place in large measure because it did not take into account systematic work with the probabilistic nature of causation in many toxic torts, malpractice, and products liability cases.

79. For the empirical observation in the same direction, see H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 98 (2d ed. 1980):

Taking the doctrine of negligence per se to an extreme doubtless unforeseen by the makers of the formal law, adjusters tend to define a claim as one of liability or of no liability depending only on whether a rule was violated, regardless of intention, knowledge, necessity, and other such qualifications that might receive sympathetic attention even from a traffic court judge. Such a determination is far easier than the task proposed in theory by the formal law of negligence.

80. 162 N.E. 99 (N.Y. 1928).

American Insurance Association in the 1970s on product liability tort reform, everyone knew the concurring opinion of Justice Roger Traynor in *Escola v. Coca Cola Bottling Co.*,⁸¹ urging strict liability instead of a negligence rule aided by the use of *res ipsa loquitur*, had no effect whatsoever on insurance rates. The exposure for liability under the two theories differed only marginally, and the presence of a strong defense was “defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.”⁸² It was only when the basic rules of the game were changed—so that the defendant could still be held responsible for harms caused by altered products that had been used improperly by a plaintiff well aware of the danger—that the field expanded wildly. But when I was first engaged to work on tort reform by the American Insurance Association, its key officials were keenly aware of the huge bump in payouts that drove a huge increase in premiums. They sensed that it was not attributable to the Restatement (Second) of Torts adopted in 1965, even with its expanded strict liability provision in Section 402A.⁸³

So, there is a lesson to be learned here: if the basic structure is sound, the countless low-frequency variations are not institutional issues, but are of concern primarily to litigators only. But if the complexity displaces the simple rules in the ninety-eight percent of ordinary cases, the social consequences can be dramatic, as with both the explosion of tort liability in medical malpractice and products liability cases in the late 1960s and 1970s.⁸⁴ Thus, traffic rules are the dominant constraint in highway accidents; but with medical malpractice, the decline of custom as setting the standard of care ushered in a new age of liability.⁸⁵ It was no accident that physicians and hospitals living with the old malpractice rules, then tried to contract out of these rules, only to be slapped down by courts heavily influ-

81. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

82. *Id.* at 444.

83. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

84. Richard A. Epstein, *Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties*, 45 J. AIR L. & COM. 87, 115–16 (1979).

85. See Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87, 95 (1976).

enced by beliefs that these novel institutional contracts were suspect contracts of adhesion.⁸⁶ Similarly, with products liability, tort liability expanded when the courts began rejecting the older, and superior, paradigm that liability only attached to products that contained latent defects in their original form that manifested itself after normal and proper use.⁸⁷ Once again, efforts to contract out of the new rules were stoutly resisted by courts, so that tort law locked everyone into a vastly inferior set of rules.⁸⁸ These differences are not small, but are literally differences in orders of magnitude.

II. FIRST AMENDMENT CASES—AT LAST

At this point, I shall move from the abstract to the concrete by discussing an important set of cases that look at both sides of the coin: those in which the Supreme Court has followed, to good effect, established common law principles, and those in which the Supreme Court has, to bad effect, deviated from those principles.

A. *Good Speech Doctrine*

First, I will discuss those areas where the Court has been successfully guided by common law principles: offensive speech and truthful speech.

1. *Offensive Speech*

On the former point, let me mention just two doctrines that resonate. The first is the view taken in cases such as *Texas v. Johnson*,⁸⁹ in which the Court held that the offense that the public at large takes to flag burning does not justify banning this vivid form of expressive conduct. The argument in favor of this position does not rest on any distinctive First Amendment doctrine, but follows from the standard common (and Roman) law

86. See *Tunkl v. Regents of Univ. of Cal.*, 383 P. 2d 441, 447 (Cal. 1963).

87. RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* (1980) (detailing the expansion in design and warning cases).

88. See, e.g., *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1964); *Henningens v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). The rejection of all waivers and disclaimers is institutionalized in *RESTATEMENT (THIRD) OF TORTS* § 18 (AM. LAW INST. 1998).

89. 491 U.S. 397 (1989).

view that certain forms of harm must be regarded as *damnum absque injuria*, literally harm (*damnum*) without legal injury (*absque injuria*). This doctrine is indispensable for development of a coherent legal system. To argue that government should intervene in any case of harm means virtually all human conduct becomes actionable, including blocking views by constructing new buildings and refusing to deal in competitive markets.

The underlying rationale for the rigorous application of this principle is that the private loss of the plaintiff is *inversely* related to overall social welfare, so that individual claims must be rejected categorically, lest legal action systematically shut down productive activity. The view here is not based on some narrow sense of “individualism”—an evocative word that has all-too-often been used to condemn laissez-faire economics.⁹⁰ But similar logic applies here. To protect individuals against mere offensive conduct is to invite people to merit that exalted status by getting angrier and angrier, so that their private resentments give strong claims of rights against one another. Everyone can play this game so that mutual indignation becomes the source of great anxiety or worse. The concept here is not viewpoint sensitive, for it applies equally to the person who is offended that the United States has gone to war and to the person who is offended that the United States did not go to war. One way to advance social peace is to deny any positive return to heightened emotions intended to stir the flames. Offensive speech thus falls into a different category from “fighting words” to a political opponent—an implicit threat of force that is within the proper scope of government regulation.⁹¹

Fortunately, this prohibition has held firm. Thus in *Matal v. Tam*,⁹² the Supreme Court held that the head of the Patent and Trademark Office (PTO) could not deny a trademark regulation to a San Francisco Asian band named “The Slants” on the ground that its name contravened the Lanham Act provision prohibiting the registration of trademarks that may disparage

90. Richard A. Epstein, *Elizabeth Warren’s Sloppy Progressivism*, DEFINING IDEAS (Hoover Institution, D.C.) (Jan. 10, 2012), <http://www.hoover.org/research/elizabeth-warrens-sloppy-progressivism> [https://perma.cc/L93S-XP5U].

91. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

92. 137 S. Ct. 1744 (2017).

or bring into contempt any person living or dead.⁹³ Justice Alito, speaking for a unanimous Court held that “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”⁹⁴

It is worth noting that *Matal v. Tam* involved not a direct suppression of speech, but the refusal of the PTO to give The Slants a more efficient route for trademark protection. Yet the doctrine of unconstitutional conditions rightly applies—given that the state has a monopoly on licenses, it cannot use that power to indirectly suppress speech it may not suppress directly. Thus, even if, as seems the case, *Tam* struck down the disparagement clause, there would still be a few instances in which the PTO could refuse to issue a trademark to an offensive use of language that did not enjoy common law protection. There is no reason why the PTO should have to give a mark, already invalid under common law principles, the added benefits of registration, namely effective notice and presumptive validity.

Indeed *Tam* is of exceptional importance because it reaffirms the bottom-up view of intellectual property rights more generally. Registration does not create the right for a trademark any more than it creates the right to acquire land. What it does, consistent with Lockean theory, is to make these property rights more secure, in the same way that the statute of frauds and a land office regulation make the title property more secure, also by giving the notice to the world and conferring a presumptive validity on the title. As Justice Alito argued, that standardized protection under clear priority rules is worlds apart from the massive government transfer programs funded out of general tax revenues, which raise wholly different issues.⁹⁵ The full set of constitutional doctrines thus works together in perfect harmony.

93. 15 U.S.C. § 1052(a) (2012).

94. *Tam*, 137 S. Ct. at 1764 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

95. *Id.*

2. Truthful Speech

The second notable set of free speech doctrines are those that protect the ability of commercial parties to make truthful statements about the services and goods that they sell. The only justified area for government repression is false and misleading speech, which again harkens back to the standard common law doctrine on misrepresentation. The point involves not only ordinary services, but also, most critically, the dissemination of information on matters of life and death, in connection with the truthful promotion by drug companies of their products to either physicians or patients.⁹⁶ The correct line in these cases follows the lead of Justice Clarence Thomas, who wrote, “I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”⁹⁷

As a matter of first principle, it strains credulity that there is any legitimate government justification for blocking the dissemination of truthful information that could aid in making life-or-death decisions. And, in light of what was said in *Tam*, the government gets no added regulatory power in FDA cases by virtue of that fact that its license is needed to market the drug. Once again the doctrine of unconstitutional conditions limits the grounds on which the government, given its monopoly position, should be allowed to turn down applications. If it cannot suppress speech by ordinary people when no license is required, it cannot use its licensing power, given to protect health and safety to block the dissemination truthful information about drugs from persons of full age and competence.

B. Bad Speech Doctrine

I now turn to cases where the First Amendment law loses its traction precisely because it does not conform with standard common law principles: collective bargaining, antidiscrimination law, and force and fraud cases.

96. See, e.g., *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *Amarin Pharma, Inc. v. United States FDA*, 119 F. Supp. 3d 196 (S.D.N.Y. 2015) (finding promotion of drug for off-label use protected).

97. *Tam*, 137 S. Ct. at 1769 (Thomas, J., concurring) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001)); see also, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

1. Collective Bargaining

The first illustration comes from the limitations on freedom of speech that are accepted in modern American labor law. As already noted, the mandatory collective bargaining scheme should on principle be rejected on the ground that employers do not enjoy any monopoly power that justifies forcing on them the duty to bargain under a theory rightly reserved to common carriers and public utilities. But now that the objection has been overrun, the question is whether traditional protections afforded to property and speech still have a role to play. In both areas, the law has to bend to accommodate the new basic premise.

Note the transition. In *Kaiser Aetna v. United States*,⁹⁸ the Supreme Court announced categorically "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."⁹⁹ But apparently not in labor cases. Thus, in *Republic Aviation v. NLRB*,¹⁰⁰ the Supreme Court sided with the NLRB when it treated as an unfair labor practice "the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees' own time."¹⁰¹ The word "trespass" did not appear in this decision, yet that is precisely what happened.

Normally the common law rules on exclusive use are suspended in cases of necessity, as when entry takes place to prevent imminent death, serious bodily injury, or serious property disruption.¹⁰² But that is not the case here. The union, of course, is engaging in speech activities when it solicits workers for membership, but it would be idle to claim that it was entitled to protection for its activities on any ground of freedom of speech on the premise that the state is involved if the owner seeks its assistance in expelling the intruders. The protection of this common law right is not a form of state action, let alone, as

98. 444 U.S. 164 (1979).

99. *Id.* at 179–80.

100. 324 U.S. 793 (1945).

101. *Id.* at 796.

102. See, e.g., *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) (allowing the privilege, but requiring compensation for property loss); *Ploof v. Putnam*, 71 A. 188, 189–90 (Vt. 1908) (allowing the privilege without compensation).

Tam notes, a state subsidy.¹⁰³ Free speech again must be understood within a comprehensive framework of general property rights. One can no more trespass to gain access to speak than to gain access to farm equipment. But once the duty to bargain is imposed, it makes no sense to continue to allow the traditional right to exclude. Then the employer could first agree to a deal and then exercise its right to exclude workers from its plants.

