Understanding America

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NEW ZEALAND BUSINESS ROUNDTABLE

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Richard A Epstein

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He has been a member of the American Academy of Arts and Sciences since 1985 and a Senior Fellow of the Center for Clinical Medical Ethics at the University of Chicago Medical School. He served as editor of the *Journal of Legal Studies* from 1981 to 1991, and as editor of the *Journal of Law and Economics* from 1991 to 2001.

His books include *Free Markets Under Siege: Cartels, Politics and Social Welfare* (New Zealand Business Roundtable and Institute of Public Affairs, 2004), *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago, 2003), *Cases and Materials on Torts* (Aspen Law and Business, 8th edition 2000), *Torts* (Aspen Law and Business, 1999), *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books, 1998), *Mortal Peril: Our Inalienable Right to Health Care* (Addison Wesley, 1997), *Simple Rules for a Complex World* (Harvard, 1995), *Bargaining with the State* (Princeton, 1993), *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard, 1992), *Takings: Private Property and the Power of Eminent Domain* (Harvard, 1985) and *Modern Products Liability Law* (Greenwood Press, 1980).

Professor Epstein has written numerous articles on a wide range of legal and interdisciplinary subjects. He has taught courses in civil procedure,

communications, constitutional law, contracts, corporations, patents, individual, estate and corporate taxation, Roman law, criminal law, health law and policy, legal history, labour law, property, real estate development and finance, jurisprudence, land use planning, torts and workers' compensation.

Introduction

Roger Kerr executive director,
New Zealand Business Roundtable

It is a great pleasure for me to welcome and introduce Richard Epstein. We at the Business Roundtable immensely value our relationship with Richard as a friend and colleague.

He helped us initially with our work on employment law. Most recently he sharpened our thinking on the foreshore and seabed issue.

This is Richard's fourth visit to New Zealand. Most universities in the United States would count themselves lucky to have him on their campus once. We have been extraordinarily privileged. There are many friends and admirers of Richard in this room.

Richard is one of the most provocative and influential legal scholars in the United States today. His book, *Takings: Private Property and the Power of Eminent Domain*, has helped revive the constitutional doctrine that private property should not be taken for public use without just compensation.

That book gave rise to a famous episode in the senate confirmation hearings for Judge Clarence Thomas. One senator went as far as to say that anyone who believed in the book was certifiably unjustified to sit on the Supreme Court. But Thomas survived, and Richard's writings have come up in subsequent hearings, and without any such theatrics.

Richard's latest book *Skepticism and Freedom: A Modern Case for Classical Liberalism*, which partly originated with his last New Zealand visit, is a defence of liberalism of the classical sort – individual liberty, private property and limited government. He criticises the modern interventionist welfare state while steering clear of unbridled laissez faire: as he once put it, anyone who

thinks you can promote virtue solely by abstaining from force and fraud is smoking some banned substance.

One commentator described Richard's work as characterised by a relentless and rigorous use of reason. He quoted Richard as saying, "My attitude is talk is cheap, so let's debate ... I want people to disagree with me out of hand. Otherwise, I run the risk of a kind of complacency which can lead to the loss of a cutting edge".

Richard has a very nice token of appreciation to his family along these lines in his latest book:

> I thank my wife Eileen, and my children Melissa, Benjamin and Elliot, who have put up with the distracted musings of husband and father in developing a set of ideas of which they do not entirely approve.

Richard's energy and output are prodigious. This week he is giving 13 lectures, on subjects as diverse as employment law, the foreshore and seabed, affirmative action, behavioural economics, constitutionalism, the corporation and the case for a flat tax.

I worked out some years ago that the pattern of Richard's work reflects the hard issues of our times. He has written on topics like the environment, indigenous peoples' issues, bioethical questions like voluntary euthanasia and the idea of a market for organ transplants, and anti-discrimination laws.

Some months ago I decided I should get my mind around the controversy about same-sex marriages so I emailed Richard, knowing that he would have written something on the subject. Sure enough, back came a recent *Wall Street Journal* article and a 50-page legal analysis.

I think we can put tonight's lecture, *Understanding America*, into the category of hard topics. America is a country of contrasts and paradoxes. It stirs up fierce passions, both favourable and critical, around the world. Yet I find myself in agreement with Paul Johnson, the British historian who visited New Zealand in 1995 as a guest of the Business Roundtable. In his acclaimed book, *A History of the American People*, Johnson writes in the concluding paragraph:

> America today, with its 260 million people, its splendid cities, its vast wealth and its unrivalled power, is a human achievement without parallel … [M]any unresolved problems, some of daunting size, remain. But the Americans are,

> above all, a problem-solving people … Full of essential goodwill to each other and to all … they will attack again and again the ills in their society, until they are overcome or at least substantially redressed … The great American republican experiment … is still the first, best hope for the human race.

No country can escape American influence. New Zealand has all sorts of links with the United States. All our main political parties want New Zealand to draw closer through a free trade agreement.

For these reasons, I believe we need to deepen our understanding both of why the United States is the world's most successful melting pot, a leader in technology and innovation, with a culture that admires business and entrepreneurship, as well as why America can go wrong.

Two years ago, the Business Roundtable had Francis Fukuyama give our 2002 Trotter Lecture on the topic *America and its Allies: Growing Together or Growing Apart?*. In hindsight, it was remarkably prescient about events that unfolded just a few months later in the Middle East.

I have no idea how Richard will approach the subject we have asked him to speak on. What I do know is that it will be original, penetrating and absorbing.

Understanding America

Let me first express my thanks to Roger Kerr and the New Zealand Business Roundtable. I have known Roger now for over 15 years, and I do not think I have met anyone in my entire life who has been as relentless, purposeful and utterly reliable in his activities as he has been. The amount of work that he and the Business Roundtable have done has been simply extraordinary. I think it is fair to say that in terms of overall output, it has exceeded in quality and in quantity all the work put out by the three major comparable American organisations – the US Business Roundtable, the National Association of Manufacturers and the US Chamber of Commerce. It is really quite an extraordinary achievement.

I have been assigned a fiendishly large topic. How do you deal with so vast a subject? Perhaps I should change the topic. Indeed, I shall – not by eliminating it, but by using my legal skills to turn it into something that is more digestible and coherent.

It is, of course, impossible, in talking about a sprawling country like the United States, to touch on every divisive issue that arises in its popular culture. Instead, I want to identify a single fault line that will allow us to see and understand some of the perennial splits in American society. To put this in the context of Paul Johnson's reference to the problem-solving nature of Americans, I will talk not about the way in which the United States has solved its past problems, but rather about a set of problems it faces today – problems that in many ways have had Americans growing further apart rather than coming closer together.

Tradition and liberty

As a way of approaching this large theme, I want to back off to address a strong theme in America political thought, which has shown a deep attachment and respect to our 'traditional liberties'. Rather than praise this sensible and sonorous notion, I want to address the implicit tension that resides within it. No matter how hard we tug and pull, the twin concepts 'tradition' and 'liberty' do not work in harmony in all areas of social life. Indeed, at some points they are profoundly opposed, and it is that opposition between them – where the forces of tradition and liberty collide in strange fashions – that is the source of so much political tension in the United States today.

