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# Law, Judges and the Principles of Regimes: Explorations

George Anastaplo

*Loyola University Chicago, School of Law, ganasta@luc.edu*

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# LAW, JUDGES, AND THE PRINCIPLES OF REGIMES: EXPLORATIONS †

GEORGE ANASTAPLO\*

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\* Professor of Law, Loyola University of Chicago School of Law; Professor Emeritus of Political Science and of Philosophy, Dominican University; Lecturer in the Liberal Arts, The University of Chicago; A.B., 1948, J.D., 1951, Ph.D., 1964, The University of Chicago. (No e-mail reception. See [www.cygneis.com/anastaplo](http://www.cygneis.com/anastaplo).)

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## INTRODUCTION

This collection, arranged in a more or less chronological order, brings together a dozen talks that I have prepared since 1988 about political and judicial applications of constitutional doctrines. A distinguished critic explained, in describing a collection of another author's work that he had compiled: "The arrangement of the following section is chronological, on the theory that time's arrangement is the most revealing."<sup>1</sup> Critical to talks such as those found in this collection are the circumstances in which they were originally prepared and delivered. Relevant circumstances, which are useful for understanding what is said in these talks and why, are noticed in the first note for each of the thirteen parts of this collection. An awareness of circumstances is usually critical, of course, to any understanding of legal and political matters, just as it is for the study of any other exploratory dialogue. I remind the reader, from time to time, of the date when a particular talk was originally given.

The immediate background against which all of these talks were prepared is provided by the constitutional system of this country. That system is examined in the commentaries on the Constitution of the United States that I have prepared for some thirty years. References to those commentaries are provided in the notes.<sup>2</sup> Even so, enough should be available in the text of each part of this collection to permit the reader to identify immediately the questions being suggested on each occasion that may be worthy of further consideration. The materials surveyed in the notes, prepared for the most part

1. THE VIKING PORTABLE LIBRARY OF WALT WHITMAN 57 (Mark Van Doren ed., 1945). Mr. Van Doren observes that even "a collection of jottings and memoranda" may have "unity because of the man who is writing." *Id.* at 473; *see also infra* note 6. The dates of the thirteen parts of my collection are the following: (1) 1988, (2) 1990, (3) 2002, (4) 1990, (5) 1992, (6) 1992, (7) 1994, (8) 1993, (9) 1998, (10) 1998, (11) 2000, (12) 2001, (13) 2000. There are three variations from a strictly chronological arrangement of these talks (3, 7, 13). The "Primer" seemed better early; the personal reminiscences seemed better at the end. The third variation, a slight one, points up the centrality of great events for our political/legal system. Each of these talks was prepared independently of the other twelve. They can, therefore, be read in any order. Most of the footnotes have been prepared at this time.

2. For the most extensive commentaries I have prepared, *see* GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971) [hereinafter ANASTAPLO, THE CONSTITUTIONALIST]; GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY (1989) [hereinafter ANASTAPLO, THE CONSTITUTION OF 1787]; GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY (1995) [hereinafter ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION]; *see also* George Anastaplo, *Constitutionalism and the Good: Explorations*, 70 TENN. L. REV. (Forthcoming 2003) [hereinafter Anastaplo, *Constitutionalism and the Good*].

at this time (that is, in 2003), include references to various published pieces of mine that spell out points that need therefore to be no more than touched upon in these talks.

The intellectual tradition, long taken for granted in the West but very neglected these days in law schools (if not also, more and more, in undergraduate programs), provides the deeper background for inquiries into constitutional and legal issues as well as for reflections upon them. It can sometimes help, when one attempts to assess what the Western tradition means, to compare what is said and done here with what has been done and said in various other (that is, non-Western) parts of the world.<sup>3</sup>

It can also help one understand these matters to consider how poets and prophets have assessed, reinforced, and modified what political leaders and their sometimes philosophical teachers and allies have managed to establish. In the West itself, however, there has been tension for millennia between the reasoned teachings of the philosophers and the inspired guidance offered by the poets. Still, it may well be that there is something of the philosophical in the greatest poets, just as there is something of the poetic in the greatest philosophers.<sup>4</sup>

Be this as it may, the poet sometimes serves as a mediator, even as a bridge, between the philosopher and the prophet—two practitioners between whom there may be even more tension than there is between the philosopher and the poet. Certainly, the prophet is likely to reach and to move many more people than the philosopher does, at least in “the short run.” The prophet is particularly likely to be effective if he has poetic images, and not merely syllogisms, at his disposal.<sup>5</sup>

3. See, e.g., GEORGE ANASTAPLO, *BUT NOT PHILOSOPHY: SEVEN INTRODUCTIONS TO NON-WESTERN THOUGHT* (2002) [hereinafter ANASTAPLO, *BUT NOT PHILOSOPHY*]. On the Western tradition as applied to American circumstances, see GEORGE ANASTAPLO, *THE AMERICAN MORALIST: ON LAW ETHICS, AND GOVERNMENT* (1992) [hereinafter ANASTAPLO, *THE AMERICAN MORALIST*]; see also *infra* note 180.

4. On relations between philosophy and art, see GEORGE ANASTAPLO, *THE THINKER AS ARTIST: FROM HOMER TO PLATO & ARISTOTLE* (1997) [hereinafter ANASTAPLO, *THE THINKER AS ARTIST*]; GEORGE ANASTAPLO, *THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE* (1983) [hereinafter ANASTAPLO, *THE ARTIST AS THINKER*]. For the perspective from which these relations are viewed, see GEORGE ANASTAPLO, *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM, AND THE COMMON GOOD* (1975) [hereinafter ANASTAPLO, *HUMAN BEING AND CITIZEN*].

5. Consider, however, the following comment I had occasion to make on the work of Moses Maimonides:

There is more than a reminder of Aristotle in what Maimonides says of the contemplative life as the ultimate perfection of the human being. Notice . . . [his] suggestion, “[I]f a man happens to exist [in the condition of the fully rational man], I would not say that he is inferior to the prophets.” This can make one wonder what Maimonides takes revelation to mean.

ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 73.

Poetic inspiration is also needed if the character of citizens is to be shaped and preserved in a way appropriate for the institutions of their regime. Some, especially those of an “individualistic” turn of mind, are likely to raise questions as to whether such shaping is an appropriate concern of the community itself, acting through its various governments. The talks collected here address, sometimes only in passing, these and like questions, which are prominent in Law and Literature materials these days.<sup>6</sup>

The factors to be considered in examining the principles of a regime can vary, if only because of ever-changing circumstances. This collection places emphasis on the workings of the judicial system, even as the political and philosophical features of this system are noted. One movement evident in these talks is from the bold innovations of an early republican, Niccolò Machiavelli, to the sober cautions of an aristocratic champion of modern democracy, Alexis de Tocqueville. This collection provides glimpses throughout of other paths that thoughtful citizens might also follow.<sup>7</sup> The way that these glimpses are provided testifies to the generosity of the editors of this law review in permitting an unconventional mode of discussing the conventions of another day.

6. Citations to my Law and Literature collections are provided in *infra* notes 7, 13, 222, 314, 357. As suggestive of matters about which the American community might want to be concerned, consider this observation about Walt Whitman’s *Democratic Vistas*:

In a single paragraph Whitman diagnoses the “deep disease” of America as “hollowness of heart.” Hypocrisy, superciliousness, deceit, depravity, corruption, and flippancy are among the terms he flings at a people whose manners have disillusioned him. The prophet of 1855 has sobered down. He has not lost his faith in the future, but the future is the only thing that gives him hope. Neither has he lost faith in his theory of democracy, which for him is still the theory of America. It is simply that he must imagine a golden age to come rather than hail one that is here. For none is here among the “vulgarians of his time.”

. . . [This] was a hard book for Whitman to feel and write, and it has been found a hard book to read. But it is a necessary book, not only for the notes it provides on the disillusionment that followed the Civil War, but for the criticism it gives of a society which always can benefit, as any live society can, from chastisement by its best lovers.

Van Doren, *supra* note 1, at 387-88. “Vulgarians”—that is, the thoughtless—are not limited to Whitman’s day. On “the epistemological and moral self-contradictions inherent in the behaviorist’s claim for the truth and beneficency of behaviorism,” see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 282-83 n.7 (containing an exchange with B. F. Skinner); Leon R. Kass, *Appreciating the Phenomenon of Life*, 23 GRADUATE FACULTY PHILOSOPHY J. 51-52 (The New School, 2001); see *infra* notes 296, 351 and accompanying text; see also Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 7 (Appendix).

7. For additional glimpses, see the bibliographies of my work found in the following collections: LAW AND PHILOSOPHY: THE PRACTICE OF THEORY 1073-1145 (John A. Murley, William T. Braithwaite & Robert L. Stone eds., 1992) [hereinafter LAW AND PHILOSOPHY]; George Anastaplo, *Law & Literature and the Moderns: Explorations*, 20N. ILL. U. L. REV. 251, 581-710 (2000) [hereinafter Anastaplo, *Law & Literature and the Moderns*]; George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRANDEIS L. J. 17, 219-287 (2000) [hereinafter Anastaplo, *Constitutionalism, The Rule of Rules*].

1. MACHIAVELLI, RELIGION, AND THE RULE OF LAW<sup>8</sup>

I do not think I could myself, be brought to support a man for office, whom I knew to be an open enemy of, and scoffer at, religion. Leaving the higher matter of eternal consequences, between him and his Maker, I still do not think any man has the right thus to insult the feelings, and injure the morals, of the community in which he may live. . . .

Abraham Lincoln<sup>9</sup>

## I.

It is only natural that the birthday of the first American President should remind us of the conditions for the establishment of this Republic. Particularly intriguing today, especially in the light of current controversies about church and state relations and about the place of clergymen in public life, is an inquiry about the proper place of religion in the commonwealth.<sup>10</sup> It is often difficult for us today to see and to appreciate what was thought about these matters two centuries ago. It can be particularly instructive to consider how Niccolò Machiavelli spoke about such matters some five centuries ago. He was, despite (let us hope not because of) his moral flexibility, perhaps the first prominent republican in modernity. Although he is not known to have been a pious man, his guidance with respect to politically-minded religion can be useful. For this purpose we will examine the fourteenth chapter of the first book of his *Discourses*.<sup>11</sup>

## II.

The chapter begins: "Not only were auguries . . . in large part the foundation of the ancient religion of the Gentiles, but they also were the cause

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8. A talk given at the Wake Forest University Law School, Winston-Salem, North Carolina, February 22, 1988.

9. ABRAHAM LINCOLN, COLLECTED WORKS I, at 382 (Roy P. Basler ed., 1953) (1846); see GEORGE ANASTAPLO, ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY 66, 239, 245, 248, 301, 350-51 (1999) [hereinafter ANASTAPLO, ABRAHAM LINCOLN].

10. See, e.g., GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 47; George Anastaplo, *Church and State: Explorations*, 19 LOY. U. CHI. L.J. 61 (1987); George Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U. L. REV. 151 (1980).