The change in one basic rule of freedom of association requires a similar change in the rules on freedom of speech. In ordinary discourse, each side can say what it wants to advance its position so long as it does not engage in the threat of force or the commission of fraud. Hence, it is perfectly permissible at common law to threaten the performance of a *lawful* action, namely the refusal to deal. So, a statement that I shall move my business, introduce machines, or fire you all is part of the way in which the parties determine whether to deal or not, and if to deal, on what terms. But once the labor law is put into place, the right to walk away disappears. So now any threat to move a business or close down a section should be understood as the threat to commit an *unlawful* act that the state can then bar.¹⁰⁴ At this point, the hard question is just what can an employer state that would not be construed as an implied threat. One reading is nothing at all. The most it can do is exercise its right under the NLRA not to make a specific concession in the course of bargaining,¹⁰⁵ which has the unpleasant consequence of leaving the union in the dark as to the employer's reservation price on critical terms. The Taft-Hartley reform, Section 8(c), seeks to provide the appropriate roadmap when it says:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.¹⁰⁶

The last phrase, dealing with a threat of reprisal or force or promise of benefit makes the fatal linkage. Threats of force

103. *Matal v. Tam*, 137 S. Ct. 1744, 1760–61 (2017).

104. *See, e.g., Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

105. 29 U.S.C. § 158(d) (2012).

106. 29 U.S.C. § 158(c) (2012).

should always be off the table, but the term “reprisal” is clearly meant to go beyond that state of affairs, to cover other kinds of actions that make it more difficult for unions to organize. And the promise of a benefit, that is, a statement of what the employer will do if the workers choose not to join the union, is banned to make sure that the employer is not allowed to undercut the collective bargaining system by competing for the loyalty of workers by offering them a better deal—including terms that allow the firm and the worker to divide the productivity gains by blocking any union that seeks to organize the workers from gaining a cut of the deal. The situation is further compounded by the insistence of dissident union members that they have a free speech right not to pay dues to a union whose mission they do not support,¹⁰⁷ which is then met by the converse claim that the union is entitled to recoup from the state under a takings theory the lost dues that come from the state adoption of a right-to-work rule that in its view allows dissident workers to free-ride on union efforts.¹⁰⁸

My point here is not to resolve this jumble of confusions, but only to point out yet again that none of these issues arise under a common law framework. The employer can decide to refuse to deal with workers, and can enter into yellow-dog contracts to secure loyalty from those to whom he extends offers. The union can only include in its ranks the members it can lawfully recruit into the organization. So there the standard theories of speech and association obviate all the second-best adjustments that need to be made, fitfully at best, in these cases. Once again, the unified theory beats the ad hoc approach as a matter of common, statutory and constitutional law.

2. *Antidiscrimination Law*

In one sense, the employment discrimination laws of the 1960s are a second generation attack on freedom of contract in competitive markets. As was the case with collective bargaining, the introduction of the new system necessarily places large

107. See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

108. See *Sweeney v. Pence*, 767 F.3d 654, 671 (7th Cir. 2014) (Wood, C.J., dissenting); *Int'l Ass'n of Machinists v. Wisconsin*, No. 2015CV000628, 2016 Wisc. Cir. LEXIS 1, at *6 (Wis. Cir. Ct. Apr. 8, 2016). For my critique, see Richard A. Epstein, *The Misconceived Attack on Right to Work Law*, 2017 U. CHI. LEGAL FORUM (forthcoming 2017).

and unprincipled limitations on freedom of association. Some of these limitations are of lesser practical consequence because they tend to match the private preferences of the firms subject to their scope: there are many more firms that support diversity and affirmative action than want to exclude minorities from their ranks—by orders of magnitude.¹⁰⁹ But it is important to understand which way dual preferences, public and private, should be reconciled. Rightly understood, they are reason to *remove* state compulsion, since markets already echo the dominant sentiment. And that case for getting rid of these laws in the absence of monopoly power (which is never found in labor markets) is stronger because there are serious dangers that government will apply these antidiscrimination laws (or human rights laws as they are often called) to small groups that have their own reasons for bucking the dominant trend. The issue of divergent preferences arises not only in employment contexts but also with charitable and religious organizations that have consistent sets of beliefs out of step with the world at large.

As noted earlier, the correct common law view on this subject only uses the antidiscrimination norm as a counterweight to monopoly power, so that it has no proper application to any business or social organization operating in a competitive environment. That argument applies equally to all forms of discrimination on the grounds of race, sex, sexual orientation, or age. Remove these particular rules and we should expect to see some private organizations depart from any X-blind rules, including diversity or affirmative action programs that have attracted widespread social support today under the banner of “inclusion and diversity.” The great virtue of a competitive market is that different organizations can experiment with different programs, allowing for a higher level of social satisfaction precisely because all organizations do not toe the same line.

It is of course clear that in modern social discourse the anti-discrimination norm has emerged triumphant against all rival

109. Jonathan D. Glater, *Affirmative Action: A Corporate Diary*, N.Y. TIMES (June 29, 2003), <http://www.nytimes.com/2003/06/29/business/affirmative-action-a-corporate-diary.html> [https://perma.cc/4FMB-9ZYC]; Roger Parloff, *Big Business Asks Supreme Court to Save Affirmative Action*, FORTUNE (Dec. 9, 2015), <http://fortune.com/2015/12/09/supreme-court-affirmative-action/> [https://perma.cc/G9J4-NZZF].

claims of economic liberty, with of course a huge exception from the so-called color-blind or sex-blind rules for given protected classes. But the First Amendment is made of sterner stuff. Under its two-tier system of constitutional rights, it calls for a higher level of scrutiny of government actions. But here again the confused state of the basic norm destabilizes the system, so that the antidiscrimination norm often trumps associational freedom when monopoly is nowhere in sight. One early case for this position was *Roberts v. United States Jaycees*,¹¹⁰ where the Court, with an opinion from Justice Brennan, sustained an order under the Minnesota Human Rights Law for the Jaycees to admit women as equal voting members in the organization. In his view, the freedom of association only came out ahead in certain kinds of “intimate human relationships,” of which membership in a large organization was not one.¹¹¹ Brennan’s carefully crafted exception was clearly motivated by the desire to prevent the state from making it illegal for people to turn down marriage partners for reason of race and religion.