I do not mean to suggest that the split between liberty and tradition aligns with that between our two main political parties. In fact, this underlying division cuts more deeply than that. Of course the divisions are highlighted during a political election, when the public rhetoric is often more extreme and heated, if not hysterical, than the population to which it is directed. But let us ignore the political excesses. The underlying conflict, in fact, has profound intellectual roots, which we must seek to lay bare and understand.

Our first task is to explore the relationship between tradition and liberty: where is the overlap and what is the contrast between these abstract ideas? Starting with tradition, we can note that the concept has a certain amount of staying power. The traditionalist is someone who says: 'I don't know exactly how all these practices and rules work and cohere, but I do know that any institution that can endure over time must be regarded as having a fair measure of success. So, even though I may not understand the mechanism, I do not want to discard those practices and rules that I know to work, and replace them with some misguided artefact of rationalist thought that may look good on paper but will not work in practice'.

When we think about the cluster of ideas associated with tradition, we point to the standard practices in business and the professions, norms regarding ownership of property, and various social customs and arrangements. Among the classical liberal thinkers who squarely align themselves with faith in traditional practices, the name that comes at once to mind is Friedrich Hayek, who believed there was a gradual, spontaneous evolution whereby people managed to migrate

to a set of efficient norms even though they did not know how those norms were created or why they seemed to work. With that powerful pedigree, tradition is not a starting point that you can lightly disregard.

How then, in a traditional world, do people think? Typically, they think by way of heuristics and analogy. They rely on some degree of intuition and are deeply suspicious of those who try to impose rational constructs on the world, including people like me who call ourselves law professors with a sub-specialty of law and economics.

On the other side stand those people who believe in liberty as the primary social good. They tend to have a very different view of how to organise the intellectual and political space. Typically, they begin with a very grand and powerful proposition from which they hope to generate testable hypotheses that will enable the creation and maintenance of intelligent and useful social institutions. So you will often find strong allegiance to the following kind of proposition from the standard liberty-loving individual: that the purpose of society is to maximise the liberty of every individual consistent with the like liberty of all other people. You will note that there is a philosophical grandeur associated with a proposition containing the phrase 'like liberty'; the challenge is how to draw out its implications in concrete settings.

If you are wondering whether or not this second view also has an impressive pedigree, the answer is yes, of course it has. John Stuart Mill, in perhaps his most famous proposition, makes exactly this kind of statement. In *On Liberty* he asserts that it is the right of every individual to do as they please in matters that merely concern themselves, and that you cannot justify imposing control over people in order to advance their own self-interest. Only harm to other individuals – a phrase that is filled with ticklish ambiguity – justifies using state power to restrain private behaviour. That proposition counts as a strong vote for freedom and a strong rebuke of paternalist theories that hold that state intervention is warranted when (and often because) individuals are said to be *not* the best judges of their own self-interest. When you take this kind of liberty-loving approach, you are likely to be highly rationalistic in working out how to maximise liberty for all relative to some normative baseline, which in the end stresses both individual autonomy and private property. The tendency, therefore, is to

develop either a system of natural rights, on the one hand, or, on the other, a complicated consequentialist calculus to make all the pieces fit together. Intellectual coherence comes first. The experiential validation, so critical to the traditionalists, can never be wholly ignored. But it comes in second place, as a check on possible excesses to general theory.

So when you start to talk about a system of traditional liberties, you have to recognise that this one phrase makes reference to two essentially different ways of approaching the fundamental questions of political theory. The task, then, is to figure out how to make them work together in dealing with particular intuitions and institutions. That road is often more bumpy than is supposed.

The New Deal flip-flop on the police power

Focusing on the American experience, we have generally split the difference between these two theories when there is a potential conflict between them. As a workable generalisation, earlier periods of American lawmaking, for example the period before 1937 and the judicial transformation associated with the Supreme Court, Franklin Roosevelt and the New Deal, the United States tended to adhere fairly strongly to the principles of liberty when it came to dealing with the range of issues relating to the constitutional protection of economic liberties and property rights. There is a famous and mysterious phrase in the Constitution, the 'privileges and immunities' of citizens.[1] That phrase has no obvious ordinary meaning, but in its judicial construction it has been understood to embrace such liberties as the right to own property, the right to enter into contracts, the right to give evidence and the right to make a will. Liberties were essentially capacity-based, and the goal was to structure a set of voluntary transactions among individuals. It is remarkable – as you will see if you look at the way in which it has developed – how the legal system managed

[1] The phrase appears in slightly different form in two places. Article IV, Section 2 reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States", which has been interpreted as a *non-discrimination* provision, whereby no state can favour its citizens against outsiders. The same phrase occurs in Amendment 14, Section 1, in more categorical form: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States …".

to revolve consistently around the trinity of liberties that Roger referred to in describing classical liberalism. They are liberty of choice, protection of private property, and limited, focused government. Such a government in turn was designed to discharge three main functions: the control of force and fraud, the creation of infrastructure, and the regulation of monopoly. Although the texts of legal judgments up to 1937 did not quite put it in that fashion, the pattern was unmistakeable and the results generally successful.

At the same time that we were so strongly devoted to protecting economic liberties in the United States, we took a very different attitude on questions relating to the family and morality. Offsetting the idea of the liberty of all individuals was the idea that the government has an inherent police power. That power, in turn, was defined broadly as the ability to regulate the health, safety, morals, and general welfare of the population at large. Safety and health covered, obviously, such matters as personal injuries and disease. With economic liberties, the Supreme Court was reasonably astute to check whether legislative measures justified as a means to protect health and safety operated as a covert and illicit form of economic protectionism. But in dealing with moral questions, that level of suspicion was nowhere to be found. Rather, the basic mindset of the period was that morality covered all sorts of things, including various kinds of sexual activities inside and outside of marriage. It covered, for example, polygamy, adultery, prostitution, homosexuality, and bestiality, all of which state legislatures could make criminal with little opposition from either the federal or state courts. The morals head of the police power also covered gaming activities, which modern legislators felt they could control with relative impunity through what they called 'sin taxes'.

Thus, in that pre-1937 period, the general rule about liberty was completely reversed when it came to certain moral issues. Even where there was a consensual arrangement between two people that did not fall within some recognised category, the state could place sharp limitations on what those individuals could do.

So we have in our evolution as a nation a liberty side and a traditional side that went relatively happily together in the pre-1937 period. They did so mainly because there was a fairly strong social consensus in favour of that division, even

though it was difficult to rationalise why the lines should be drawn where they were and why two such different approaches could coexist on matters that dealt with individual choice and personal behaviours.

Then, in the post-1937 period, the entire system started to flip over. With respect to questions of property rights and economic liberties, the proposition emerging from the 1937 revolution was that these rights could be subject to the state's police power on very capacious grounds. The state could regulate an individual's ability to dispose of property or to use it in ways they saw fit, even when they were not causing harm to neighbours. Property use could be subject to extensive zoning regimes, development moratoria or to exactions (if you want to build an apartment or house, then give us land or money), even if these restrictions and requirements were intended to provide additional protection or benefits for current landowners at the expense of the holders of undeveloped real estate and those who might wish to buy or rent from them. The capacious view of the police power that used to be applied to moral issues now carried over to the regulation of land use decisions.