11. The complete title of this book is *Discourses on the First Ten Books of Titus Livius*. On Machiavelli, see LEO PAUL S. DE ALVAREZ, THE MACHIAVELLIAN ENTERPRISE: A COMMENTARY ON THE PRINCE (1999); ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 516; LEO STRAUSS, THOUGHTS ON MACHIAVELLI (1958).

of the well-being of the Roman Republic."<sup>12</sup> Thus, Machiavelli seems to approve of the use of auguries, however comic his account here may be in certain respects. It is useful for the student of law to observe not only how religion can be treated but also how one may read the more careful writers.<sup>13</sup>

Earlier chapters of the first book of the *Discourses* suggest the usefulness of religion, especially in republics. It is indicated there as well that religious reassurances can make an army more confident than it might otherwise be. Well-conducted auguries can suggest that the world makes sense, that the gods care for human beings. They can also suggest that virtue and success are intimately related, or at least that the Romans enjoy advantages because of their superior ability to read the signs and their greater determination to respect them.<sup>14</sup>

The prince of the hen-men, we are told [in the chapter appended to this 1988 talk], made a false report to Papirius, the consul. The truth should have been given to the consul, permitting *him* to decide how best to use it.<sup>15</sup> He may, for example, have decided to postpone action until the next day, providing in the meantime that the chickens not be fed until then. A postponement for this reason could have a salutary effect, for it could instruct the army that these matters are being scrupulously observed by its leaders.

Appearances are very important in religion: if things can always be figured out without some kind of revelation (or appearance), then there would be no need for divine intervention or guidance. But, the prince of the hen-men in effect said, appearances do not matter, but only what the consul wanted. In this effort to cater to what he took to be the consul's desire, the prince of the hen-men resorted to a form of usurpation. One can be reminded of the insistence in Plato's *Republic* that it is not proper to lie either to one's doctor or to one's ruler, for that keeps the man nominally in charge from truly governing what is to happen.<sup>16</sup>

### III.

One problem with the way that the prince of the hen-men proceeded may

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12. This chapter of Machiavelli's *Discourses* (I, 14) is appended to this talk in the text accompanying *infra* note 33.

13. On how to read serious texts, see George Anastaplo, *Law & Literature and the Austen-Dostoevsky Axis: Explorations*, 46 S.D. L. REV. 741, 751, 758 (2001); Anastaplo, *Law & Literature and the Moderns*, *supra* note 7, at 254.

14. On Delphi, the site of perhaps the most celebrated source of oracles in the Classical world, see ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 93.

15. The prince of the hen-men, in proceeding as he did, was usurping the power of the consul (the commanding officer); that is, he was attempting to rule. "Above all, the prince must be able to see through deceptions." DE ALVAREZ, *supra* note 11, at 114; *see also infra* text accompanying note 17.

16. On Plato's *Republic*, see ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 278-281; ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 303, 316.

be seen in what happened: the truth did get out among the soldiers, threatening to demoralize the army. Should not the prince have conducted his "inquiry" of the chickens altogether alone, or with completely reliable associates, if he was going to falsify the report?

Papirius rebuked his nephew for bringing the report to him about the chickens: each is to do his assigned duties, not someone else's. The prince of the hen-men should have done what the nephew is now doing, if anyone did. Instead, the prince of the hen-men had performed the duty of the consul: he decided what to do about the information he had rather than allowing the consul to decide. The rebuke of the nephew is called for; Machiavelli teaches elsewhere that a leader should permit only those whom he has asked to counsel him to do so, adding that he should diligently ask for counsel.<sup>17</sup> Papirius had asked the hen-men about the chickens. I suspect that a leader did not resort to the hen-men until he was fairly sure that he wanted a favorable answer: are not chickens highly likely to eat whenever an opportunity is offered to them?

Papirius insists to his nephew that "as for him and the army the auspices were good"<sup>18</sup>—and on this basis he could go into battle with high expectations. But "if the [prince of the hen-men] had said lies, these would turn to his prejudice."<sup>19</sup> One can be reminded of Thomas Hobbes's advice that one obey one's ruler, as transmitter of messages from God. If the ruler is mistaken, the blame is his to expiate, not that of the obedient subject.<sup>20</sup>

Although Papirius rebuked his nephew, he did make use of what he learned from him; he placed the hen-men in the forefront of the fighting.<sup>21</sup> This should teach them, or their successors, to tell the truth in the future.

#### IV.

The chance killing of the prince of the hen-men and the approving comment by Papirius show how a prudent man can make use of chance.<sup>22</sup> Was the killing truly by chance? It seems to be suggested that Papirius is better able to discipline his men (the nephew, the prince of the hen-men, the army) than the prince of the hen-men had been able to discipline his talkative associates.

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17. See MACHIAVELLI, *THE PRINCE*, ch. 23. The first reliable translation of this treatise into English is by Leo Paul S. de Alvarez. It was published by the University of Dallas Press in 1980 and thereafter by the Waveland Press. See *infra* notes 386-87.

18. See the appendix to this talk, paragraph 2.

19. *Id.*

20. See Laurence Berns, *Thomas Hobbes*, in *HISTORY OF POLITICAL PHILOSOPHY* 390-93 (Leo Strauss & Joseph Cropsey eds., 1972).

21. See the appendix to this talk, paragraph 2.

22. *Id.* Is the "prognostication" referred to that of the prince of the hen-men or that of Papirius?



We can see, with this “chance” killing of the prince of the hen-men, that Papirius surely would have found a way to proceed in a satisfactory fashion if the prince of the hen-men had reported the truth to him.<sup>23</sup> We can also see the tough-mindedness of the Romans: good intentions did not suffice, especially since the prince of the hen-men had put Papirius in “an impossible situation.”

Machiavelli shows that he understands such matters and invites the thoughtful reader to join him. The requirements of a republican regime are kept in view by him, something that iconoclastic intellectuals of recent decades have been careless about.<sup>24</sup>

## V.

The second story in our fourteenth chapter exhibits the wrong way to respond to unfavorable auspices—the drowning of the chickens.<sup>25</sup> This is far too blatant a response, however “understandable” the exasperation of Appius Pulchrius may have been. It is, we are taught, far better to dispose of the prince of the hen-men the way Papirius did than to dispose of the chickens the way Appius Pulchrius did—better, that is, for good order in the military.

What accounts for Appius Pulchrius’ defeat? Was defeat in battle somehow to be expected from someone who had been as careless as Appius Pulchrius had been about the chickens? Furthermore, did his army learn of what he had done to the chickens, thereby becoming demoralized?

Thus, Machiavelli teaches us, the auspices are and are not to be taken seriously—and this is properly the duty of the prudent leader to determine.

## VI.

The chapter (I, 14) we have drawn upon has been supplemented, of course, by others in the *Discourses* on the use and abuse of religion in the commonwealth. In Chapter 9 of Book I, for example, the introduction of religion accompanies Romulus’ fratricide as well as his killing of a colleague.<sup>26</sup> These unnatural killings are described and condoned by Machiavelli.

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23. “I hold thee fast, Africa. [*Teneo te, Africa.*]” is what Julius Caesar is said to have improvised upon inauspiciously falling to the ground while disembarking for the campaign he was leading into that continent. All this was in full view of his superstitious army, which had been horrified upon seeing him stumble thus. See A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES 20 (H. L. Mencken ed., 1942).

24. For statesmanlike cautions against irresponsible disparagements of religion, see *supra* text accompanying note 9; *infra* note 32; see also *supra* note 10; *infra* notes 29, 30.

25. See the appendix to this talk, paragraph 3.

26. On Romulus, see MACHIAVELLI, THE PRINCE, ch. 6.

Further on, in Chapter 15, Papirius plays down the effect of the oath the enemy had taken, disparaging it as a sign of weakness in the circumstances.<sup>27</sup> He also discounts the evidently impressive crests that the enemy sported: "Crests do not cause wounds," he insists.<sup>28</sup> Are we to be reminded by these crests of the fateful chickens in Chapter 14?

In any event, Machiavelli advocates "religion well-used." If the soldiers had known what Papirius knew, Machiavelli seems to say, they would not have needed the auspices. By resorting to the auspices, Papirius permitted the soldiers to share, as much as they could, his own understanding of the military situation. Thus the auspices did for the soldiers what skill in war did for Papirius.

## VII.

What use can the prudent man today make of all this? Should not churches be recognized, if only tacitly, for what they contribute to the community? Does it not help to be aware of how serious men could once deal with such matters?<sup>29</sup>

Even in this enlightened age, subterranean religious passions are still to be reckoned with. It remains to be seen who can make the most sensible use of such passions in our public life. The more that sophisticated men and women disparage such passions, the more likely will it be that others with inferior understanding and of dubious civic-mindedness will exploit such passions.<sup>30</sup>

All this is related to questions of how one reads and what one knows about human nature.<sup>31</sup> A great gulf divides those who read properly and those who merely read. Proper reading in legal and political things depends, at least in part, upon returning again and again to fundamentals—to the study of the Declaration of Independence, the United States Constitution, and other high expressions of the American mind, as well as to the study of the lives of our greatest men and the thoughts of the best teachers elsewhere.

27. Is not this before the battle prepared for in Chapter 14?

28. See MACHIAVELLI, *supra* note 12, at I, ch. 15. Even so, warriors inspired by crests or other adornments may certainly cause wounds.

29. See, e.g., ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 8, 97, 203, 214; see also *supra* note 24.

30. See, e.g., ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 214, 319, 327, 341, 345, 527.

31. Do not these two questions go together? Certainly, what one knows about human nature can be critical for how well one reads discussions of human things. In addition, may not what one knows about human nature help one prepare oneself for a proper study of non-human things? One may be helped, for instance, if one has learned what it means to know and if one has developed an awareness of what is likely to impede understanding. See, e.g., ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 7; ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303; *infra* note 392.

Thus, in thinking further about the problems posed by Machiavelli in the *Discourses* chapter we have begun to look at, we should take to heart the advice given by President Washington in his Farewell Address in 1796:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience forbid us to expect that national morality can prevail in exclusion of religious principle.<sup>32</sup>

**Appendix: MACHIAVELLI, DISCOURSES, I, 14<sup>33</sup>**

14. The Romans interpreted the auspices according to necessity, and with prudence made a show of observing religion when forced not to observe it; and if anyone rashly disparaged it, they were punished.

Not only were the auguries, as has been discussed above, in large part the foundation of the ancient religion of the Gentiles, but they also were the cause of the well being of the Roman Republic. Hence the Romans had greater care of them than of any other order of theirs; using them in the consular assemblies, in the beginnings of enterprises, in leading out the armies, in engaging in battles, and in every important action of theirs, either civil or military; never would they go on an expedition that they had not persuaded the soldiers that the Gods [*Dei*] promised them victory. And among other auspices they had in the armies were certain orders of haruspices, who were called hen-men. [*pullari*. See Livy x.40] And whenever they gave the order to engage the enemy in battle, they turned to the hen-men to make their auspices—if the chickens pecked, they fought with a good augury; not pecking, they abstained from the battle. Nonetheless, when reason showed them that a thing ought to be done, notwithstanding that the auspices were adverse, they did it in every mode, but turning it about with words and modes so suited that it did not seem that they had done it with a disparagement of religion.