In those cases, the freedom of association is at its strongest. But why does the right vanish when the organization gets larger? Socially, everyone understands the difference, which is why marriage and social organizations operate under different rules, even in the absence of the antidiscrimination norm. The Jaycees will be subject to much social pressure to change their rules, and if they refuse to buckle, other organizations will expand or form to take up the slack. Given these powerful forces it is risky business for the government to decide whom any group must admit and whom it may exclude. Public agencies have little knowledge of the internal dynamics of discrete private organizations that justifies putting them in a position to dictate values on group membership or rules of internal organization. Groups that go too far out of line with social practices will find it hard to attract new members or trading partners.

Predictably, *Roberts* raised unwelcome complications with the decision in *Boy Scouts of America v. Dale*,¹¹² where a bitterly divided Court took the opposite view and allowed the Boy Scouts to refuse to make Dale a troop leader solely because he

110. 468 U.S. 609 (1984).

111. *Id.* at 617–18.

112. 530 U.S. 640 (2000).

was gay. The case thus drew the opposite balance as *Roberts* for this large-scale organization, in part because of its religious overtones. That decision provoked a sharp dissent from Justice Stevens who insisted that the only organizations that should be entitled to First Amendment protection against antidiscrimination laws are those that have deep commitments to their extreme substantive views, which the Scouts could not claim because of internal inconsistency on gay rights.¹¹³ But Justice Stevens's view (like the rules on offensive speech) only strengthens the hand of extremists in every organization. The voice of moderates should count equally.¹¹⁴ In fact, in the aftermath of *Dale*, extended internal deliberations ultimately resulted in a shift of policy, all the more legitimate precisely because it was achieved internally.¹¹⁵

The greatest controversy comes from recent cases in which small businesses have been subject to the full brunt of the law in connection with their refusal to make wedding cakes,¹¹⁶ take photographs,¹¹⁷ or supply flowers for same-sex marriages.¹¹⁸ These proprietors have uniformly claimed that they cannot enter into activities that violate their personal and deeply-held religious beliefs, for which they have received a storm of abuse from government officials on the ground that those individuals who don't want to play by the human rights laws are bigots who should be shut down.¹¹⁹ The question is whether there is

113. *Id.* at 675 (Stevens, J., dissenting).

114. For my views, see Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000).

115. David Crary & Brady McCombs, *Boy Scouts faring well a year after easing ban on gay adults*, ASSOCIATED PRESS (July 23, 2016), <https://apnews.com/3de59dad2ba74b8f98bd3bc9b93c9bfc/boy-scouts-faring-well-year-after-easing-ban-gay-adults> [<https://perma.cc/L9L9-M8BV>].

116. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

117. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

118. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

119. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), <http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF> [<https://perma.cc/R6GY-PQ5P>]. The report contains a separate statement by five of the commissioners—Chairman Martin Castro, joined by Commissioners Roberta Achtenberg, David Kladney, Karen Narasaki, and Michael Yaki—who write: “These laws”—which seek exceptions to the antidiscrimination laws—“represent an orchestrated, nationwide ef-

any pushback to these intemperate statements. One line of defense is that taking pictures, baking cakes, and arranging flowers are forms of expressive activity. A second is that the defendants do not discriminate on grounds of sexual orientation, but only on their views of proper marital status.¹²⁰ The first argument pushes the expression-conduct line so that much can be made conduct. The second is hard to sustain given the high, but by no means complete, correlation between the two positions: these same bakers will not make cakes for polygamous marriages either.¹²¹

Within the current framework, both First Amendment arguments have been blown away by courts that treat human rights laws as embodying a compelling state interest. Thus it is said that: "Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm."¹²² Or further, that "[t]he reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work."¹²³ Or finally: "At first blush, it may seem reasonable that a private business should be able to refuse service to anyone it chooses. This view, however, fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are."¹²⁴ The explicit strategy is to reduce these cas-

fort by extremists to promote bigotry, cloaked in the mantle of 'religious freedom.'" *Id.* at 160.

120. See, e.g., *Arlene's Flowers*, 389 P.3d at 553.

121. This rationale motivated Justice Ginsburg in *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). Indeed, just this point surfaced in the recent Supreme Court decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (striking down a Missouri constitutional provision forbidding any cash contribution to religious organizations and insisting on a distinction between status and conduct). That distinction was rejected by Justice Gorsuch, who would have extended the First Amendment protection further, *id.* at 2025 (Gorsuch, J., concurring), and by Justice Sotomayor, who thought that the protection went too far and would have allowed some states to impose the prohibition even if others did not, *id.* at 2027 (Sotomayor, J., dissenting).

122. *Elane Photography*, 309 P.3d at 64.

123. *Id.* at 66.

124. *Craig v. Masterpiece Cakeshop, Inc.*, Colorado Civil Rights Commission CR 2013-0008, at 4 (2013). The United States Supreme Court later granted certiorari on the question of "Whether applying Colorado's public accommodations law

es to issues of economic liberty where the state's power is thought to be greater.

Yet the common law framework does not yield to these facile arguments. These statutes do nothing to ensure that various services are available in the market. The parties who claim protection as a matter of freedom of religion or of association possess no power to prevent a huge industry from serving groups that a few isolated, small merchants refuse to serve, and then only for the religious ceremonies. That market is quite robust, even if 100% of the firms do not serve it. But even worse, the claims for legal protection are driven by an exaggerated sense of dignitary harms of the very sort that were emphatically rejected in *Matal v. Tam*.