The police power was also applied with a vengeance to limit freedom of contract. In the pre-1937 period, voluntary exchange in labour markets was encouraged and upheld. Although it is difficult to imagine today, there was a fierce reaction in the United States following the 1937 revolution to such ideas as minimum wages and wage-setting regulation. However, slowly and inexorably, the 'progressive' forces won, and legislatures introduced comprehensive controls over the employment contract, which included minimum wage, maximum hour, collective bargaining, and anti-discrimination regulation. The traditional narrow view of the police power was totally vanquished in areas where it once dominated, and every effort to revive traditional conceptions has met with fierce resistance from those groups, such as labour unions, that receive special protections under the new order.

If this were a talk about the substance of these issues, I would describe in painful detail why I am a believer in the old libertarian view on these matters and why I reject the modern position. To put it in one sentence, it seems to me that the New Deal has allowed monopoly and competition to coexist in whatever ways the legislature sees fit, whereas the previous regime had a decided

constitutional preference for competitive arrangements, so that monopolies had to be justified (and often regulated). This was, and still is, the case with intellectual property such as patents and copyright, and complex network industries such as power, communications and transportation, which had certain natural monopoly characteristics. That is a preference I would embrace today, but I shall not dwell on it here.

My reason for not doing so is that there is a relatively comfortable consensus in the United States today on the scope of government regulation. When we have our political battles, liberals and conservatives will both generally argue within the same framework for or against the minimum wage or a safety statute. It is fair to say that those who favour open markets have won at least half the legislative battles on such questions in the last 30 or 40 years. They are controversial issues, but not ones that will break a nation in two because they do not go to those matters that touch on sensitive issues of personal self-image.

However, when you come to the issues covered by the police power under the morals heading, the division is far greater. When people say they believe in traditional values with respect to family, marriage, homosexuality and so forth, one has to understand, as a matter of basic psychology, that such impulses derive from a set of innate intuitions that are exceptionally strong. The relationship of sexuality to purity seems to be one of the major themes that modern psychology has isolated as a dominant force in the primitive mind. There is no doubt that many of the phobias, fears and tendencies carry over into the modern age, even after the basic conditions of human relationships have changed as a result of the advances of modern science. To put it in the simplest terms: natural impulses do not shift as rapidly as the technological developments that help define the modern age. Thus, people will be more fixed in their attitudes than might be expected in the face of modern technological advances. And just to make matters more complicated, there will be a wide degree of variation across a large population that differs in profound ways by upbringing and education.

So the next question is: do we want to flip back in the other direction? When we come to questions of marriage and morals and sexuality – and also

patriotism – do we now reject the strong view of legislative supremacy that dominated in the pre-1937 era? Do we hold that the liberty interests are dominant so that the unquestioned application of the police power to morals and related matters is no longer regarded as appropriate? The simple truth is that, as a nation, the people of the United States have yet to finish the discussion of that subject. If you take the long view, it seems clear to me that the application of the police power to moral issues is becoming displaced by a fairly strong libertarian impulse. However, that process is far from smooth, so that the United States is left very sharply divided, both in terms of its popular discourse and its current political directions. Here are some of the key milestones in that debate.

A sexual transformation

To help put the process in perspective, let me take you through some of its phases. I shall discuss two issues by way of illustration. The first has to do with various aspects of sexuality and the second concerns religion and the flag and patriotism. You will see that the divisions I am describing are not confined to a single topic.

With respect to sexuality, the initial salvo was fired by a well-known case of the Supreme Court called *Griswold v Connecticut* (381 US 479 (1965)). This case raised a constitutional challenge to what was described as "an uncommonly silly law" that made it unlawful in the state of Connecticut to sell contraceptives, even to married couples. So a married couple and the planned parenthood organisation sued to set the law aside on constitutional grounds. Given its strongly entrenched views on economic liberties, the Supreme Court had to think very hard about how to attack this explosive issue, because if the statute were looked at simply as a sale transaction, then the state should be allowed to regulate this more or less at will. But with some interpretive hijinks, the Supreme Court said, 'no, we think there is a new interest called marital privacy, and the state has to have a very powerful justification to interfere in the intimate affairs of a married couple'. A way of understanding this is to see the privacy interest essentially as a statement that the Court was willing to protect freedom of contract and action within marriage, even if it

did not do so in the marketplace. People who know each other are, in fact, allowed to do more or less as they please unless the state can justify interfering with their choices on grounds that hearken back to the classical liberal synthesis: protection of harm to their persons, or exploitation of one of the contracting parties. Neither seemed remotely credible here.

On *Griswold's* stylised facts, it turned out that not much was put forward by way of justification for the status quo. Nobody claimed that the use of contraceptives was in any way a health hazard, and it was very difficult to invoke a diffuse sense of popular resentment against their use by married couples. So Justice Douglas struck the statute down by a bold act of judicial intervention, most notable for his inability to identify which clause of the Constitution the statute offended. How far did his decision go? If you read the *Griswold* opinion carefully, the answer is that, in 1965, when this issue was decided, it was limited to marital privacy, on the grounds that this relationship was traditionally protected from state intrusion even before the adoption of the Bill of Rights. To drive the point home, the thoughtful concurring opinion of Justice Harlan explicitly noted that, "adultery, fornication, and homosexual practices" received no protection at all, precisely because these were traditional subjects of state regulation under the police power. In effect, the Court tried to say that while it interfered in cases of marital privacy, it was only a court and not the kind of super-legislature that had been condemned for interference in economic matters in the pre-1937 period. So this was not a particularly strong or universalistic statement about how personal or sexual liberties should be understood. Only traditional liberties were protected, with equal weight on both terms.

However, read with the benefit of hindsight, the judgment in *Griswold* clearly counts as a wedge decision that marked a change in the overall mindset: tradition would grow weaker and liberty stronger in the general sexual calculus. Not surprisingly, the next question to arise, for those in the rationalist tradition, was the extent to which the state could confine the principle of voluntary association to marriage. If you take marriage as some kind of preferred social institution, you might be able to maintain its distinctive status. However, if you adopt the classical theory of contract, marriage is simply a

question of two individuals getting together. We applaud mutual gains from trade, so, to the extent that a mutual agreement is untainted by force or fraud, there is a reluctance to interfere with such arrangements. Given this intellectual orientation, the traditional marriage licence is now thought to be suspect for the same reason that all licences are suspect. Do we really think that the state could end marriage as we know it by refusing to grant licences to any and all couples? And do we really think that there were no marriages before state licensing became a standard practice relatively late in our history? When economic liberties were protected by constitutional guarantees, licences were always scrutinised to see that they served legitimate purposes.

Sure enough, seven years later, the question arose again in a case called *Eisenstadt v Baird* (405 US 438 (1972)). Justice Brennan, who was a social liberal who supported extensive state control over the economy – in other words, an enthusiastic New Deal regulator – said he had read the *Griswold* decision closely, and he was convinced it applied not just to married people but to all people. Couples living outside of wedlock could, therefore, use contraceptives.