These terms were used by Papirius, the consul, in a most important battle that he made against the Samnites, after which they remained wholly weakened and distressed. For when Papirius was in camp opposite to the Samnites, and it seemed to him that victory was certain in the fight, and wishing because of this to go into battle, he commanded the hen-men to make their auspices. But the chickens not pecking, and the prince of the hen-men seeing the great disposition of the army for combat, and the opinion of the captain and all the soldiers that they would conquer, in order not to take

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32. ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 25-26.

33. The Leo Paul S. de Alvarez translation of the *Discourses* drawn upon here has not yet been published. I used some years ago, with considerable success, photocopies of this translation in a Jurisprudence course at the Loyola University of Chicago School of Law. See *infra* note 117.

away from that army the occasion of good action, he reported to the consul that the auspices had gone well. So Papirius was drawing up the square, when some of the hen-men said to certain soldiers that the chickens had not pecked, and these told Spurius Papirius, nephew of the consul; and when he reported it to the consul, he was immediately answered that he should attend to doing well his own office, that as for him and the army the auspices were good, and if the hen-man had said lies, these would turn to his prejudice. So that the effect might correspond with the prognostication, he commanded the legates that the hen-men should be drawn up in the forefront of the battle. Whence it came about that in going against the enemy, a Roman soldier cast a dart and by chance killed the prince of the hen-men. Upon hearing of it the consul said that everything had proceeded well and with the favor of the Gods, for the death of that liar had purged the army of every fault and of whatever wrath they might have had against him. Thus through knowing well how to accommodate his plans with the auspices, he decided to enter into battle without the army's becoming aware that he had in any way neglected the orders of that religion.

The contrary was done by Appius Pulchrius in Sicily, during the First Punic War. Wishing to do battle with the Carthaginian army, he had the auspices made by the hen-men, and upon their reporting to him that the chickens did not peck, he said "Let us see if they want to drink!" and threw them into the sea. Whence, upon fighting, he lost the day. And when he was condemned in Rome and Papirius honored, it was not so much because one had lost and the other had won, but that one had acted prudently regarding auspices, and the other rashly. Nor did this mode of divining tend to any other end than to make the soldiers confidently go into battle, from which confidence victory almost always arises. This thing was not only used by the Romans but also foreigners, of which, I think [*mi pare*—literally, it seems to me], I shall give an example in the following chapter. [End of Appendix].

## 2. JUDGES, POLITICS, AND THE CONSTITUTION<sup>34</sup>

We still have to discuss the judge. Above all he must be sure not to depart from the statutes, imperial pronouncements, and custom.

Justinian 1<sup>35</sup>

### I.

What should judges, especially federal appellate judges, do in applying the Constitution of the United States? Should judges limit themselves to interpreting the original Constitution or should they adjust constitutional law

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34. A talk given at the Skokie Public Library, Skokie, Illinois, April 30, 1990.

35. IV JUSTINIAN, INSTITUTES 17. On Justinian, see George Anastaplo, *Rome, Piety, and Law: Explorations*, 39 LOY. (New Orleans) L. REV. 1, 98 (1993) [hereinafter Anastaplo, *Rome, Piety, and Law*].

to our time? Continuous modification of constitutional law is said to be necessary if our system of government is to be adapted to changing circumstances. On the other hand, if people generally appreciated how practical the Framers of the original Constitution were, there would be far less talk of a need to adapt the Constitution to our circumstances.

Vital to a proper consideration of this subject is the determination of what the Constitution of 1787 says, not only about judges but also about the general powers of the National Government. One negative effect of the unfortunate politicizing of judges is that wary legislators have come to rely upon judges to make various tough (that is, politically-risky) decisions that legislatures are usually better equipped to make than are judges.

## II.

What does the Constitution provide with respect to judges? There is no provision at all in the Constitution for judicial review of Acts of Congress. It is doubtful that the Framers of the Constitution anticipated that courts would be able, as a general practice, to assess Acts of Congress for their constitutionality. If the Framers had anticipated this, they almost certainly would have made provision for it in a way comparable to the provisions they made for the exercise of the Presidential veto.<sup>36</sup> Various narrow readings of the Constitution, especially of the Commerce Clause, intensified the problems of judicial review for a century or so before the late 1930s.<sup>37</sup> The same can be said of the distorted readings of the Due Process Clauses, which led to the questionable rulings in *Dred Scott*,<sup>38</sup> *Lochner*,<sup>39</sup> and the Abortion Cases<sup>40</sup> (of 1857, 1905, and 1973, respectively).

The provisions made in the Constitution for selection of the federal judiciary suggest that judges were intended to be used primarily for traditional judicial functions, not for the exercise of judicial review, which was virtually unprecedented in 1787.<sup>41</sup> The constitutional qualifications for the President and for Members of Congress include age and residence requirements. No

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36. ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, 47-48.

37. *See, e.g., id.* at 58; *Wickard v. Filburn*, 317 U.S. 111 (1942).

38. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). On *Dred Scott*, see ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 333; ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 457; ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 363.

39. *See Lochner v. New York*, 198 U.S. 45 (1905).

40. *See Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). On the Abortion Cases, see ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 185; ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 455; ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 389-90, 399.

41. On judicial review, see ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 335; ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 460; *see also infra* text accompanying notes 294-300, 359.

such requirements are indicated for judges; rather, the President and Senate collaborate in the selection of judges, with no strings attached. The Framers probably believed that such selection would be based, as it had traditionally been *said* to be based in the British system, primarily upon considerations of learning and character.

Character, especially if grounded in natural-right teachings, and learning are essential if federal judges are to conduct themselves properly not only in interpreting and applying the laws made by Congress but also in developing the common law. To speak of the judicial function in this way is to expect of judges thereafter what had long been expected of them theretofore in the well-established legal system with which the Framers were most familiar.

### III.

This is not to deny that the United States Constitution was to be important for all judges in the United States. For example, the laws of the various States have to conform to the Constitution. The principal concern here, however, under the Constitution of 1787, is to make sure that the States do not interfere with the National Government's effective exercise of the powers available to it under the Constitution.<sup>42</sup> The development of judicial review of Acts of Congress and the imposition of critical restraints by the Fourteenth Amendment on the States have necessarily made judges both more political and less judicial than anticipated by the Constitution of 1787.<sup>43</sup> The rarely-noticed fact that there is no constitutional mandate that federal judges even be citizens of the United States suggests how a-political the Framers once considered judges to be.

If, however, federal judges are to continue to conduct themselves in the political manner to which they and we have become accustomed, they should probably be men and women with considerable political experience.<sup>44</sup> This means, among other things, that judges should *not* be coming from the appointed officers of the Executive Branch of the Government or from law school faculties, except in rare instances. Even most practicing lawyers, including many United States attorneys, may not have enough political savvy to qualify.

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42. On the Supremacy Clause, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 338; *see also infra* text accompanying note 298.

43. Judges, even before the Fourteenth Amendment was available to them, attempted (as in *Dred Scott*) to settle the great political issues of the day. *See supra* note 38 and accompanying text; *infra* note 44 and accompanying text.

44. Would United States Supreme Court Justices with more political experience have steered clear of the 2000 presidential election, leaving the matter to the Congress to resolve in accordance with the relevant constitutional provisions? *See, e.g.*, George Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, 34 Loy. U. Chi. L.J. 131 (2002) [hereinafter Anastaplo, *Bush v. Gore and a proper separation of Powers*]; *see also infra* note 133; *infra* text accompanying note 374.

Of course, not all politicians would do well as judges, since many of them are not technically competent in the law. But it is salutary to emphasize the advantages, in our circumstances, of politically-experienced men and women on the bench. Experienced politicians do tend to be better equipped than either Executive Branch personnel or legal scholars to make political decisions; they tend to be better attuned to the political life of the country. The politician, in order to survive, has to learn how to talk to people sensibly. Politicians do develop a healthy respect for the opinions of the community at large. Prudence is thereby encouraged, including an awareness of what can and cannot work. Or, as a distinguished law school classmate of mine put it a decade ago with the Abortion Cases immediately in mind: "The political branches of government, in their own halting and sometimes frustrating way, tailor the pace of social change to what society as a whole can accept."<sup>45</sup>

Another way of putting all this is to say that the politician is apt to be sensitive to the demands, or at least to the rhetoric, of natural-right principles. Certainly, the successful politician is hardly apt to be a proclaimed moral relativist or positivist, as all too many intellectuals (conservatives and liberals alike, in government and out) tend to be today. Routinely looking to competent politicians to supply the federal bench might have the happy side-effect of discouraging the dubious "litmus-test" approach that is unfortunately politicizing selection of the judiciary at this time.<sup>46</sup>

### 3. A PRIMER ON CONSTITUTIONAL ADJUDICATION<sup>47</sup>

Making . . . due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer . . . educated to the bar [only] in subservience to attorneys and solicitors will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.

William Blackstone<sup>48</sup>

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45. Abner J. Mivka, *The Courts and Politics: When They Mix and When They Don't*, 14 INT'L SOC'Y OF BARRISTERS Q. 345, 350 (1979); see *infra* text accompanying notes 372-73.

46. This lament by me was voiced in 1990. The dubious "litmus-test" approach has been relied upon even more since then. On the "natural-right principles" referred to, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303.

47. A talk given at the Loyola University of Chicago School of Law, Chicago, Illinois, April 4, 2002.

48. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 32.

## PROLOGUE

Students of the Constitution should be encouraged to recognize that sensible people will find ways, sometimes rather contrived ways, to do what needs to be done to deal with the pressing problems of their day. The ways actually resorted to may be called for because of the supposed constitutional barriers to any reliance upon the obvious and more sensible ways that would otherwise be developed.

These barriers may be due to accidents of one kind or another, including accidents grounded in misreadings of constitutional texts and accidents resulting from partisan manipulations. To recognize that people will do what needs to be done is to be reminded that people shy away from obviously suicidal courses.

## I.

The *Heart of Atlanta Motel* case reveals much more about the “situation” than contemporary constitutional authorities seem to recognize. The Civil Rights Act of 1964 challenged in that case had been enacted by Congress because of profound concerns nationwide about race relations.<sup>49</sup>

This was obvious to everyone involved in this and like cases, on all sides of the issues litigated. It is disingenuous, or at least misleading, to ignore the primary concern here with racial justice. Even so, those who considered themselves the champions of racial justice had had to ground their legislation and litigation primarily on supposed commercial assessments.<sup>50</sup>

## II.

The objective—the elimination of racial discrimination in public accommodations—had been approached, for some time, by contrived or roundabout ways. That is, the Commerce Clause was used as the ostensible basis for the legislation relied upon here.<sup>51</sup>

Lawmakers, in developing the 1964 legislation, also referred to the Fourteenth Amendment, with its obvious bearing on race relations, but that Amendment took second place to invocations of the Commerce Clause. The Opinion of the Court in *Heart of Atlanta* was aware of this somewhat odd state of affairs, even as it pretty much set the Fourteenth Amendment to the side and devoted itself primarily to Commerce Clause issues.<sup>52</sup>

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49. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); see also *infra* note 51.

50. See *infra* text accompanying note 337.

51. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 146-51 (12th ed. 1991); see also *infra* text accompanying note 265.