More generally, any claim of dignitary harm has to be rightly resisted, lest any refusal to deal on any ground not covered by the Washington human rights law could count as a dignitary harm, including customer decisions not to patronize religious organizations because they find their beliefs offensive. And it is easy to embroider these claims. For example, the private complainants, who had patronized Arlene's Flowers for years, claimed that they lost their appetite for a large wedding once they were rebuffed for fear that other proprietors would follow, even after Barronelle Stutzman, Arlene's proprietor, provided the names of nearby shops that would take their business, while other merchants, following their Facebook feed, supplied the couple free services.¹²⁵ It is easy to embellish the level of emotional anguish by claiming that they were "feeling very hurt and upset emotionally," and "so deeply offended that apparently our business is no longer good business," because "[his] loved one [did not fit] within [the vendor's] personal beliefs."¹²⁶ Note how the religious element drops out of the description of the case.

to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/> [<https://perma.cc/S2TR-UU4A>] (last visited Sept. 25, 2017).

125. *Arlene's Flowers*, 389 P.3d 543, 549.

126. *Id.*

The simple way to understand the exaggerated nature of these customer complaints is to ask about the tradeoffs demanded. The religious organizations only ask that people, for a limited subset of services, go down the block to another business that is happy to serve them. The human rights proponents ask people to give up their religious beliefs or go out of business entirely. They care not about the emotional anguish that those threats cause. Nor are these proponents much moved when these small proprietors are subject to multiple threats and unkind messages. To make matters worse, the human rights law compounds the risk of set-up. A gay couple that has no desire to have their wedding services provided by fundamentalist Christian groups may put in a diplomatic request, and when politely referred somewhere else, turn the matter over to a civil rights commission that finishes the job by initiating full scale prosecution, complete with demands for reeducation of offenders in good Maoist style.¹²⁷

There is a lesson to be learned here. There is little that the First Amendment will do to protect people once the antidiscrimination laws are held to be a compelling state interest even in fully competitive markets. It is no pleasure to see the full brunt of the law brought against small businesses. There was once a time when the purpose of constitutional guarantees of individual rights was to protect, in the famous words of Footnote 4 of *United States v. Carolene Products*,¹²⁸ “discrete and insular minorities” against oppression by government actors.¹²⁹ It was that spirit that led to the decision in *NAACP v. Alabama*,¹³⁰ where associational freedoms were protected against state demands for the disclosure of membership lists that could expose their members to just this form of abuse. But now that the gay rights movement is ascendant, small evangelical Christians can be forced to choose between abandoning their religious beliefs or their business. The lesson here is that vulnerable individuals and groups cannot be protected against a legal onslaught once

127. See Steven F. Hayward, *Persecution and The Art of Baking, Or How Civil Rights Became Corrupt*, FORBES (June 30, 2014), <https://www.forbes.com/sites/stevenhayward/2014/06/30/persecution-and-the-art-of-baking-or-how-civil-rights-became-corrupt/> [https://perma.cc/JY5F-4KSL].

128. 304 U.S. 144 (1938).

129. *Id.* at 152 n.4.

130. 357 U.S. 449 (1958).

economic liberties fail. Economic liberties and political liberties stand together or fall together. The antidiscrimination laws are now used to steamroll associational freedoms where it matters most—on matters of religious belief and conviction.

3. Force

The next set of cases that I wish to examine involves the relationship of First Amendment protections to private conduct that involves the use of force. Commonly, there are legitimate grounds for the restriction or suppression of force as well as fraud, and genuine uncertainty as to how that goal should best be accomplished. One of the areas which gives rise to the greatest tension is picketing around some controversial site. Traditionally that tension arose in connection with labor disputes, where it has always proved difficult to tease out the threat of force on the one side of the equation from the effort to persuade on the other. At times, these decisions have been based on common law principles,¹³¹ and at other times on the First Amendment.¹³²

As should be apparent, there is in principle no reason to expect or accept any systematic divergence between the two approaches, since they both share a common objective of sorting the wheat from the chaff. The evident difficulty is that courts struggle to come up with some general rule that works across all cases. But by the same token, allowing endless variation in defining the scope of an injunction invites excessive levels of judicial discretion in individual cases. Unfortunately, modern First Amendment law often takes the wrong approach on both liability and remedies.

In *Snyder v. Phillips*,¹³³ members of the Westboro Church picketed near the funeral site of a Marine Lance Corporal who was killed while serving in Iraq. The signs at some distance from the funeral promised to wreak vengeance on all those who were in the U.S. military.¹³⁴ But the picketing took place some 1000 feet from the funeral site and could not be seen or heard

131. See, for illustrations of the problem, *Vegalahn v. Gunter*, 44 N.E. 1077 (Mass. 1896) (finding picketing illegal, over a passionate Holmes dissent).

132. See *Thornhill v. Alabama*, 310 U.S. 88 (1940).

133. 562 U.S. 443 (2011).

134. *Id.* at 448.

or heard during the ceremonies.¹³⁵ The plaintiffs only learned about the activities after the services were over.¹³⁶ They brought five different common law causes of action: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.¹³⁷ There is little reason to go into these in great detail, but essentially each of them would fall short under standard tort law. The most obvious candidate would be intentional infliction of emotional distress. But so long as there is no direct interaction between the defendant and plaintiff that claim would fail, for the supposed impact is no greater than if the demonstration were done 100 miles away.¹³⁸ Short of interference with the ceremony, the case is at an end.

Accordingly, the jury verdict of \$2.9 million for intentional infliction of emotional distress and intrusion on seclusion goes way beyond the traditional limits of that tort. I am not aware of any tort case in which an adverse reaction to mean and nasty words or gestures is actionable in the absence of some direct connection. Perhaps one should be able to argue for a reversal of that rule, but remove the physical connection and the scope of liability becomes virtually unlimited. Either way, that too is a federal constitutional issue for the same reason that the contours of the tort of defamation was a constitutional issue in *New York Times v. Sullivan*. Freedom of speech begins where the tort law ends, so that interdependence between the two is total.