At this point you see a real change occurring. To many people, the prohibition against extramarital sex is not 'an uncommonly silly law'. It reflects what they consider to be the highest standards of moral behaviour. So when some liberal judge (who is a Roman Catholic, no less) comes out and tells them that they do not understand the law of the land, the reaction is going to be hostile in some quarters and incredulous in others. We now have a powerful claim to liberty of association being asserted in an ever-wider class of cases dealing with sexual conduct. This is in profound tension with the traditional, if mysterious, notion of *contra bonos mores*, which refers to conduct that is against good public morals. The idea behind this age-old notion is that if decent, respectable people take strong offence on religious or moral grounds to certain kinds of activities, their offence counts as sufficient justification to allow the legislature to shut those activities down. That view is a very disputed application of the so-called harm principle. Do we count reasonably grounded social offence as a harm falling within the Millian rule that the only justification for state intervention is the prevention of harm to others? I am forced to conclude that Mill did not come up with an answer that would leave

everybody happy under all circumstances. His narrow exception to the protection of individual liberty was capable of indefinite expansion.

Thus, the unravelling of earlier norms continued. The pace of events escalated dramatically in 1973 with the abortion cases, especially *Roe v Wade* (410 US 113 (1973)). True to form, a majority of the Supreme Court said that *Griswold*, which dealt with contraceptives within marriage, was really a strong enough principle to support the view that individual privacy encompassed the ability of a woman to decide whether or not to terminate a pregnancy. At this point the conflict became intense, because the opponents to *Roe* were not simply arguing on the grounds of public morals (although they were indeed invoking moral arguments); they were also insisting that the protection of the life of another human being (if that is what it was) fell squarely within the Millian harm principle.

As an illustration of just how difficult this last case turns out to be, there are two kinds of libertarian organisations in the United States today: Libertarians for Choice and Libertarians for Life. The reason the issue is so difficult is that if you treat the foetus or embryo as a person, then the harm principle has to apply, because extinction of another person is at stake. If you treat it as something less than a person, then the liberty principle will turn the case toward the pregnant woman (mother is the wrong term to use if it implies a child is on the other side). So we have this very deep cleavage that operates at an ontological level.

But in a strange sense the abortion cases, although highly divisive, did not bring to the fore the issue I am talking about, namely the extent to which public morals are a valid justification for government regulation of private sexual conduct. This issue, often at fever pitch, now separates in modern terms the social libertarians, many of whom turn out to be Democrats, from the social conservatives, many of whom turn out to be Republicans with a strong religious background.

To take this line of thought one step further, and I will oversimplify somewhat, the year is now 1986 and the case is one known as *Bowers v Hardwick* (478 US 186 (1986)). The issue in this case was whether the state of Georgia was entitled to punish two individuals for engaging in private, consensual

homosexual sex without coercion, without duress, and without any third-party effects except for the fact that some other people did not like it. Here we see the peculiar intersection of criminal law enforcement on the one hand and the symbolic force of laws on the other. Even by 1986, actual criminal prosecutions for homosexual conduct had become a comparative rarity, but there were many people who wanted the statutes kept on the books, because they thought the only way to affirm their traditional value set was to ensure these activities were still branded as criminal.

When the US Supreme Court had to face this issue, the tradition–liberty battle turned out to be central to the way in which the decisions came out. Justice White was a Democrat appointed to the Court by President John F Kennedy. He also came from a rather traditionalist Colorado family. Consistent with his background, he wrote the majority opinion in a bitterly divided five-to-four split that emphatically rejected the proposition that sodomy was "deeply rooted in this nation's history and tradition", citing exhaustively laws regulating various forms of sodomy since the beginning of the Republic. Any originalist reading of the Constitution would assume that if we have always had such laws then there is nothing in the guarantees of individual liberty founded in the Constitution that makes sodomy anything other than an improper form of behaviour. So Justice White was a straight traditionalist. On the other side stood Justice Blackmun, another enthusiastic regulator on economic issues, saying that unless the state could show a rational justification for preventing the conduct it wished to regulate, the Supreme Court should apply the standard libertarian framework. Is there any force or fraud, and is it used between the parties to induce the relationship? The answer is no. Are there any externalities to the relationship that involve nuisance-like activities and third parties? The answer is also no, especially when the conduct is done in private. The only thing then left is that a lot of people do not like it, and his response to that was: 'If you don't like it, don't do it'. Thus, he concluded the whole matter was completely unconstitutional. The classical liberal logic that had been rejected in the economic cases was warmly embraced on matters of sexual freedom.

You can see the way the Supreme Court arrived at a five-to-four decision that allowed for the continued criminalisation of homosexual relations at a time when the political sentiment on that question had moved sharply in the opposite direction. It is fair to say that most of the legal profession, which is intensely pro-regulatory on economic issues, saw the *Bowers v Hardwick* case as a legal monstrosity that ranked as the number one target for legal reform. Being an economic libertarian who likes consistency, I tended to side with the left on this issue, to the astonishment of some of my economically pro-market friends who are also social conservatives.

This equilibrium position was maintained for close to a generation in the face of enormous political changes in the United States over the whole issue of gay rights. The question then became whether or not what occurs in the political arena will be reflected in some degree in the judicial arena. And, as sure as night follows day, the Supreme Court, especially with a change in membership, is not indifferent to these broad social trends. It responds to the legal dissonances, and acts as a saviour or a sinner, depending on one's point of view.

The persistent unhappiness with *Bowers* came to a head 17 years later with another prosecution for homosexual sodomy in *Lawrence v Texas* (539 US 558 (2003)). When this case was before the Supreme Court, everyone was trying to work out whether the Court would affirm or overrule the *Bowers* decision, and if so, whether on broad or narrow grounds. (The narrow grounds were to hold that it was impermissible to make same-sex sodomy illegal when sodomy between men and women was not.) In this instance, the decision was overruled on the broadest possible grounds. By this stage, the gulf between the social conservatives and the social liberals had grown so wide that a form of sexual behaviour that conservatives regarded as immutably sinful was now regarded by the social liberals as a 'transcendent' personal experience. Whatever your own evaluation of this conduct, it was very clear that the two sides were at hopeless odds with each other. However, the important thing to understand about this particular tension is that the judge who wrote the opinion was not one of the traditional liberal judges: it was Judge Anthony Kennedy, a Republican appointment. The other person who flipped over to make the

majority was Judge Sandra Day O'Connor, also a Republican appointment. Thus, the Court majority was suddenly six-to-three in favour of the liberals.

The moment the decision was handed down there was the usual kind of backing and filling. The judges said it was not really a big deal: they had simply struck down the sodomy statutes that nobody cared about anyway, and they were not making any comment about same-sex marriage (an issue that is now, of course, on everybody's plate). But it was obvious at the time that this was a case in which the power of argument was much more important for the flow of the political discourse than the ad hoc disclaimers of the US Supreme Court. I was therefore convinced that it would change course.