52. See *Heart of Atlanta Motel*, 379 U.S. at 250-52.



## III.

This odd state of affairs goes back to a series of events sketched out in this way in the *Heart of Atlanta* Opinion:

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866.<sup>53</sup> There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the *Civil Rights Cases*, 109 U.S. 3. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. . . . [In 1964,] the Civil Rights Act of 1964, here under attack, was finally passed.<sup>54</sup>

We can see from these dates (1866-1875) that the original Civil Rights Acts had immediately followed the Civil War, drawing thereby on both the principles and the passions of the victors. That was during the first decade after the War.

We can also see, however, that two decades after the Civil War, a period of "reconciliation" had set in between North and South to which the interests of the emancipated slaves can be said to have been sacrificed. In that campaign for reconciliation, it had been considered proper to relax restraints upon the exercise of racial prejudice and to minimize the "reach" of the Fourteenth Amendment, confining it to more or less explicit "State actions" denying equal protection to everyone.

## IV.

In the *Heart of Atlanta* case, the Court's Opinion recognized that the 1883 *Civil Rights Cases* had severely restricted what the Courts could say and do with the Fourteenth Amendment with respect to public accommodations legislation.<sup>55</sup> In its 1964 Opinion, the Court noticed that the 1883 cases had shaped how Congress conducted itself when it decided to serve the objective that guided the Congress in 1875.<sup>56</sup>

The Court also recognized in the *Heart of Atlanta* Opinion that long before the *Civil Rights Cases* of 1883 the United States Supreme Court had acknowledged that the Commerce Clause authorized the Congressional regulation of virtually the entire economy of the country. Passages from

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53. The Civil War, it should be remembered, ended in 1865.

54. See *Heart of Atlanta Motel*, 379 U.S. at 245-46 (footnotes omitted).

55. See *Civil Rights Cases*, 109 U.S. 3 (1883); see also *Heart of Atlanta Motel*, 379 U.S. at 250-52.

56. See *id.* at 251.

*Gibbons v. Ogden* are quoted to this effect.<sup>57</sup>

## V.

The *Heart of Atlanta* Court reinforces its preference for relying upon the Commerce Clause rather than upon the Fourteenth Amendment in upholding the public accommodations provisions of the 1964 Civil Rights legislation. Perhaps this contributed to the discouragement of any dissents from what the Court did on this occasion.

Evident throughout the *Heart of Atlanta* opinion is something artificial about the Court's primary reliance upon the Commerce Clause. This approach conforms with the desire of lawyers to "play it safe" in controversial matters, preferring to win rather than to be right. We can see, in the reluctance to rely upon the Fourteenth Amendment here, how important precedents tend to be for those steeped in the law.

## VI.

The Concurring Opinion of Justice Douglas reminded the *Heart of Atlanta* Court of what it already knew. That is, Justice Douglas tells the Court that there is indeed something artificial, if not even unrealistic, in treating this kind of case as primarily a Commerce Clause case instead of as a Fourteenth Amendment case.<sup>58</sup>

Indeed, Justice Douglas argues that forthright reliance upon the Fourteenth Amendment would discourage the subterfuges and the obstructiveness encountered again and again in such cases. It seems, however, the Justices did not believe that they could retain their desired united front if they attacked frontally the 1883 precedent.<sup>59</sup>

## VII.

The limitations of courts in such matters can be seen in another feature of the 1883 opinion in the *Civil Rights Cases*. This is the insistence by that Court that it was discussing only the Fourteenth Amendment issue and not the Commerce Clause issue.

That is, the 1883 Court acknowledged that its assessment of the 1875 Civil Rights Act might have been different if it had also considered the authority provided to Congress in these matters by the Commerce Clause. The Court added, however, that it was not considering the Commerce Clause in that case inasmuch as the parties had not argued it.<sup>60</sup>

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57. *See id.*

58. *See id.* 279-80.

59. *See supra* note 51 and accompanying text.

60. *See Civil Rights Cases*, 109 U.S. at 19.

## VIII.

This, it seems to me, is a shocking state of affairs. An obviously important Act of Congress, conceived as an effort to promote racial justice, is invalidated by a Court which admits that there may be grounds on which that Act could be sustained.

Nothing is said about why the parties were not asked to submit further briefs and arguments drawing upon Commerce Clause considerations. Nor is anything said about why the Court itself, independent of the parties to this litigation, could not use its own resources to determine how the Commerce Clause bore upon this matter.

## IX.

Even more shocking is that this sort of thing should be generally accepted, with little challenge and for so long. The limitations of much contemporary discourse about constitutional law are thereby exposed.<sup>61</sup>

## X.

The obvious defense of standard practice here looks to well-established rules about raising issues in litigation. It must be asked, however, in what circumstances do such rules make sense?

A certain efficiency is promoted, and lawyerly diligence is encouraged, when such rules govern most civil litigation and routine prosecutions. But is not prudence, and not a mindless reliance upon rules, called for when great matters of state are involved?

## XI.

After all, it should be remembered, the Constitution nowhere suggests that Congress must specify the constitutional provisions it draws upon. The Constitution only suggests, in effect, that Congress may, when it sees fit, exercise the powers with which it is entrusted.

Of course, Members of Congress, in the debates to which proposed legislation may be subjected, can raise questions about constitutional authority, as may the President when he considers whether to sign whatever has been passed by Congress. In due course, the People can pass their own judgment upon whether Congress is sound in its assessment of its constitutional powers.

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61. See, e.g., George Anastaplo, *How to Read the Constitution of the United States*, 17 LOY. U. CHI. L.J. 1 (1985) [hereinafter Anastaplo, *How to Read the Constitution*]; George Anastaplo, *Samplings: Nine Talks*, 27 POL. SCI. REVIEWER 345, 373 (1998); see also *supra* note 44. On the importance of political will in these matters, see Part 10 of this article.

## XII.

Such considerations should make judges reluctant to intervene by way of invalidating acts of Congress. This kind of reluctance was anticipated by Chief Justice Marshall in *Marbury v. Madison* when he indicated that courts would appreciate the seriousness of any future invalidation by them of an Act of Congress, something that was not done for a half-century thereafter.<sup>62</sup>

Do courts today ever express the kind of reluctance that the Chief Justice did? This kind of reluctance—recognizing the proper place of and the respect due to courts in our constitutional system—is drawn upon as well by Abraham Lincoln in his 1861 Presidential addresses.<sup>63</sup>

## XIII.

We should be reminded by these observations of the inherent limitations of courts as adjudicators of constitutional issues. For one thing, it is virtually impossible to eliminate policy (that is, political) considerations from constitutional determinations, considerations for which judges are not properly prepared.

If such constitutional determinations are desired, it makes far more sense to have a specially-designated constitutional court which routinely subjects all Congressional legislation to scrutiny, similar to what the President does. This court would be, in effect, the third house of the legislature, subject to whatever control the People want to impose upon it.

## XIV.

It is well to notice why the typical judge is not properly prepared to deal sensibly with the policy issues that are likely to be a part of any constitutional determination. For one thing, judges do tend to be “out of touch” with the issues of the day, not least because they do tend to be older than legislators.

We do want judges to be somewhat “out of touch” when passing on individual cases, the effects of which are pretty much limited to the parties involved (and which can be corrected by legislation). The advanced age of judges can be useful there, making a dispassionate assessment of the particular facts and equities more likely.

## XV.

The 1920 case of *Missouri v. Holland*<sup>64</sup> reminds us of the contrivances to

62. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). The case, a half-century later, was *Dred Scott*. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

63. Compare *Aaron v. Cooper*, 358 U.S. 1 (1958); *infra* text accompanying note 299.

64. 252 U.S. 416 (1920).

which ill-conceived constitutional determinations by courts can lead. The effort to regulate the hunting of migratory birds in this country could have been grounded in that expansive view of the Commerce Clause promoted by Chief Justice Marshall.

By 1920, however, that view had been replaced by a much narrower reading of the Commerce Clause, obliging Congress and the president to "import" sufficient regulatory power here by negotiating a treaty with Great Britain. It is odd that nowhere in the Opinion of the Court by a learned Justice is there any question raised about the series of constitutional adjudications which had driven responsible legislators to such a bizarre remedy as a treaty devised to empower Congress to legislate on this obviously domestic matter.<sup>65</sup>

## XVI.

Why does not common sense make us wonder whether something may be fundamentally wrong with our premises about constitutional adjudication? Is it consistent with our traditions about the wisdom of the Framers of the Constitution that they should have left the United States without elementary powers entrusted to the governments of civilized countries everywhere?

Along with the insistence by the Courts of the United States upon invalidation prerogatives that do not seem to have been intended in the scope to which we have had to become accustomed, there has been the abdication by those Courts of truly judicial powers related to the contribution they (and only they) could make to the shaping of the common law in the United States. Thus, at about the same time that those Courts were beginning to return to the Marshall view of the Commerce Power, they tried to abandon their traditional and inherent powers as common law courts.<sup>66</sup>

## XVII.

The Courts did come to their senses with respect to the Commerce Clause in time to keep the Great Depression Congresses from looking, in their desperation, to such gimmicks as that relied upon in *Missouri v. Holland*. In other circumstances, the War Power might be used to permit Congress to do what it believes vital for the common good.<sup>67</sup>

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65. This Justice, Oliver Wendell Holmes, Jr., did recognize that the matter under consideration (the protection of migratory birds) bore upon vital interests of the United States. See *Holland*, 252 U.S. at 435; see also *infra* note 263; *infra* text accompanying note 286.

66. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 128-37. On the common law, see *id.* at 332. See also Part 8 of this article; *infra* text accompanying notes 270, 361.

67. Consider, also, how President Lincoln used his powers as Commander-in-Chief to support his issuance of the Emancipation Proclamation. See ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 197; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 114, 316 n.77.

Judicially-imposed shackles upon Congressional powers are probably fewer now than they have been since early in the Nineteenth Century. This is not to deny, however, that there do remain misreadings of the Fourteenth Amendment which can inhibit what might have to be done from time to time in the interest of racial justice and, hence, domestic tranquility.

#### EPILOGUE

One should not criticize the limitations of judicial experiments in constitutional determination without recognizing the importance, since the Second World War, of the rulings in *Brown v. Board of Education*<sup>68</sup> and thereafter. The praise due here, however, should be tempered by a further recognition that *Brown* might not have been needed if the Court had done what it should have done in *Plessy v. Ferguson*<sup>69</sup> and in the *Slaughter-House Cases*,<sup>70</sup> as well as in the *Civil Rights Cases*.<sup>71</sup>

It is only prudent to add here that all too many calls for reliance upon "original intent" today come from jurists and others who do not suspect that a proper understanding of "original intent" would concede far more powers to the Government of the United States than they are comfortable with.<sup>72</sup> It is also prudent to expect that sensible people, confident of their moral as well as their political competence, will work out satisfactory ways of doing what has to be done, no matter what courts and their champions may happen to say from time to time.

#### 4. BILLS OF RIGHTS—ANCIENT, MODERN, AND NATURAL?<sup>73</sup>

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Ninth Amendment<sup>74</sup>

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*Compare* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

68. 347 U.S. 482 (1954); see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 168, 184, 439 n.209.

69. 163 U.S. 537 (1896).

70. 83 U.S. (16 Wall.) 36 (1873); see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 176-77.

71. 109 U.S. 3 (1883).