The Supreme Court in *New York Times v. Sullivan* did not examine the soundness of the state law judgment by asking whether it violated any norms against force and fraud. Instead, it assumed that state law had final say on the tort law, so that the First Amendment only came into play after the tort decision was settled.¹³⁹ That approach represents one of the occupational hazards of insisting that tort and constitutional law fall into separate compartments. But in *Snyder v. Phelps*, the shift in approach leads to the wrong place, by asking whether the speech was a matter of public interest and concern that rated a higher level of constitutional protection than matters of merely private

135. *Id.* at 449.

136. *Id.*

137. *Id.* at 450.

138. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989).

139. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267–68 (1964).

level of concern. But in this context why worry about this distinction at all? If there had been some direct abusive conduct, I am hard pressed to think that the conduct should be protected from tort liability because the abuse related to the war in Iraq as opposed to the decedent's bad posture. The content makes no difference here, for any matter of public concern can be raised, as it was done in this case out of eyeshot and earshot of the plaintiff. There is no reason for some distinctive constitutional overlay. The difficulties at the borderland of the tort theory are not resolved by invoking some supposed constitutional norm that itself faces the same degree of difficulty. Once again, the common law rules are an accurate guide to constitutional law, in difficult as well as easy cases.

The issue of picketing surfaced yet again in *McCullen v. Coakley*,¹⁴⁰ which involved a Massachusetts statute that imposed a thirty-five-foot buffer zone around abortion clinics targeted solely at picketers.¹⁴¹ A statute of this sort would be wholly out of line if there were no explicit or implicit threat to people entering the clinic. But there was a legislative record that documented frequent occasions in which persons who claimed to be giving compassionate advice were perceived by women in an obviously vulnerable position as making unwelcome advances that crossed over from persuasion to coercion.¹⁴² Women who have scheduled an appointment at an abortion clinic are not the most likely targets for advice that they switch course at the last moment.

The question is how to sort out these messy situations, and common law courts are by necessity left with the need to work out individual injunctions in ad hoc decisions that could produce different outcomes from case to case. The legislative solution was intended to remove this uncertainty by picking a distance that allowed picketers to get close enough to have their signs read and their messages heard, but not so close as to reach out and touch people seeking to enter the clinic, which for these purposes is a guaranteed constitutional right no mat-

140. 134 S. Ct. 2518 (2014).

141. MASS. GEN. LAWS ch. 266 § 120E1/2(b) (2012) ("No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility . . .").

142. *McCullen*, 134 S. Ct. at 2535.

ter what one thinks of the constitutional soundness of *Roe v. Wade*.¹⁴³ It looks as though this statute makes an appropriate accommodation for the relevant interests. I would vote for the statute if a member of the state legislature.

It is therefore instructive to see how current constitutional jurisprudence skews the analysis in ways that led to striking the law down. One class of First Amendment cases involves the application of content-neutral rules that impose time, place, and manner restrictions that do not, and are not, intended to switch the balance of advantage between rival positions.¹⁴⁴ These in general receive more deference than content-specific statutes which generally require higher scrutiny because of their greater ability to tip the scales in one direction or another in any substantive debate.¹⁴⁵

In practice, however, both these presumptions are much too rigid. In *McCullen*, Chief Justice Roberts took the view that the Massachusetts law imposed a content-neutral restriction, which he then struck down because he thought that historically the ability of the state to regulate protests on public streets was “very limited.”¹⁴⁶ There is no doubt that this judgment makes sense in most cases. But it does not obviously apply at a choke point at the access to private property where threats are far higher. So, in this case, the basic presumption is overcome, as the right of ingress and egress should dominate.

Justice Roberts’s position is in my view subject to a strong objection that the Massachusetts law is a content-based decision, given that it is known that the only protestors that will camp outside reproductive health care facilities are abortion protestors. But once again it does not follow that the Massachusetts statute should fall because it is content-based, as Justice Scalia protested,¹⁴⁷ in light of the good reasons for imposing that restriction. It would be wildly inappropriate to impose these same limitations in front of those businesses that face no picketing threats. To rely on the content-based distinction

143. 410 U.S. 113 (1973).

144. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949).

145. *United States v. Alvarez*, 567 U.S. 709, 724 (2012).

146. 134 S. Ct. at 2522 (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)). For the origin of the doctrine, see *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515–16 (1939).

147. 134 S. Ct. at 2548 (Scalia, J., concurring).

misses the central point. This uniform statutory rule is meant to supply a wholesale substitute to case-by-case injunctions. In practice, those injunctions would necessarily be confined to abortion clinics, so any statute that went beyond the area of controversy would necessarily be overbroad. Using content-based distinctions as a targeted response to a content-based problem is wholly appropriate. The Massachusetts statute did a good job of minimizing uncertainty in its administration by setting a distance that balanced the competing interests. It deserved to pass constitutional muster.