Same-sex marriage

In the meantime, a deep division developed in Massachusetts, a state where the intelligentsia is irrefutably liberal while the general population is strongly Catholic. In a four-to-three decision, the Massachusetts Supreme Court in *Goodridge v Department of Public Health* (440 Mass 309 (2003)) declared that the principles of equal protection required the state to recognise same-sex marriages in the absence of any strong justification for banning them. This case was a bombshell that provoked a very strong political reaction. Yet the argument itself was essentially unexceptional: if we accept Justice Kennedy's view that homosexual sex is a transcendent experience, how can we deny homosexual couples the same ability to formalise a relationship that heterosexual couples have? Inevitably someone would point out that you have to get a licence in order to get married. And, as noted earlier, that is where the standard libertarian critique cuts in: who has the right to issue a licence, whether for a heterosexual or a homosexual marriage? Where does the state get that authority? This issue had troubled me in earlier writings, bearing such suspect titles as 'The Permit Power meets the Constitution'. These argued, in effect, that the only grounds on which the state may withhold a licence to any individual who wishes to engage in private activities are that, if the activities occurred, they could be subject to sanctions for legitimate state reasons. In short, you could not treat the licensing power as carte blanche to regulate. In the case of physicians, for example, who could be licensed for reasons of safety and competence, you could not argue that

you would grant a licence only if they agreed to become Roman Catholic, vote Republican, or, more to the point, agreed to provide 20 percent of their medical services free to indigent people. Such rules simply would not pass muster. It follows, if you accept that logic, that you have to start thinking from scratch not only about homosexual marriage, but also about heterosexual marriage. If you treat marriage as a natural relationship and the licence as being justified on specified grounds – for example, to protect against various kinds of diseases – you cannot exclude the institution from the same analysis, even if the traditional view ran in the opposite direction.

While we are we tackling the issue of homosexual marriage, let us also consider polygamy; after all, on what grounds can you outlaw it? Then, if you take on polygamy, why could you not have four men marry three women and rotate partners in a way that leaves all parties happy and satisfied? It is a little mind-blowing to persons with conventional moral attitudes, but in effect the difference between the two cases is this: the four-on-three polygamist marriage does not have a huge constituency out there knocking on the door, whereas the proponents of same-sex marriage are storming the barricades of state legislatures and courts. If your fundamental beliefs in this world are only two, namely, do not force people to come together if they do not want to, and let them come together if they do, at this point you are very hard-pressed to side with the traditionalists on this issue.

The question here is whether this strong philosophical orientation translates into constitutional law. On that again, there is a sharp division of opinion. If only traditional liberties are entitled to that respect (as in the analysis of privileges and immunities), ultimately it is a political question whether same-sex marriages should be recognised, and libertarians will support that proposal. But if the constitutional protection of liberty is not subject to any traditionalist qualifications, then Richard Epstein, a legal 'conservative', becomes Richard Epstein, constitutional 'radical'. This transition is intellectually painful and somewhat awkward. But let me take it one step further before we move on to other aspects of the tradition–liberty divide, where you will meet Richard Epstein who wishes to distance himself from all constitutional arguments.

It is a matter of common knowledge in the United States that the academic elites tend to be liberal while the so-called red state voters tend to be conservative. Thus, in the November 2004 election, referenda to ban same-sex marriages passed in many states, often with resounding political majorities. During this same period, President Bush decided he would support legislation designed to create a federal constitutional ban against same-sex marriages. We have had in US history one similar effort: an ill-fated amendment put forward around 1910 to create a constitutional prohibition against marriages of individuals from different races. This earlier initiative proved to offer a profound challenge to liberty, and here, in the way described by Paul Johnson, the good sense of the American people came through ahead of the politicians. Notwithstanding what their leaders say, the majority of Americans frankly do not like this kind of thing: they basically believe that 'live and let live' is a sensible legal response. The real genius of the American people, as opposed to some of their erstwhile leaders, is that they have long understood the absolute, critical distinction between the things they do not like and the things that you should ban. The criteria for banning are a lot stronger than the criteria for disliking. So in a muddling-through sort of way, this particular amendment got nowhere. I find it therefore disturbing that the state initiatives had such great success because I had hoped that people would show more caution before translating their deepest moral convictions into laws that bind those who disagree with them. But, at the same time, it looks as though no such constitutional amendment will make it into federal law, which is some consolation.

I have to finish this brief account with one last point. I hate to find myself in a position where I conclude that one side to a debate is right and the other side is wrong. I would much prefer to be in a position where I can say that, on important points of principle, both sides are wrong. And I am happy to say that, in this particular case, I can do this. The point concerns the intersection between the gay rights movement and the anti-discrimination laws. It is quite an interesting conversation. How does it go? Well, if you take popular sentiment in both the gay community on the one hand and the general population on the other, there is fairly broad support for the proposition that we should have an anti-discrimination law effectively banning

discrimination on the grounds of sexual orientation. This is a statute I fiercely oppose, and people ask how I could be opposed to that when we have a law on racial discrimination. My answer is that I am perfectly consistent: we should repeal that law as well and just let voluntary associations take over. Take the gay population, for example: employers covet them because typically they are willing to go on long trips, they work well, and they are highly educated – so they get wage premiums. Is this really an oppressed group that needs special legal protection?

When it comes to same-sex marriage, however, the same people who support banning discrimination on grounds of sexual orientation find this idea a little bit too exotic. But when you start to think about it, you see that even without an anti-discrimination law you can still get a job, for no one employer holds a monopoly position against any prospective employee. On the other hand, with the prohibition against gay marriage you do not have a marriage. In other words, one statute cuts you off from a voluntary association you may want (the gay marriage case) and the other may be little more than a nuisance.

Therefore, we have to remind the American left that these kinds of coercive statutes fall in fact into the illiberal part of their tradition. For example, if you are dealing with Roman Catholics or Orthodox Jews who are opposed to homosexual relationships, the last thing you want to have is a statute requiring you to hire gays, or to take them into your house or to do business with them in any other way. People can sort themselves out voluntarily and the key to success is to make sure that live and let live works on both sides of the social divide. You let them come together when they want to, and let them stay apart when they do not. The American right does not understand the importance of contract and the American left does not understand the importance of refusal to deal. I like to think I understand them both, which puts me in a very small minority of legal and social thinkers.

Does this mean, then, that one disrespects tradition? No. But you do have to understand why you are suspicious about its role in these controversial settings. The reason is this: the traditions discussed by people like Hayek were essentially arrangements that people engaged in commerce worked out for themselves, so there was virtually unanimous buy-in from those who were used

to dealing with one another. Here we are talking about political traditions, and if you are trying to bind all people to the traditions of an established majority, you have to look at them with a little more care and worry about the risks of oppression of minorities.

Patriotism and the flag

The same tension between tradition and liberty has played itself out with equal force in debates about patriotism. I cannot cover all the ramifications here but I will discuss them in relation to a line of cases that have to do with the American flag. The flag has, of course, been a symbol of greatness for the nation, and if you read writers like Paul Johnson you see very clearly that symbols are the things around which societies coalesce. Likewise you see that one of the mistakes traditional economists make is to misunderstand the power of symbols in ordinary discourse, and to think only in terms of meat and potato issues that do not capture the way in which real people think and react.

Let me touch on three episodes associated with the flag. The first is the flag salute cases in the dark days of World War II – *Minersville School District v Gobitis* (310 US 586 (1940)), which was overruled three years later in *West Virginia State Board of Education v Barnette* (319 US 624 (1943)). At issue in these cases was whether or not the states of West Virginia and Pennsylvania respectively could, in a burst of national patriotism, force the children of Jehovah's Witnesses to recite the Pledge of Allegiance to the United States (without the 'under God' part, which was introduced only in 1954), when in fact their religious convictions held that this conduct was a form of idolatry condemned as a matter of biblical injunction. Facing this question in 1940, Justice Frankfurter argued, in effect, that the interests of national security and patriotism are so strong that we should allow this particular form of coercion to take place. Shortly thereafter there was a very loud and justifiable outcry and the common view developed that the state should not go that far, but should allow people to opt out of the pledge. In 1943, a majority of the Supreme Court basically stated that, on grounds of freedom of speech, freedom of religion and freedom of conscience, they were not going to insist on coerced expression of belief. Justice Jackson wrote that if there is "one fixed star" in our constitutional firmament, it is that

we do not force people to avow beliefs that they do not hold. Justice Frankfurter was still in dissent, and it is interesting to note that in his attack on this opinion he expressly belittled as impoverished the libertarian foundations on which the Jackson decision rested.