72. See, e.g., George Anastaplo, "McCarthyism," *the Cold War, and Their Aftermath*, 43 S.D. L. REV. 103, 147, 150-51 (1998) [hereinafter Anastaplo, "McCarthyism," *the Cold War, and Their Aftermath*].

73. A talk given at a panel of the American Political Science Association Annual Convention in San Francisco, California, August 29, 1990. For another talk that I gave at that Convention, see George Anastaplo, *Lessons for the Student of Law: The Oklahoma Lectures*, 20 OKLA. CITY U. L. REV. 19, 133 (1995) [hereinafter Anastaplo, *Lessons for the Student of Law*].

74. See *infra* text accompanying note 98; see also *infra* note 273.

## I.

Professor Gary Glenn has called to our attention the precision of Publius and others in their use of the term “bill of rights,” a precision that continued in some American writers through the Nineteenth Century.<sup>75</sup>

It has been pointed out to us that writers shied away from calling the first eight (or ten) amendments to the Constitution a “bill of rights.” How much this reluctance relates to the instructive distinction drawn by Professor Glenn between a bill of rights as a “community-defining declaration” and a bill of rights as a “judicially-enforceable law” is a question that his paper invites us to consider.<sup>76</sup>

One reason that some legal writers were reluctant to use the term “bill of rights” to refer to our constitutional amendments may have been that the term had a technical meaning going back to the English Bill of Rights of 1689. That bill, which took the form of a parliamentary statute, restricted the powers of the Crown and asserted various powers and immunities of “the Lords Spirituall and Temperall and Commons.”<sup>77</sup>

We can see laid out in the Bill of Rights of 1689 the conditions upon which “their said Majestyes [William and Mary, Prince and Princess of Orange] did accept the Crowne and Royall Dignitie of the Kingdoms of England France and Ireland and the Dominions thereunto belonging.”<sup>78</sup> This instrument included various fundamental provisions similar to the distribution of powers found in the Constitution of 1787. In this sense, the initial amendments to the Constitution are not a “bill of rights.” Writers learned in the law and in British constitutional history were aware of this.

In a popular sense, however, the term “bill of rights” was more widely used. “During the controversy with Great Britain, from 1763 to 1776,” we have been told, “American editors frequently reprinted the English Bill of Rights, and American leaders hailed it as ‘the second Magna Carta.’”<sup>79</sup> Half of the State constitutions in 1787 had affixed to them, usually at the beginning, affirmations of rights called “bills of rights.” This was a loose usage perhaps, but it was widespread. Not only did these affirmations exhibit the spirit of the English Bill of Rights, but they also drew upon their illustrious English predecessor for specific provisions. For example, the

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75. Professor Glenn is a senior member of the faculty of the Northern Illinois University Political Science Department. See Gary D. Glenn, *Cyrus' Corruption of Aristocracy*, in *LAW AND PHILOSOPHY*, *supra* note 7, at 146.

76. It was assumed in the Glenn paper that judicial review, as understood today, would apply “Judicially-Enforceable Law.”

77. For the text of the 1689 Bill of Rights, see *THE STATUTES OF THE REALM* 142-45 (1819). See also ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 263-68.

78. See ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 267.

79. Leonard W. Levy, *Bill of Rights (English)*, in *I ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 113 (Leonard W. Levy ed., 1986).

Eighth Amendment to the Constitution was anticipated by the English Bill of Rights, which provided that “excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”<sup>80</sup>

It seems to have been sensed by the public at large that the initial amendments to the Constitution provided some of the assurances that the celebrated Bill of Rights of 1689 had provided. It took more than a century for the full extent and character of the English instrument to be generally forgotten in the United States.<sup>81</sup>

## II.

Mr. Glenn reminds us that various early apologists for the Constitution of 1787, such as the Publius of the *Federalist*, justified the lack of the bill of rights that some critics of the proposed constitution were making so much of. Among the justifications for what turned out to be an embarrassing omission was the argument that many of the provisions proposed by critics were vague, imprecise, and otherwise indefinite.<sup>82</sup>

Political motivations were not inconsequential in determining how these arguments were developed. If the Framers of the Constitution had anticipated how much would be said about the absence of a formal bill of rights, they would almost certainly have produced one in the course of their Philadelphia deliberations.<sup>83</sup> On the other hand, the more determined critics of the proposed Constitution in 1787-1788 were not thinking of the kind of amendments produced in the First Congress in 1789, but much preferred instead significant limitations upon the substantial powers of Congress, something that the Federalists who controlled the First Congress had no intention of providing.<sup>84</sup> The Anti-Federalists’ failure is reflected in their inability, in the First Congress, to get the term “expressly” added to what is now the Tenth Amendment.<sup>85</sup>

Political motivations aside, what about the criticisms, voiced to this day, about the imprecision of various provisions in the initial amendments? Most of the provisions are fairly clear, providing sufficient guidance on their own

80. ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 265.

81. This forgetting is reflected in the materials that Professor Glenn sifted for us.

82. The Publius referred to here is the nominal author of *The Federalist*, the papers produced in 1787-1788 by Alexander Hamilton, John Jay, and James Madison for the New York State electorate. On *The Federalist*, see Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 13.

83. The proponents of the proposed Constitution were moved, during the ratification campaign, to make some perhaps dubious arguments against all bills of rights once the agitation about the lack of a bill of rights threatened their desired speedy ratification of the Constitution.

84. For some of the significant limitations proposed by critics of the Constitution, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 298-313.

85. On the term “expressly,” *see id.* at 458. Judges and other expositors sometimes read “expressly” into the Tenth Amendment.



terms. This may be seen as well in the two sets of provisions, dealing with Congressional districts and with the compensation of members of Congress, found in the two proposed amendments that were not ratified by the State legislatures in 1789-1791. These two barely missed ratification, which suggests that they were not clearly regarded as simply inappropriate as amendments.<sup>86</sup> Various initial amendments were probably considered to be as precise as, say, the Eleventh Amendment a few years later, which asserted certain immunities of the States with respect to the jurisdiction of the Courts of the United States.<sup>87</sup>

Also, it should be noticed, most of the provisions in the Bill of Rights of 1789-1791 draw on traditional formulations that had long served to provide reliable guidance in English law and practice. Even the much-abused term "due process of law" had in 1789 a fairly precise meaning that went back, at least in spirit, to Magna Carta.<sup>88</sup>

Mr. Glenn reminds us that Publius, in *Federalist No. 84*, singles out the term "liberty of the press" as a striking instance of imprecision: "What signifies a declaration that 'the liberty of the press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"<sup>89</sup> Liberty of the press, in English constitutional history, stood at least for the rule against previous restraints (or a system of press censorship). This is one element in the formulation now included in the First Amendment language "freedom of speech, and of the press." Some scholars in our time have tried to limit that provision to the prohibition of prior restraints (as explained by Blackstone).<sup>90</sup> This effort, however, does not take due account of what had happened in America when the ultimate "sovereignty" moved from Parliament to people at large. What freedom of speech means under this radically new dispensation is suggested by the traditional assurance incorporated in the Bill of Rights of 1689: "That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."<sup>91</sup> My observations here lend support to Publius' oft-questioned insistence in *Federalist No. 84* that "the constitution is itself, in

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86. In fact, Congressional practice has, in effect, always accepted the principles reflected in the two proposed amendments not ratified in 1791. The second of these originally-not-ratified amendments was "ratified" in 1992 and is now known as the Twenty-seventh Amendment. On this amendment, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 465 (Index).

87. On the Eleventh Amendment, see *id.* at 458 (Index).

88. On due process of law, see *id.* at 457 (Index).

89. On freedom of speech or of the press, see *id.* at 459 (Index).

90. See ANASTAPLO, *HUMAN BEING AND CITIZEN*, *supra* note 4, at 33. For the usefulness of the anti-censorship no-prior-restraint (or no-previous-restraint) rule today, see ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 680-82 n.18.

91. See ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 265.

every rational sense, and to every useful purpose, A BILL OF RIGHTS.”<sup>92</sup> Thus, just as the Bill of Rights of 1689 defined the relation between Crown and Parliament, so the Constitution of 1787 (even without its amendments) defined the relation between the Government and the People, with the People now in the position occupied by the Parliament in the British constitutional system.<sup>93</sup>

Although some of the Bill of Rights-like provisions in the Constitution of 1787, as well as in the initial amendments, may seem imprecise, that may be in large part because the craftsmanship of the Constitution itself is not generally appreciated. The considerable reliance now placed upon judicial review of Acts of Congress also reflect a dubious reading of the overall Constitution, a system of government which would have been significantly different in many particulars if modern judicial review had indeed been provided for in the Constitution.<sup>94</sup>

### III.

I have found instructive Gary Glenn’s vigorous distinctions, with respect to bills of rights, between “community-defining declarations” and “judicially-enforceable law.” We need not consider here whether these are the only alternatives. We can notice that the Preamble to the Constitution does serve as a “community-defining declaration.”<sup>95</sup>

It can be said that the initial amendments to the Constitution are not precise enough to be judicially enforceable and certain things are believed to follow from this as to the status of the rights set forth there. But when we notice the order in which the elements in the twelve amendments proposed in 1789 were arranged, we can see that some of them were directed primarily to the Congress, some to the Executive, and some to the Courts. The implications of this arrangement should be noticed.

Take the provisions, such as the Fifth, Sixth, and Seventh Amendments, which are clearly directed to the Courts. Suppose the Courts do not conduct trials as prescribed in those amendments. We would *not* expect to find a remedy or “enforcement” elsewhere in the system short of a recourse to legislative impeachment of judges. Thus, we rely here on the courts to be respectful of and to adhere to the provisions that bind them. Similarly, the

92. See THE FEDERALIST NO. 84. The English Bill of Rights of 1689, on the other hand, is in large part a constitution, defining and limiting the powers of the monarchy.

93. One consequence of this shift is that the People need, for effective governance by them, the freedom of speech originally developed for members of Parliament. See, e.g., ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 93-129.

94. See, e.g., *supra* text accompanying note 36; see also *supra* note 41.

95. We need not consider here the part that the Preamble was intended to play in interpretations of the body of the Constitution. See, e.g., ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 336 (Index).

provisions that bind the Legislature and the Executive depend, for the most part, on the willingness of those branches, subject to the supervision of the electorate, to be respectful of whatever pertains to them. Thus, we need not assume that those provisions have to be enforceable by any other branch of government in order for them to be significant restraints upon government.

But have we not always been aware of this? After all, we know that most actions taken by the Government of the United States may not be routinely subjected to judicial review. The degree to which State actions are judicially reviewable is different, and intended to be different, not only since the adoption of the Fourteenth Amendment, but also in the Constitution of 1787 with its Supremacy Clause. In fact, it is not only the Courts of the United States that can review what the States do, but Congress and the President also, as may be seen upon considering the much-neglected "Republican Form of Government Guarantee."<sup>96</sup> In the Constitution of 1787, there are no provisions for the supervision of Congressional activity, aside from the qualified Presidential veto, whereas there are provisions for the national supervision of the activities of State governments.