4. *Fraud*

A parallel afflicts the dominant Supreme Court approach in cases of fraud. Initially, the First Amendment adds nothing to the proper definition of fraud. There are many cases, especially under the securities law, where it is always an open question of how to draw the line between statements of fact and statements of opinion, or to determine potential liability for concealment or nondisclosure, or to address the issue of causation in fraud cases. A quick aside, all the common law issues surface in parallel form with fraud actions under the securities law, and once again the same arguments that have traction in the common law context tend to be those that work best at the statutory level.¹⁴⁸ The correct approach is to first determine the scope of fraud, and then to make sure that the government is not allowed to force into the fraud category truthful statements that do not belong there. It is just this sound procedure that is followed in cases that make “false and misleading” statements the touchstone for liability. To be sure, in some cases, fraud morphs into misrepresentation under either a negligence or

148. See, e.g., *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1330 (2015). *Omnicare* relied in part on the common law decision in *Smith v. Land and House Property Corp.* (1884) 28 Ch D 7 (C.A.) 15 (Eng.), which showed a better grasp of the overall situation, by placing the correct emphasis on asymmetrical information. Thus, in that case the owner of a set of flats knew that his tenant had problems making rental payments, but nonetheless falsely described him as a desirable tenant. But in *Omnicare* the prospect of further government regulation was surely known to both sides in a sophisticated transaction, so that the claim for a false statement of fact was far weaker. The case should not have been remanded for a full trial. There should have been a summary judgment for the defendant.

strict liability standard,¹⁴⁹ but even then, the element of falsehood remains. But, as in *McCullen*, it is critical to understand the interplay between public and private remedies.

One case that illustrates these current doctrinal pitfalls is *United States v. Alvarez*,¹⁵⁰ which arose out of a criminal prosecution under the Stolen Valor Act, the key provision of which provided:

(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS. — Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.¹⁵¹

The statute then imposed enhanced penalties for claiming to be a recipient of the Congressional Medal of Honor—this nation’s highest military award.¹⁵² The statute as drafted contained no scienter requirement, but as a matter of good sense, the government was prepared to prove scienter in its prosecution of Alvarez who had stated falsely on multiple occasions, “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.”¹⁵³

In striking down this statute Justice Kennedy did not start with the notion that common law fraud is generally actionable, but begun instead with First Amendment doctrine that subjects content-based restrictions on speech to a high level of scrutiny and not some “free-floating test” that purports to weigh the relative costs and benefits in each case.¹⁵⁴ Instead, he notes that this balancing approach applies to various cases involving defamation, threats of imminent lawless action, and fighting words.¹⁵⁵

Critically, he does *not* apply the same logic to ordinary common fraud, even if that is punished time and again under the

149. See *supra* text accompanying notes 29–30.

150. 567 U.S. 709 (2012).

151. 18 U.S.C. § 704(b) (2012).

152. *Alvarez*, 567 U.S. at 724.

153. *Id.* at 714.

154. *Id.* at 717 (quoting *United States v. Stevens*, 559 U.S. 460 (2010)).

155. *Id.*

securities law, or laws dealing with false claims for medical reimbursement, resume fraud in job applications, the unfair trade practices law, and the like. In these areas, the rationale for the strong prohibition against fraud is that feeding people false information can lead them to make bad decisions of a business or social nature—decisions that they would not have made had they known the truth. Justice Kennedy then argues that the government had not established any actual link between the false statements and harm to anyone else, and did not show that counter speech would not be sufficient to handle the situation, given that the false nature of his speech was readily apparent to most people.¹⁵⁶

In contrast, the concurrence of Justice Breyer stresses that in some cases, lies are justified to keep away prying eyes, or to help patients who are ill.¹⁵⁷ But there is of course no shred of any independent justification offered in this case. Nor does this case involve those tricky mixes of fact and opinion, which should generally be given a wide berth. Unlike Justice Kennedy, Justice Breyer thinks that a more “finely tailored” statute might survive scrutiny, without telling us how that revised law might look.¹⁵⁸ But none of this deflects the single most obvious point that Alvarez engages in the worst kind of lying for private gain and the expense of others. Only Justice Alito’s dissent made the sensible point that these frauds had occurred pervasively with literally hundreds of people making these false claims in a year, with little repercussion.¹⁵⁹ Striking down the statute knocks out the ability to control these cases where the frauds may themselves work serious harms.

So, the real question is how should a common law lawyer look at this issue, and the answer is—as in the abortion picketing situation in *McCullen*—that it is always appropriate for legislatures to enact state remedies when private rights of action turn out to be inadequate. The same is true with the securities laws concerned about fraud on the market precisely because it is so difficult to prove reliance in individual cases.¹⁶⁰ The situation here gives rise to the usual collective action problem,

156. *Id.* at 726–27.

157. *Id.* at 733 (Breyer, J., concurring).

158. *Id.* at 737.

159. *Id.* at 741–42 (Alito, J., dissenting).

160. *See, e.g.,* *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

where no single potential target will sue over false speech that harms large numbers of unrelated persons. The statute thus sensibly dispenses with proof of specific causation in the individual case, and imposes injunctive relief or criminal sanctions to counteract the virtual certainty that some unidentified, and perhaps unidentifiable, individual has been hurt. Socially, improved deterrence can be achieved even if the particular victims cannot be isolated. That happens with standard consumer fraud statutes that follow exactly this position. So why then deviate from these rules just because the particular victim is not found? The common law rules on fraud are perfectly general, they apply to all material false statements of fact, and there are no special rules carved out for certain types of speech.¹⁶¹ If a statement is a lie, it should be punished and the claim that the First Amendment prohibits various content-based statements makes no sense in light of the underlying risks. *Alvarez* so waffles on remedial issues that it necessarily erodes, for no good social purpose, the institutional protection against fraud. The common law position offers a far firmer foundation for this statutory prohibition.

The same difficulties in determining the appropriate boundaries of the First Amendment also arise in the commercial context, most notably in the recent decision in *Expressions Hair Design v. Schneiderman*.¹⁶² That case involved New York General Business Law § 518, which provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."¹⁶³ The purpose of this statute was to protect credit card companies whenever merchants wished to impose a higher charge for the use of a credit than for payment in cash or by check. In effect, the merchants could keep the identical price differential by offering a discount to the customers who paid by cash or by check. In pure economic terms, the dollar figures are the same if the credit card transaction costs \$102 and the cash or check transaction costs \$100. But it does not take a behavioral economist to recognize that the percentage of credit card transactions would likely fall if the language of penalty

161. See, e.g., RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

162. 137 S. Ct. 1144 (2017).