In fact, I believe it is now clear that what was impoverished was not the libertarian position itself, but Frankfurter's critique of it. In the case of loyalty, forced loyalty is worse than no loyalty at all. If you manage to make people engage in forms of expression that they find distasteful, you show your weakness, not your strength. A powerful, just nation will learn to step aside and thereby elicit the gratitude and support of the very individuals they dispense from these kinds of obligations. Case closed with respect to that particular issue.

Let me now fast forward about 65 years to a second case. A man named Michael Newdow – a single-minded fellow – had an out-of-wedlock child over whom, after a series of complicated legal manoeuvres, the California courts gave custody to the mother. Newdow was an avowed Jewish atheist who took the argument one step further. He was not content with the view that his daughter not be allowed to utter the Pledge of Allegiance, given that it contained the words 'under God'. Nor did he think that it was sufficient for her to stand aside while others spoke it because he did not want her to face this Hobson's choice of either giving the pledge like everyone else or being subject to ridicule by standing aside in the Jehovah's Witness way. To make sure his daughter could be educated in the right environment, he urged that *nobody* in public schools in the United States should be allowed to recite the pledge with the words 'under God'. To him, putting the words 'under God' in the pledge was just like putting the words 'under Jesus' in it, so that the whole exercise amounted to an establishment of religion that violated the prohibitions of the First Amendment to the Constitution.

I will not comment here about the strength or weaknesses of these arguments; in my view, the issues are difficult. But note that there is a gulf between proposing that a claim of individual liberty allows you to be exempt from a collective mandate, and proposing that a belief about the appropriate form of pledge to the United States allows a single person to trump the majority

will of everyone else in respect of what happens in public schools with their children. My own position on the merits of this case is that I would sustain the Pledge of Allegiance, which has been in place for 50 years – tradition seems to have its place after all. And I would do so on the grounds that the state is not acting as a licensor when it runs a public school; it is acting as a manager of a complicated institution in which it is allowed to take into account the sentiments of its students and their parents. So if, as is the case, the dominant practice in private schools (where the issue has been thoroughly vetted) is to keep the pledge but allow individual students to stand aside if they choose, no questions asked, that suggests the accommodation is appropriate. The private practices offer a convenient yardstick to measure the reasonableness of management decisions in public schools and similar institutions. End of case.

The Supreme Court decided, however, that it did not want to buy into this fight, and it managed to divert the case on grounds of standing in *Elk Grove Unified School District v Newdow* (542 US 1 (2004)). Because Mr Newdow did not have custody over his child, he did not have 'standing' to bring suit against the school district. That choice lay with the child's mother who had legal custody. And, I am happy to say, I actually helped write one of the briefs that urged the Supreme Court to 'vacate' the case, without a decision one way or other. You could say I chickened out. But I believed that no matter which way *Newdow* came down on the merits of the case, there was going to be a nasty social struggle, and having this dull procedural escape hatch allowed the United States to sidestep a major political and cultural controversy.

The third set of cases concerns a somewhat different issue, but the point is exactly the same: it is the tension between liberty on the one hand and morality on the other. These are the flag-burning cases, which arose in the late 1980s. Believe it or not, it is not only foreigners who sometimes dislike the way the US government behaves; quite often American citizens passionately hold the same view. In this instance, to express their displeasure, they decide to burn the flag. This sets off a strong patriotic impulse in other Americans who object vigorously to seeing their symbol trashed. They see flag-burning as a public offence and say: 'Let's regulate it under the police power'. This leads to a lot of shuffling in the Supreme Court. Here, Justice Brennan, who tends

to favour extensive state regulation of economic matters, but who is a libertarian on speech questions, in effect said to those who were appalled at the protesters that if they did not like their flags being burned, then they should not burn their own. This sounds sensible. To allow intense opposition as a reason to silence speech is to invite people to escalate their own emotions. The sound position here is that offence, no matter how great, never counts as harm within the meaning of Mill's harm principle. Accordingly, it is improper for the United States to restrict the way in which people express themselves, nor argue that the United States has a trademark on the flag and therefore no one else can burn it.

Texas v Johnson (491 US 397 (1989)) provoked a huge reaction, including multiple attempts to reverse it by statute or constitutional amendment. But, again, cooler minds have thus far managed to prevail. If you allow people to burn the flag, the first two or three times it happens it may have some real shock value. By the time you get to the fifth or sixth time, no one pays it any attention; the practice then withers away and the symbols remain unsullied. The lesson again is to live and let live, unless there is some form of tangible harm.

Live and let live

Live and let live. That phrase, which has so much of the common law about it, is, I believe, the moral of this story. To understand how America works we need to see the very powerful tension that exists between the 'live and let live' principle on the one hand, and the 'we know what's right when we see it and we'll impose our view' attitude on the other. Looking forward, I believe Americans will have a country that, for the most part, will accept live and let live as its starting point. It will assume that all of these moral absolutes matter in the lives of ordinary individuals, but not so much as to justify public forms of coercion.

So, in my view, the key thing to think about in trying to understand America, or indeed any other country, is the extent to which the old-fashioned virtue of tolerance manages to survive in new and large contexts. It is especially important in an age in which the ever-greater diversity of cultural and moral

views makes it harder to see eye-to-eye on fundamental questions of right and wrong. The stakes here are enormous, because Americans could blow themselves apart as a nation on social issues if they are convinced that big government can supply the answer to any nation whose citizens hold deeply divided views. However, this is a case in which the classical liberal principles of small government seem to hold out the greatest hope for political and social peace. Generally speaking, when we defend these principles, we do so because of the way in which they work in voluntary economic exchanges. But to me, their defence in respect of social interaction is, in many ways, more important, because whereas an economic monopoly may mess up production, civil war is in fact a lot more disruptive to the life of a nation. My advice to most Americans is this: you may think I am a radical, but I think I am a moderate, and the reason I think this is that the first principle of political organisation is: 'cool it'.

Questions

Do you see the liberties you spoke about as privileges of US citizenship, or do they extend to foreigners with whom the United States deals?

As a matter of constitutional law, there is a profound choice to be made as to whether you locate the protection of traditional liberties inside the 'privileges and immunities' clause, or in either the 'equal protection' clause or the 'no person shall be deprived of life, liberty or property without due process of law' clause – that is, the due process clause. It matters, because in the Fourteenth Amendment to the Constitution, the 'privileges and immunities' clause, which guarantees the traditional liberties of contract, association, speech and the like, only applies to citizens. Therefore, if you take that to be the source of this protection, aliens are excluded from its reach.