The extensive recourse to judicial review of Acts of Congress since the Civil War has not unnaturally led to questions about how the various rights in the original Constitution, as well as in its amendments, should be regarded. I have suggested that routine reliance on judicial review of Acts of Congress reflect a failure to understand the extent to which the Congress was intended to be the dominant branch of the Government of the United States. Perhaps the severe limitations placed upon the States in the Fourteenth Amendment, which *were* intended to be enforced by the Judiciary as well as by other branches of the Government of the United States, got judges into the questionable habit of believing that all legislatures have been created equal.<sup>97</sup>

I suspect that the belief widely held among us is that the fundamental rights recognized in our Bill of Rights are imprecise, equivocal, and unenforceable depends in large part upon the also prevalent opinion today that

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96. On the Republican Form of Government Guarantee, see *id.* at 337 (Index); ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 463 (Index).

97. The belief that the three branches of government established by the Constitution of 1787 are equal is also questionable. On legislative supremacy, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 333. Consider, as well, the following letter that I wrote to the *Chicago Tribune*, in March 2001, which was not published:

One of your readers, understandably troubled by radical measures resorted to unilaterally these days by the Bush Administration, argues that "the U.S. Constitution stipulates in no uncertain terms that the executive, legislative, and judicial branches are equal branches." [*Letters to the Editor*, CHI. TRIB., Mar. 10, 2002, sec. 2, at 6.]

Sometimes the judiciary, as we saw in December 2000, acts as if *it* is supposed to be the dominant branch. At other times, as we now see, the executive acts that way.

But what the Constitution actually provides is that Congress, with such powers as those of the Purse and of Impeachment, is to be the dominant branch of the National Government, always subject of course to the sovereign Will of the People.

the moral element in those fundamental rights shall not be taken seriously in legal reasoning. The argument in opposition to the prevalent opinion means, among other things, that various of these rights would be binding on our governments whether or not set forth explicitly in the Constitution. The Ninth Amendment reflects this approach.<sup>98</sup> In any event, if the moral element in our fundamental rights is recognized, then prudence should be intrinsic to the interpretation and application of these rights.

#### 5. THE MASS MEDIA AND THE AMERICAN CHARACTER<sup>99</sup>

But anyway, in our consideration of the nature of the land and the order of the laws, we're looking now to the virtue of the regime. We do not hold, as the many do, that preservation and mere existence are what is most honorable for human beings; what is most honorable is for them to become as excellent as possible and remain so for as long a time as they may exist. This, too, I think, was said already, in our earlier discussions.

The Athenian Stranger<sup>100</sup>

#### I.

About a quarter of a century ago, in the course of an archaeological tour that I was conducting in Greece, our tour bus pulled into the village of Mavromati in the southwestern corner of the country. We had made our way to that remote place, off the beaten tourist track, to see the miles of ancient walls that had survived the depredations that had been visited over millennia on similar walls in the more populated parts of Greece. By the time we finished walking as much of those walls as we wanted, it was early afternoon, a hot summer afternoon. The shaded outdoor taverna to which we then went was a very nice place to rest and refresh ourselves for an hour or so before getting back into our bus for our next stop, Nestor's and Thucydides' Pylos.

I had heard that there were even older ruins in the valley above which our village was placed, a valley that could be reached by scrambling several hundred feet (or so it seemed) down a steep footpath. A visit to that site meant, however, that lunch would have to be foregone—and none of my tour group could be persuaded that the promised ruins would be worth that sacrifice. They were probably right about that, for I do not now recall the ruins I did manage to find once I got to the floor of that valley, where there

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98. For the Ninth Amendment, see *supra* text accompanying note 74. All this bears on the underlying and much-neglected issues in the puzzling case of *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See *infra* Part 9 of this article.

99. A talk given to the Politics Department of The University of Dallas, Irving, Texas, April 23, 1992.

100. PLATO, LAWS 707D.

was no other sign of human life—and by that time it was very hot indeed. But what made the descent not only worthwhile but even one of my most memorable experiences as a traveler were the multitudes of colorful butterflies I found in that abandoned corner of the world, a sea of butterflies in which I could swim and refresh myself to my heart's content.

Another descent, a much more recent one has been far less exhilarating. That was into the tunnels, forty and more feet under the surface of Chicago's downtown area. We in that city have all, in a manner of speaking, been plunged below the surface of the city since we learned that hundreds of millions of gallons of water from the Chicago River had gushed into those tunnels, flooding the basements of many buildings in the Loop and shutting off the electric power for a considerable area. The damage we sustained ran into the hundreds of millions of dollars, perhaps into the billions.<sup>101</sup>

I have said that this descent into the Chicago "flood" has been far less exhilarating than that into the sea of butterflies at Mavromati. It is even sad for me personally because I had to some extent anticipated what happened—and had done nothing about it but mention it to a few people as a problem. I had wondered for some time about what precautions had been taken to block the flow of water into the subway train system in the event of a break in the tunnel overhead at one of the two places where that train system goes under the Chicago River. In fact, I had planned to write about this to people that I knew in City Hall, once during the present administration, and once during a previous administration. But I had put it off, partly because I was busy, and partly because of another reason to which I will return.

I was, therefore, bothered, even more than most of my fellow Chicagoans, when I learned of our subterranean flood, a massive flood that could have been significantly moderated if there had been floodgates installed on either side of those places where tunnels run under the River, something which I have long thought should have been done—and for all I knew may have been done already. Once the news came of the flood, I was personally bothered because I sensed that I might have been of help if I had spoken up when I had been first moved to do so. One experiences here that sense of responsibility that a citizen can, probably should, have for the common good.

In such self-accusing circumstances, it is natural to find solace as well, since it is probably not healthy to make very much even of what one is truly responsible for. It is somewhat of a relief to see how people have risen to the challenge posed by this calamity—and a number of interesting things have come to light. It is also some solace to recognize that probably nothing I might have done would have made any difference anyway, especially as it became evident that there were many more tunnels under the River than the two subway train tunnels I had been concerned about. Many more than the four floodgates I had envisioned may have been needed. I was reinforced in my assessment that the expression of my concerns would not have made any

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101. See, e.g., N.Y. TIMES, Apr. 14, 1992, at A1.

difference when we all learned that the City had received warnings about a serious break in one tunnel under the River as early as last January [I could say in 1992], warnings that were even backed up, it seems, with video pictures of what was happening. Little, if anything, was done in response to those ominous reports. We should not be surprised to learn a year from now that little, if anything, has been done to install the dozen or more floodgates that are still needed. We tend, “naturally” enough, to devote our attention and resources to immediately pressing problems.

It should be instructive to consider what contingencies *are* routinely provided for in our large cities, probably many more than most of us are ever aware of. Public servants are usually far more conscientious than we give them credit for. Even in the Chicago-tunnels situation, it is not clear that anyone recognized that the break that had been discovered by January was under the River. The failings of public servants, as for most of us, tend to lie in the realm of imagination, not in the realm of dedication to the common good. It is remarkable, for example, how cavalier people of a century ago evidently were in tunneling again and again under the Chicago River. But then, consider how cavalier we have been in our own time with the building of nuclear plants and the generating of immense quantities of lethal wastes that we do not really know what to do with. We are now becoming mightily concerned about this, just as we have long been concerned about the proliferation of nuclear weapons around the world. Concerns about nuclear plants devoted to peaceful purposes are reinforced by news about the thousands of deaths in Ukraine because of the troubles in 1986 at Chernobyl.<sup>102</sup>

## II.

What does it mean to say, as I have said, that “the City” had received, several months ago, warnings about a break in a tunnel? Some people in city government were told something; questions are now raised about how many of them there were told, how high up the hierarchy they were, and what was said to them. We can see here a problem that we face again and again: What does it mean to have a community? You will recall that Aristotle argued that Babylon was not a *polis*, observing that part of Babylon was once taken by an enemy without other parts of it knowing that this had happened.<sup>103</sup> The parts of a true *polis*, like a living organism, share experiences much more than the parts of Babylon could share.

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102. See, e.g., N.Y. TIMES, Nov. 8, 1992, at 1; see also IMPLICATIONS OF THE ACCIDENT AT CHERNOBYL FOR SAFE REGULATION OF COMMERCIAL NUCLEAR PLANTS IN THE UNITED STATES (United States Nuclear Regulatory Comm’n, 1989).

103. See ARISTOTLE, POLITICS 1276a28-31; see also ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 459.

In matters of public concern, all, or almost all, of the significant things are likely to be known somewhere in a large association. Almost always there is likely to be some information in the system that would be useful if it were put in the hands of the right people. We can see this, for example, when we examine what information was available to the American military in November and December 1941 before the Japanese attacked Pearl Harbor.<sup>104</sup> Sometimes the key or most revealing information is the sudden lack of available information (or a “blackout”) about certain matters.

Consider the significance here of the research done by lawyers and judges into statutes and precedents that may have long been forgotten. What does it mean that the information sought might be considered relevant? Is it not odd that such long-forgotten things are looked to for authoritative guidance as to what “the law” is? A community, as an organic whole, seems to be taken for granted by such reliance upon what is buried somewhere in the recorded memory of a people.

To some extent, the critical binding together of a people may depend on the catastrophes that they have shared. Consider, for example, the baptism in blood that the Civil War provided for the American nation. In that case, infant baptism—that is, the sentiments and experiences of the Revolutionary War period—had not been sufficient. We should at once notice, however, that even the Civil War would not have sufficed here if it had not been illuminated and guided by enduring principles that gave it special meaning.<sup>105</sup>

### III.

Similarly, we must think about what lends significance to our “everyday” catastrophes, such as our recent experience with the Chicago River. If one hole in a tunnel under the River—a crack about twenty feet long, the size of a large pickup truck—can have the remarkable effects that we have been witnessing, what about a modern war? Does not this suggest the folly (if only the remarkable inadequacy) of much of the planning and preparation since 1945 for a nuclear war? In Chicago, we had decades of air-raid-warning tests every Tuesday morning, with all fire-station sirens in the city (or so it seemed) wailing in unison at 10:30. It was never clear what we were supposed to do if we ever had the real thing. A number of people did panic on the one occasion that those sirens were let loose at another time of day—one night when Richard J. Daley, a devoted White Sox fan, celebrated his team’s

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104. See, e.g., George Anastaplo, *Clausewitz and Intelligence: Some Preliminary Observations*, 16 TEACHING POL. SCI.: POL. IN PERSP. 77 (1989); George Anastaplo, *On Freedom: Explorations*, 17 OKLA. CITY U. L. REV. 465, 645 (1992) [hereinafter Anastaplo, *On Freedom*].

105. Consider, for example, how President Lincoln, in the Gettysburg Address, applied the principles of the Declaration of Independence to the circumstances of the war. See ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 229.

winning of a divisional baseball championship.<sup>106</sup> Be that as it may, the regular Tuesday morning sirens did permit us to check our clocks. A few of us could hope that the Russians did not choose that time for their moment of madness.<sup>107</sup>

Even more important than what we believe we can endure from a nuclear assault and how is what we have been preparing and are willing to do to others. The strongest nations—and it should have long been obvious that we are by far the strongest of the strong—should be sensitive to the moral and other restraints that they must impose upon themselves. I am afraid that we saw in the recent Gulf War [I could say in 1992] how devastating, if not unconscionable, our use of overwhelming power can be—and how useful it had been for us to be somewhat moderated by our respect for Russian power.<sup>108</sup>

It should be evident that modern societies are very complicated and hence very vulnerable.<sup>109</sup> That is, our liabilities are intimately related to our assets and advantages, including the considerable freedom each of us has to choose his own way of life. All this is related to our precarious relation with the natural, as we do conquer nature to a considerable extent. Our vulnerability, heightened in certain respects by our long-cherished liberty, shows up in epidemics, spiritual as well as physical. These can be interrelated, as may be seen in the worldwide AIDS epidemic, in the serial killings of our time in this country, and in the mass-extirpation programs of the Twentieth Century abroad.<sup>110</sup>

#### IV.

I return to the second reason why I did not deliver my warning to City Hall about tunnel flooding: one does not want to turn into a Cassandra. Or, put another way, one should ration out the warnings one issues, knowing that otherwise one's credibility is likely to be soon squandered otherwise.