163. *Id.* at 1147.

and surcharge were used. This is why the credit card companies supported the statute which blocked the use of terms like “surcharge.”

The Supreme Court found that the regulation was directed toward speech, overruling the Second Circuit which had found that it regulated conduct. Because the Second Circuit spoke about the mode of communication, and not the information communicated, the case was remanded for further review to determine whether it “survived First Amendment scrutiny.”¹⁶⁴ There remained the contested issue of whether the New York law was a valid commercial speech regulation under *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*,¹⁶⁵ or a valid disclosure requirement under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.¹⁶⁶ It is a sure tipoff of intellectual disarray to leave a case hanging on these familiar, but elusive, modes of analysis.

This confusion stems from the fact that the dispute in this case revolved around the wrong question, namely, whether the New York statute regulated conduct or expression. This distinction must be drawn under current law because the law subjects speech regulation to higher levels of scrutiny than economic regulation. But the hard question is why the law should treat speech and conduct differently in the first place. From a classical liberal perspective, the choice of pricing mechanisms can be left to the banks and merchants to decide by contract, and presumably they will come up with some formula that will allow them to reach the right solution on both relevant points: the rate of interest and the mode of its presentation.

The correct approach disregards the line between conduct and speech. If the state can regulate the interest rates that private parties can charge in competitive markets, then it can regulate the mode of their communication. If it cannot regulate the first, then it cannot regulate the second. Ideally, both forms of regulation should be struck down in competitive markets, so that the balancing rituals can be safely put to one side in favor of a unified theory of the sort advocated in this article.

164. *Id.* at 1151.

165. 447 U.S. 557 (1980).

166. 471 U.S. 626 (1985).

III. CONCLUSION

The purpose of this article is to propose that the Supreme Court rethink the way in which it organizes its inquiry into free speech cases. Right now, the general approach is to treat the First Amendment inquiry as deriving from a set of tests that are said to follow from the constitutional text. Thus, the Court places too much reliance on its uncritical defense of the usual distinctions between speech and conduct, between content-specific and content-neutral speech, between low-valued and high-valued speech, and between political and commercial speech. Its approach gives rise to an entire set of constitutional presumptions that work their way through its entire docket.

I do not regard the Court's First Amendment jurisprudence to be the same type of intellectual shipwreck that characterizes its treatment of the takings cases,¹⁶⁷ where the constitutional analysis of private property is wholly unrecognizable to anyone who cares or knows its basic structure, as it has been derived through the ages. The key difference between these two areas is that the rational basis test, which dominates the takings law, does not drive First Amendment analysis. Higher levels of judicial scrutiny are almost always positively correlated with higher levels of intellectual acumen. Nonetheless, the complete separation between freedom of speech and economic liberties is not possible, for example, in the context of labor laws, so that there is always some uncertainty as to which level of scrutiny applies.

As I demonstrate in this paper, a different set of results comes from thinking of the constitution as resting on common law *substantive* doctrine, which announces protection for freedom of speech, and then uses standard interpretive techniques to ask how that freedom relates to the control of force, fraud, and monopoly practices. In this situation, one key question is often whether particular speech is false or misleading, and if it is, whether it is properly subject to well-crafted regulation. A

167. Of which the latest illustration is Justice Kennedy's majority opinion in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), which manages to mangle the law of regulatory takings because of its resolute refusal to return to first principles working through the field. For a critique of the subject, see Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in Murr v. Wisconsin*, 11 N.Y.U. J.L. & LIBERTY 151 (2017).

second question is whether certain forms of speech amount to the use or threat of force. In both these cases, government regulation is permissible and the great challenge is how to organize the relationship between public and private remedies when it is uncertain whether the effort to suppress fraud will also suppress proper speech.

The first of these inquiries, dealing with entitlements, tends to be conceptual and in this context one great judicial achievement is the insistence that mere offense by others to words spoken is never a sufficient justification for shutting them down. It is critical not to let these self-induced emotional and dignitary losses drive the shape of the law. Yet because freedom of speech is put into one silo and the antidiscrimination laws into another, the same kind of emotional-reaction refusal-to-deal cases based, for example, on same-sex marriages, is treated as a grave offense that justifies massive government intervention, which leads to a totalitarian overreach directed against a weak and isolated minority that also should enjoy speech and associational freedoms. A similar progressive mistake arises under Section 8(c) of Taft-Hartley, which statute's unacceptable restrictions on employer speech are justified only as a back up to the progressive system of mandatory collective bargaining, which is itself economically unwise and constitutionally suspect. These two doctrinal innovations stand together, and, more importantly, should fall together, for the effort to control employer speech has nothing to do with the control of force, fraud, or monopoly.

In other cases, however, the insistence of starting fresh in First Amendment cases tends to lead to an overexpansion of speech protection relative to a sensible common law norm. That arises with the casual attitude to fraud in cases like *Alvarez*, and to the threat of force in *McCullen*, leading to the serious under-enforcement of fundamental libertarian norms. The common law rules on the exercise of sound discretion call for courts and legislatures alike to minimize the risks of over- and under-enforcement, considering the risks of case-by-case discretion in setting legal remedies.

In the end, the doctrinal and administrative errors made by seeking to forge a distinctively constitutional culture for each provision results in excessive restriction of speech in some cases, and insufficient regulation of speech in others. Unfortunate-

ly, the two sets of errors do not cancel out. They cumulate. A fundamental call to a consistent common law approach to all areas will have two desirable consequences: first, it will allow for a more coherent exposition and development of the law governing freedom of speech, and second, it will allow for the development of a more integrated doctrinal approach across different constitutional areas, which in fact are linked together by the classical liberal principles that animate the constitution and offer the only foundation for constitutional adjudication.