But American law has always treated the 'privileges and immunities' clause as a dead letter. The source of the problem lies in an absurdly narrow reading of the privileges and immunities clause in the *Slaughterhouse* case (83 US 36 (1873)). The case held that this major charter of individual liberties was intended to deal with the rights of individuals solely in their role as US citizens, so as to cover protests to the federal government regarding federal issues, and did not give people any such rights against individual US states. Once the privileges and immunities clause becomes a dead letter, you then look at the due process clause as something substantive as well as procedural, and read it as 'no person shall be deprived of life, liberty or property without due process of law', that is, 'without just compensation'. That key transformation leads to reading the due process clause as a kind of takings clause for liberties

that applies to everybody, citizen and alien alike. So textually, the proper way to proceed is to give the privileges and immunities clause due weight, and then to treat the due process clause as essentially a procedural protection. Otherwise there is no distinction between citizens and foreigners, and that is what the whole constitutional structure was about, given that the first clause of the Fourteenth Amendment was devoted to a definition of citizenship that was broad enough to include all former slaves, but not aliens.[2] On matters of personal liberty, the more intellectually defensible approach is to go in exactly the opposite direction and show equal respect to foreigners.

Thinking about free speech, do you believe that the holocaust denier David Irving should be prohibited as an immigrant, or do you regard that as an infringement of his free speech rights or, indeed, the rights of those who want to listen to his ludicrous views?

The difficulty with speech rights is that they are always correlative, involving both speakers and listeners. If you have a strong, citizen-based right that covers speech and a system of protection for aliens that does not, then you have to think of the rights of (domestic) listeners rather than (foreign) speakers. In my view, that should be sufficient to get you to the right answer. I have the same attitude to David Irving as I do to everyone who disagrees with me. I want him to speak. I want him to discredit himself. Every time you prevent someone from speaking to an audience you give them an undeserved legitimacy. What if they incite violence? My view is that you stop the violence, not the speech. The speech is protected and the violence is not, and in situations of violence the police power argument about safety comes in. I do not, however, believe that a terrible speech about the holocaust counts as an incitement to violence, unless there is a lot more contextual evidence to support that view.

You may recall that this was an issue that came up in reverse in the United States throughout the 1950s, when we were keeping all sorts of people out on the grounds that they held subversive, that is, communist, opinions. That

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2 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

hard line has generally been a self-defeating approach. A free society has to take risks, and it does so irrespective of whether it excludes or admits. Ironically, the greater risks come from what is regarded as the safer position – exclusion.

So I would let David Irving in. If he invited me, I might ask him a pointed question or two and I might encourage some other kinds of opposition. But while you can fight fire with fire and speech with speech, I do not favour fighting speech with fire.

With the current and continuing threat the United States faces from terrorism, Americans seem to be showing a greater tolerance for giving up individual liberties. Might this affect the equilibrium you describe?

The question here – about the relationship between liberty and security in the face of terror – is an area in which I think the United States has generally come out well. There are some important caveats, but they do not in the end alter the basic picture. The standard Lockean theory of politics applies perfectly. Each of us gives up some fraction of our natural liberties in order to receive security, making the liberties we retain worth more in a state of war than if they had been unprotected in a state of nature. The question to ask is: what are you protecting yourself against and how great is the peril? If the peril averted turns out to be weightier than the likely loss of liberty, and it is real and demonstrable, most rational people would rather have somewhat less liberty and somewhat more security. Then, the moment the threat abated they would return to the previous equilibrium.

United States citizens have tolerated the current anti-terrorist restrictions, mainly because the political equilibrium has been such that everyone can see the gains to themselves and their fellow citizens. When the terrorist threat passes, as we all pray it will, the political pressures for unravelling some of the restrictions will be strong, and they will not go unheeded.

Making generic evaluations of these things is very hard. For example, how do you evaluate the $100 billion commitment of the United States to national security? You cannot have public disclosure about security operations without compromising their effectiveness. In this instance, Americans must to

some extent trust the government and the people inside it, and wait for some kind of visible miscarriage. As of this moment, I have seen none, so that so far I think we have done fairly well.

Where has America gone wrong? It is not in hysteria, nor in laxness, but in the way we have treated isolated cases of incarceration of combatants and non-combatants in Guantanamo Bay and in the United States. The question is: what kind of hearing do you give them? My view is that you look at the due process clause and note that it says: "no person shall be deprived of life, liberty or property without due process of law". They have surely been deprived of liberty by being incarcerated. So what process of law is due? The Constitution is deliberately vague because the standards for incarceration will vary greatly with the circumstances. Furthermore, even our Supreme Court would understand that due process on a battlefield makes little sense if everyone on your side is going to get killed if it is applied. When there is reasonable time to make decisions, you must consider whether to give people the chance to get a lawyer. You also need to be concerned about security risks, and you may want to do it on a military-only basis. The right course of action, in my judgment, would have been for the federal government to design a process before the Supreme Court imposed one on it. And, because no process can hardly be due process, I believe it has seriously mishandled the issue. I think the Court was right to say 'start over again, and figure out how you want to deal with it'. I wish that the Bush administration would be more cooperative on these matters.

If you are looking for a risk-free position, there is no such thing; and the moment you start bulldozing ahead, people lose confidence in their institutions. If you give suspects some kind of hearing or trial, then later, if you incarcerate them, people will have more confidence in the judgment precisely because those involved were given a chance to defend themselves, and failed to convince an independent body of the soundness of their positions.

Therefore, I believe that the federal government went wrong in a number of cases. The good news is that it went wrong in 13, maybe 15, maybe 20 cases. But this was not a matter of a wholesale round-up of individuals, and compared with the debacle in World War II involving Japanese–American internment, it is small potatoes. Nevertheless – and this has always been the

civil libertarian position – small mistakes should never be overlooked or forgiven, lest they soon become larger mistakes. You need to keep things in proportion to the gravity of the wrong, but you never want to say: 'oh, it's only a small error so let's just forget it'. There is a terrible conflict: a government that is strong enough to protect you is strong enough to consume you, and trying to work out how to isolate the good from the bad without neutering the government entirely has been a problem of the ages. I think on that one America scores A–. Furthermore, if you look around the world, most nations facing these kinds of choices under similar pressure have not done as well. But America could easily get a higher grade.

You have talked about Guantanamo Bay and aliens, and the application of American law to them, but what is your view about American citizens and the Patriot Act?

The Patriot Act is rather complicated and I disclaim any real expertise on it, so I will confine myself to aspects that I know a little about.

The worst thing about the statute is its title, in that it suggests a kind of chauvinism whereby anyone who does not go along with it is non-patriotic. Its major provisions have to do with a very difficult choice, which is the extent to which you allow information across various intelligence services to be pooled. In other words, if the FBI knows something, and the CIA knows something, you have just two pieces of information, but put them together and a pattern may emerge. The late Attorney-General Edward Levi – who was my university president and friend – introduced the separation in the mid-1970s because he thought there could be a bleeding of intelligence concerns into civil concerns in ways that would undermine the ordinary procedural safeguards at work in routine criminal trials. But where the intelligence risk turns out to be large and thousands of lives may be at stake, and you may be able to connect the dots and get a unified picture, then perhaps the occasional risk of a misguided prosecution is one worth running. I might also add that most of the actual provisions of the Patriot Act that authorise various kinds of investigations are hemmed in with procedural protections that are often as great, or even greater, than those used in ordinary criminal matters. There are other statutes, such as those that allow criminal sanctions to be imposed on

persons who give 'material support' to terrorist groups overseas that are mistakenly thought to be part of the Patriot Act but are not, that raise more difficult issues.