Much of my own credibility as a prophet has been invested in recent decades in efforts to play down the extent of the Russian threat to the United States, the perception of which has had such unfortunate effects upon

106. The White Sox won, in 1959, their first pennant since 1919.

107. One precaution here would have been to have had the major cities in the country use different times for such testing. Perhaps that was done—or did the differences in time zones take care of this risk? However that may be, this too I did not bother to suggest to anyone in authority.

108. See Anastaplo, *On Freedom*, *supra* note 104, at 589, 604.

109. This was most recently dramatized by the deadly gas-main explosion in Guadalajara the day before this talk of April 23, 1992.

110. See, e.g., George Anastaplo, *On Trial: Explorations*, 22 *LOY. U. CHI. L.J.* 763, 977 (1991) [hereinafter Anastaplo, *On Trial*]. The September 11, 2001 assaults in New York and Washington can now be added to this list. (The *On Trial* collection is to be published in book form by Lexington Books.)



American life, both materially and spiritually. Long ago I decided and said that we confronted in the Soviet Union, a seriously anemic giant, capable of inflicting severe blows perhaps but also very limited in its true strength, ultimately because of its political order. My suspicions were confirmed by a fortnight spent in the Soviet Union in the summer of 1960.<sup>111</sup>

We are considerably more sensible these days about the Russians. But some of our foolishness abroad continues, as was seen in the way we approached the Gulf War.<sup>112</sup> This is not to deny, I should at once add, that other peoples, such as the Iranians, the Saudis, the Iraqis, the Kuwaitis, and the Japanese, have been foolish as well. The most sensible participants in the international struggles in which we have been interested in recent decades have long seemed to me to be the Israelis, despite their obvious recent shortcomings (with respect both to their Lebanese incursions and to the Intifada). It is not encouraging [I could say in 1992] to watch the United States now treat the Israelis as the “bad guys” in the Middle East.<sup>113</sup> This is to be contrasted with our accommodations toward the barbaric Khmer Rouge faction in Cambodia.

## V.

I have glanced at both domestic crises and foreign crises. These are not unrelated, especially since our excessive concerns with the Russians have contributed to the neglect of our cities (and their infrastructure) which neglect in turn very much affects our domestic institutions (including living conditions, educational facilities, employment opportunities, and urban violence).

Far more serious than either domestic troubles or foreign policy concerns is another longstanding problem: What kind of a people should we be? This has long been the most serious problem from which we have been diverted by foreign challenges and domestic crises. Particularly vital here is whether this question—What kind of a people should we be?—ought to be a matter of community concern.

A prior question is (as I have indicated) whether there is a community—an association which should take itself seriously. To ask whether there is a community is to ask whether we can be informed enough, both as to “facts” and as to standards of the good and the bad, to be justified in being confident in what we may and should do.

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111. See, e.g., ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 3.

112. See *supra* text accompanying note 108. The moralizing temptations of the powerful may be seen in how the Iraqi threat came to be spoken of in 2002 and 2003.

113. Israel, a decade later, appears better to us, but perhaps for the wrong reasons. On the case for Israel, see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 155; Anastaplo, *On Freedom*, *supra* note 104, at 622.

A critical obstacle here is the growing opinion, even among some of the more influential politically-connected people in the academy, that each one of us should be on his own, that it is no business of government to guide us in what to believe, and that we are entitled to act as we please (that is, as we chance to please) so long as we hurt no one else—and what “hurt” means is narrowly construed.

All of this can be reinforced by some extraordinary notions (especially among “conservatives”) about the origins, nature, and prerogatives of private property, notions which tend (at least in our time) to legitimate as well as to support privacy and hedonism.<sup>114</sup>

## VI.

What kind of a people *should* we be? Certainly, we should be more civic-minded than we seem to be these days. There *is* considerable concern among us for our people’s health, prosperity, and longevity, all of which are facets of an emphasis upon government as necessary to protect us physically.

Civic-mindedness includes patriotism and self-sacrifice for the good of the whole. The last time I talked at the University of Dallas, during the 1988 Presidential campaign, I had some things to say about the impropriety of having a vice-presidential candidate who had the gall to hide himself in the National Guard in order to avoid service in that war in Vietnam which he and his influential family had been pushing.<sup>115</sup> Now we have [in 1992] a leading Presidential candidate who also avoided the draft in questionable ways, but he at least did not support the war that he avoided. In the “good old days,” any *self-interested* shirking of military service would, once exposed, have meant the end of a serious political career in this country.<sup>116</sup>

We are all doing some shirking of our own these days, however, as may be seen in our animus toward anyone who presumes to raise our taxes. We can indulge ourselves in this even though our national debt escalates, threatening (or so it seems) our economic health and hence our political morale and long-term social stability.

## VII.

I again ask: What kind of a people should we be? The answer to this question must address not only issues of patriotism, but also of education,

114. On the case for private property in our regime, see ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 213-17. See also Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Parts 2 and 3; *infra* notes 121, 144.

115. See ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 108.

116. We have seen, since this 1992 talk, that remarkable switch in positions which has had a Democratic Administration presiding over a Budget surplus and a Republican Administration preparing to preside over an unprecedented Budget deficit.

especially the education appropriate for a republican people.

I have found particularly instructive here Machiavelli's *Discourses*, a text for republicans that is now available in a first-rate translation by Leo Paul de Alvarez.<sup>117</sup> Whatever reservations one should ultimately have about Machiavelli, he does offer us lessons that it is prudent to ponder.

Among the lessons to be drawn from Machiavelli are a depreciation of private interests, as ordinarily understood (whatever may be ultimately done with glory), a moderation of wealth in a republican regime, and an endorsement of that clear thinking which is apt to be enhanced by a study of the doings and sayings of the prudent men of other times and places.

Vital to a proper education of a people is that instruction which helps us grasp what we need to study and to know in order to understand what is required for sensible action in a variety of circumstances. This capacity is what the Politics Program here at the University of Dallas has long been interested in developing.<sup>118</sup>

### VIII.

I ask once more: What kind of a people should we be? This is a question not only of patriotism and of education, but also of moral character. It is character which can keep patriotism from deteriorating into the extremes of either militant chauvinism or debilitating self-absorption. It is character which can keep education from being diverted into either sophistry or pedantry.

What is the state of the character of the American people today? Has there not been a steady decline in the morals, including the tastes and language, of the American people? Certainly the sense of morality exhibited in our mass media, including the music and films we have become accustomed to, is not elevated or elevating. What makes this particularly troubling is that many of our more gifted people are devoted to these enterprises.

I return to my Cassandra mode by reminding you of my advocacy of the abolition of broadcast television in this country, a decades-long advocacy which has (so far as I know) made no converts and which (I am afraid) has undermined my credibility.<sup>119</sup> Some of those who might agree that there is something wrong with television and its imitators are dubious about governmental intervention in such matters. Aside from the concerns they may have about dictators and a general repressiveness, there is for them an

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117. That translation by Professor de Alvarez, drawn upon by me in Part I of this Article (in the text accompanying *supra* note 33), has yet to be published. Recently, a reliable translation of the *Discourses* has been published by Harvey Mansfield, Jr. and Nathan Tarcov.

118. See, e.g., WILLMOORE KENDALL: MAVERICK OF AMERICAN CONSERVATIVES (John A. Murley & John E. Alvis eds., 2002).

119. See ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 245; see also *infra* text accompanying notes 135, 354.

underlying problem: they have serious reservations about anyone's ability to know the good or about the legitimacy of any communal efforts to impose or act upon moral standards.<sup>120</sup>

## IX.

I now shift to a more positive note, away from the more "negative" mode seen in my quixotic abolition-of-television advocacy.

My longstanding concerns about the American character were vividly brought home to me during a two-week, five-thousand mile drive across the United States over the New Year's holiday, a drive from Chicago to the Grand Canyon and then home again by way of a meeting in San Antonio. The people on exhibit during this odyssey were decent and attractive, and the countryside was engaging. But it was depressing to notice, on the radio bands of the country, what the people of this country are routinely subjected to, day and night—what is offered as entertainment and as information.

It is obvious that most people do not appreciate how bad the stuff is to which they are subjected, including much that passes for religious worship and for political discussion. They have long since lost, if they ever had, the capacity to judge how low a "culture" is being propagated over the air waves, a "culture" which is very much occupied with selling. The way of life encountered there is so massive that it probably reflects much of what people are feeling and thinking these days. So far as I can tell, the market is not likely to correct this decline on its own. In fact, the market may even make matters worse since large-scale broadcasting requires more and more resources and hence larger and larger audiences to pay for all this. The least common denominator must be used in determining what is to be catered to.

The market which is made so much of—as may be seen in the current rage for "deregulation"—does contribute to a more efficient use of resources, with efficiency measured primarily with a view to material well-being. The market tends to permit us to be left alone so that we can personally control our lives to a considerable extent. But this is consistent with, if not likely to lead to, a steady lowering of standards, even as technology can improve products and expand choices.

Even so, an *effective* market economy depends upon a people that are disciplined in a certain way. Such a people is not simply the product of this kind of economy. A market economy may reinforce the habits of the disciplined, but it can also, depending on the circumstances, lead to the subversion of character and hence of the discipline upon which this kind of economy relies.<sup>121</sup>

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120. See, e.g., ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303.

121. See, e.g., George Anastaplo, *Legal Education, Economics, and Law School Governance: Explorations*, 46 S.D. L. REV. 102, 132 (2001) [hereinafter Anastaplo, *Legal Education, Economics, and Law School Governance*]; see also *supra* note 114; *infra* note 144;

However enamored we may be of the principle of choice and self-determination, we cannot really control our own lives if we do not know what we are doing and if we do not know what is better and worse—that is, if we are not virtuous. The lessons taught and the tastes catered to and encouraged by the mass media are hardly conducive to the maintenance and deepening of morality among us.

The positive note which I have promised follows upon the observation that one can better notice how low the stuff is that is typically broadcast these days by comparing it (as we did in our recent fortnight on the road) with what is now readily available on hundreds, if not thousands, of cassettes. For our trip, a couple of dozen cassettes were selected from the readings of complete plays, poems, novels, and other forms of literature available at reasonable prices. Two quite different “worlds” were thus available to us as we alternated between the broadcast bands and the cassettes.

I set aside, for this occasion, the questions raised by the images and the music with which we are inundated these days. It is with the words we hear and read that I am most concerned, those words upon which we primarily depend for moral instruction, including instruction about how to use and even respond to music and images.