Where those kinds of trade-offs are being made, an outsider could adopt the following attitude: as long as people seem to be in the right ballpark with respect to the conflicting values at stake, you could give the government the benefit of the doubt until things prove calamitous. With the Patriot Act, I think the US government has not misplaced that trust. To be sure, the rhetoric by (then) Attorney-General John Ashcroft has been truculent and, I think, misguided; but the small number of actions that have been taken do not suggest we are looking at a case of overkill.

Let me give you an example of the kind of thing that gave rise to immense concern. In November 2001, after the September 11 attacks, when Ashcroft announced that for future terrorist cases there was to be a series of military procedures that would allow for expedited trials before juries, non-unanimous judgments and so forth, people were concerned about the dangers of a kangaroo court. However, if you looked at the procedures more closely, you found that they had to be activated by an affirmative action of the Attorney-General at some future time. Almost three years have passed now and they have never been activated. So the question is: do you want to debate the soundness of a set of procedures that nobody uses, or do you want to focus on current practices that count as abuse? The principle I follow is that I want to see evidence of misconduct before I get too indignant. That is why I get upset about Guantanamo Bay: I know what has gone wrong. With respect to the Patriot Act, it seems to me that both the risks and the gains are still hypothetical, and in these circumstances I tend to be a little deferential toward its use.

If I knew more about the mechanics of the statute I might have some criticisms of individual design features. But that is a lower level criticism than the one that claims the Patriot Act is a major threat to American liberties, which may be true but at this point it is not proven. What is extremely important is that there is a powerful consensus in the United States – both on the libertarian left and on the libertarian right – that is alert and ready to

pounce at the first sign of danger. I believe that kind of coalition has had a welcome impact on the way even people like the somewhat fevered Mr Ashcroft behave when push comes to shove. While equilibria like this could easily become destabilised, for the moment I am prepared to give the administration the benefit of the doubt. Maybe at some point I will live to rue those words.

But let me be clear: I am a civil libertarian when it comes to these kinds of criminal issues. It is not that I am dewy-eyed and naive, for I do think that the path of greater danger lies in premature reaction, even when the stakes are as high as they are with the terrorism threats. I feel slightly differently about some other issues. For example, I have some sympathy for race profiling when screening people going through airport terminals, because I think the returns from that form of screening are probably fairly demonstrable, particularly when resources are constrained. To what extent do you use it? That is a very tough question. But, to me, it is largely an instrumental and technical question, rather than a fundamentally moral question. In other words, it is not so much a question of whether it is just, but whether it is effective. If it is effective and the gains are large, then I think targeted citizens have to suffer a little of the inequity associated with the kind of procedures involved – and then thanked for their patience in these difficult moments.

When it comes to understanding America, one of the puzzles is the lack of a link between social and economic values across the political spectrum. For example, the Republicans tend to argue against government intervention on economic issues, at least when it suits them, and in favour of choice. But when it comes to social issues, such as abortion and the many things you have talked about, they are opposed to choice. The Democrats, on the other hand, tend to take a pro-choice position on abortion, but when it comes to something like allowing a parent to choose which school their child attends, they oppose choice. Is there a paradox there or a pattern, and how should we understand it?

Your question highlights the division and the role reversals that I talked about in my principal remarks. In fact, I think both sides are wrong to the extent that they abandon the libertarian position, that is, the presumption against state interference. The advantage of my position is quite simply that

it takes a uniform framework and does not require you to draw those distinctions. Will the conclusions therefore be the same in all cases? That depends on the facts. Let me give you two types of situations and then you can judge for yourselves.

The first concerns the standard health justification for the regulation of employment contracts in, for example, bakeries and mines, namely that employment conditions are dangerous for the workers in question. One could take the view that the problem could be resolved through voluntary contracts governing wages and conditions, and that the government could stay out of it. Strangely, the Supreme Court never took that position, even in the pre-1937 period. Invariably, it took the position that health issues trumped the issues of liberty that were at stake. I believe you need to be fairly cautious on this issue, but the American left has always thought the answer was so obvious that it was simply not worth debating.

When you come to the question of whether a bath house could be closed because of the spread of venereal disease, my view is that the health justification here is stronger than in the mining case. So I would give the government the power to shut a bath house down if a risk of contagion could be demonstrated. And the demonstration does not require proof that some condition, such as AIDS, has in fact spread. The difficulty here is that the prohibition comes too late. Rather, it is sufficient to act on the ground that high levels of anonymous sex will lead to the rapid spread of deadly illnesses before they are isolated and named.

The American left, however, takes the opposite position in this case because it puts sexual freedom so high that it completely trumps the health risk. My basic attitude is to treat the two liberties – sexual freedom and freedom of contract – as being of rough parity. Generally speaking, there is a greater probability (not a high probability) that you will be able to establish the health justification in the bath house case than you will with employment arrangements. However, one of the interesting things about the Texas case involving Mr Lawrence was that the state of Texas did not even try to make a health justification, so it did not even try to meet its burden of proof. All its case rested on was public morals, and for me that is not enough.

Thus, I think you are right that there is a paradox and my view, in essence, is that the presumption in favour of liberty should be uniform across the Constitution.

Because you are an eminent lawyer, I cannot resist asking for your view on whether the popular, worldwide perception of the United States as a place that is rampantly litigious and utterly dominated by lawyers is a fair perception or whether it is, in fact, overstated?

There are two parts to my answer. First, just consider the number of lawyers in the workforce versus the number of doctors: lawyers are the bigger growth industry, not doctors, notwithstanding the enormous expansion in Medicare and Medicaid. Then look at incomes, and you will see that lawyers have overtaken doctors, so we are clearly busy. The question is: what are we doing? I suggest the following distinctions are correct: the difference between no lawyers and a few lawyers is the difference between chaos and civil liberties. The difference between a few lawyers and too many lawyers is the difference between civil liberties and paralysis through litigation. Currently, the United States is on the wrong side of the curve in my view.

So the question is: how did we get there, and what can we do about it? The single biggest source of difficulty here is that as property rights become more indefinite, the gains from litigation start to increase. When the protections of economic liberties under the Constitution have been undermined, everything becomes fair game for the legislature and the judiciary at the state and federal level. To give you just one simple illustration: without a zoning statute, you can only take somebody's land if you give them just compensation. That means that there is generally no gain for the state in attempting takings, so it will refrain from doing so. If there is no compensation requirement, 80 percent of the value of any site is up for grabs, first through regulation and ultimately through litigation that challenges that regulation. So lawyers will move fiercely either to obtain a zoning permit or to deny it to a competitor. That has happened over and over again, creating a situation where property rights are indefinite as a matter of law, and the strongest and ablest of judges will not allow them to be stabilised by contract. As long as these opportunities exist, lawyers will go into battle, not only because they are

independent entrepreneurs, as is the case with many class actions, but because their clients will want them to do so. You should understand litigation as a giant prisoner's dilemma game. If you could stabilise property rights *ex ante*, everyone would agree to do so; but *ex post*, if they are unstable, everyone will defect from the cooperative equilibrium and start suing each other like crazy.

Is that worse than what you have here? That depends on whether you think litigation or regulation madness turns out to be the greater evil, a topic that requires a new lecture all of its own.