As we moved across the country, I was struck by how *good* it would be if all motorists (as well as people at home) could easily do what we were doing: switch to recordings of the best that can be read among us. We now have the technology and there is already more than enough material recorded to permit the establishment of a publicly-funded nationwide radio network that would do nothing but broadcast the kinds of recordings I have been describing. This could be done twenty-four hours a day, perhaps on the same frequency across the country, with the broadcast schedule of works to be announced in advance and perhaps in the daily newspapers. Very few people would be needed to do this, for only an occasional (pre-recorded) announcement of what is being read would be required. The mechanical details of such an enterprise could easily be worked out once it was determined that it should be done. Nor need it be limited to one such network.

Of course, any one of us could choose to do this sort of thing for himself. But is it not good for the community to affirm the standards it would by embarking on this kind of endeavor? It would certainly support those who are interested in such affirmation, including teachers who could work announced broadcasts into school assignments and who could come to expect the common discourse of the community to be higher than it is now. Besides, all too many of us would not choose to do this on our own, certainly far fewer than those who might be “exposed” to this sort of thing and who would come to find it attractive once it was broadcast routinely. I do not believe that the critical question here is the mode of selection of the materials to be broadcast. Reasonable accommodations can be made here; political partisanship can be

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*infra* text accompanying notes 135, 337, 354.

avoided by those determined to avoid it. It is well to be reminded of how well the B.B.C. has served the British people for many years. The enterprise I am advocating could reasonably be expected to elevate the general tone of our language and public discourse, both secular and sacred.

I return, in closing, to the tunnels under Chicago, for they do serve as a metaphor for the tunnels that underlie our life as a community. Those psychic and social tunnels, which are useful in many ways, do have to be cared for, for what happens in those subterranean passages can, even when they are barely noticed on the surface, affect the quality, if not the very possibility, of everyday life.

I am told my television-abolition proposal has provided the occasion for productive discussions in college classrooms, especially since it has been incorporated in a fine political science reader.<sup>122</sup> I venture to suggest that the proposal for a national Network for the Written Word (NWW), which I am launching here, can also provide occasions for discussions of what we should stand for and what we may properly do to advance the good and to retard the bad.<sup>123</sup>

Certainly, a "statement" of significance would be made by this kind of venture. We should remind ourselves that there is out there, in the words of an old song, "a valley of love and delight," something far better than the self-centeredness and hedonism to which we have been permitted, if not even encouraged, to become addicted.<sup>124</sup> That is, there is "out there" a sea of butterflies in which all of us can swim to our souls' content.

## 6. POLITICAL PHILOSOPHY AND A SOFT CAESARISM<sup>125</sup>

Upon what meat doth this our Caesar feed  
That he is grown so great?

Cassius<sup>126</sup>

### I.

I am grateful [I could say in 1992] for this opportunity to sort out my

122. The reader was edited by Mary P. Nichols. See also *supra* note 119 and accompanying text.

123. Thus far, I have not heard of any attempt to establish a national Network for the Written Word (NWW). For my proposal for a "singing bus" (also not yet attempted), consider Cornelia Grumman, *Wrong Question*, CHI. TRIB. MAG., Nov. 26, 2000, at 14, 24.

124. The song drawn upon here is the Shaker classic, *Simple Gifts*. See *infra* the text accompanying note 276.

125. A talk given to the Politics Department of The University of Dallas, Irving, Texas, October 23, 1992. The original title of this talk was "*Upon What Meat . . . ?*": *American Constitutionalism and the Perot Intervention*.

126. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2.

thoughts about the Ross Perot candidacy—and to do so in Mr. Perot's own State, especially since he is the only real Texan in the Presidential contest this year. In fact, since he lives in Dallas, I am addressing this "phenomenon" in his backyard.

Mr. Perot, in the last presidential debate of the current campaign, suggested that experience as the governor of a small State such as Arkansas does not significantly qualify one for the Presidency of the United States. It would be, he argued, as if managing a corner grocery store were regarded as qualification for running Wal-Mart. The audience's response to this argument seemed to endorse the wisdom of Mr. Perot's witticism.

But is not a governor of even a small State, especially if he has had to deal with legislators and face electorates repeatedly, likely to be better equipped for political life than even the most successful businessman? Such a businessman, however distinguished he may be, may not have what a political leader or a military commander, such as General Eisenhower, is likely to have had—that is, experience in politically organizing diverse groups of people. It also helps to develop one's political instincts if one has, as politician, lost an election or two early in one's career.<sup>127</sup>

Mr. Perot's experience in or with government has been, for the most part, behind the scenes where he could build up and then use effectively his vast fortune. He has had to get used to what most politicians must learn to deal with, the rough and tumble of political life. It is likely that his inability to deal effectively with such rough and tumble encounters contributed both to his bizarre withdrawal in July [1992] and to his determination to insulate himself as much as possible from press conferences and the like upon reentering the race. We can suspect that he is aware of his vulnerabilities here, vulnerabilities for which no one in high office would long be able to compensate.

We may wonder, therefore, whether the skills of the successful businessman, however impressive they may be, are readily transferred to political life. Whether such skills are usually transferable even from one industry to another may be a question.

## II.

A Perot advertisement I heard yesterday included this exhortation, "It is not time for business as usual. It is time to get down to business."

We should notice that business is a way of life for which profits and losses matter a great deal, for which deficits and debts can be decisive. Mr. Perot *has* made us take the national debt even more seriously than we already did and in such a way as to remind us that the typical popular issue *is* apt to

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127. How one loses can affect what one is able to do thereafter. Thus, Abraham Lincoln's loss in the 1858 Senatorial contest in Illinois helped him in his bid for the Presidency in 1860. See ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 157.

have something behind it.

But is the deficit as important as businessmen are inclined, not unnaturally, to make it out to be? I have noticed that the balance sheet is likely to be an overriding concern for a businessman or, if not for him, for his stockholders and creditors. But should it be the overriding concern for government?<sup>128</sup> Those who make much of the deficit often talk as if we did not get anything, or *have* anything to show, for all the debt we have run up.

Since I am here at the University of Dallas I venture to illustrate what I have been saying by reminding you of the opinion about justice expressed by Cephalus in the first book of Plato's *Republic*. The formula for justice that Cephalus comes up with, about telling the truth and paying debts, evidently comes out of his life as a businessman.<sup>129</sup> It is a formula that has much to be said for it, but Socrates shows that it must be subordinated to other considerations, both political and philosophical.<sup>130</sup>

### III.

Philosophy, including political philosophy, should be distinguished from the kind of cracker-barrel shrewdness relied upon by Mr. Perot. Such expressions, often one-liners, can have an immediate appeal, especially for audiences shaped by television. But serious political judgments require much more than the canniness evident in the folk wisdom invoked by Mr. Perot, invocations which easily lose their appeal upon repetition.

It can soon become evident that what Mr. Perot says is not as fresh, and hence is not as immediately relevant, as it can seem at first. What is needed instead is an appreciation of the complexities that arise when the general rules, which are drawn upon by what can be called his mind-bites, are applied to particular situations.

Such applications require prudence, which both depends on sound first principles and is nurtured and matured by experience. Among the consequences of prudence are an appreciation of the self-discipline necessary for sustained political talk and a suppression, if not elimination, of any tendencies one may have to paranoia.<sup>131</sup> Immensely wealthy men, I am afraid, may not be properly restrained since they are not likely to suffer materially because of their mistakes.

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128. See, e.g., ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 183, 186-87; ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 455 (Index: Balanced-budget Amendment).

129. See PLATO, *REPUBLIC* 331D, sq.

130. See *id.* at 331C, sq.

131. On paranoia, see ABRAHAM LINCOLN, *THE GETTYSBURG ADDRESS, AND AMERICAN CONSTITUTIONALISM* 147-48 n.33 (Leo Paul S. de Alvarez ed., 1976).



## IV.

The insulation from public scrutiny that Mr. Perot prefers, and perhaps personally requires and can purchase, leads him to rely primarily on television, certainly not on the give-and-take of press conferences (which are to be distinguished from guest-friendly talk shows). There is something both attractive and questionable about Mr. Perot's desire to avoid what he denounces as "personal" attacks. In thinking about him, it is instructive to recall Shakespeare's Coriolanus.<sup>132</sup>

Mr. Perot is so dependent on television ads that he is now outspending for this purpose Mr. Bush and Mr. Clinton combined. It can be troubling that what he is doing relies so much on his personal fortune, a fortune which obviously depended on his having been able for years to "work" the governmental system.<sup>133</sup> Certain misguided readings of the First Amendment by the United States Supreme Court have kept Congress from putting somewhat effective limits on how much a candidate can spend on his campaign for certain public offices.<sup>134</sup>

Is the constantly growing reliance on television, to which both Republicans and Democrats have contributed in recent decades, a healthy development?<sup>135</sup> Mr. Perot's television barrage is primarily a national appeal, and as such is apt to be shallow, at least in the short run. Local contacts, organized political parties, and carefully developed polices are minimized. This kind of national appeal goes against the spirit of our constitutional system. Indeed, one brake upon a successful Perot intervention may well be the States-oriented arrangement represented by the Electoral College.<sup>136</sup>

Much of political life is inevitably local and personal. That life is apt to be more sensible if people are encouraged to work from what they *can* know. The Perot approach tends to be more ideological, even when it is put in terms of common sense. Effective policies, if they are to endure, cannot simply be ideological. In addition, ideology tends to make one "honest" at the expense of prudence.

It would be sad, as well as serious [I could say in 1992], if the Perot factor contributed significantly to the defeat of either Mr. Bush or Mr. Clinton. That is, Mr. Perot can perhaps help someone lose but he cannot help anyone truly

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132. On Coriolanus, see ANASTAPLO, *THE ARTIST AS THINKER*, *supra* note 4, at 23-24.

133. For a more recent "working" of the governmental system, see George Anastaplo, *Prudence and the Constitution: On the Year 2000 Presidential Election Controversy*, in *TEMPERED STRENGTH* 210-11 n.7 (Ethan Fishman ed., 2002) [hereinafter Anastaplo, *Prudence and the Constitution*]. See also *infra* text accompanying notes 150, 333.

134. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

135. On the abolition of television, see *supra* text accompanying note 119.

136. On the Electoral College, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 333; ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 457 (Index). See also *supra* notes 44, 133.

win because a “successful” intervention by him can adversely affect the kind of country and government that we are to have.

## V.

One consequence, if not implication, of the Perot approach, especially with its massive reliance upon television, is that it confirms and reinforces the plebiscitary tendencies that we have had in recent decades. These tendencies are intimately related to the improper magnification of the Presidency in our constitutional system, as could be seen during the 1990-1991 Persian Gulf crisis. The people are encouraged to authorize, and to rely upon, the President to “take charge.”<sup>137</sup>

Plebiscitary government means, among other things, a depreciation of politics. The way is open thereby for demagoguery with direct appeals to the people, bypassing various long-established institutions. Thus, the system of “coordinated electorates” in the Constitution is undermined; checks and balances are circumvented.<sup>138</sup> It is instructive, in thinking about this prospect, to recall Shakespeare’s Julius Caesar.

Caesar depended upon his wealth and reputation as a “doer,” both of which were derived from his remarkable military service, to appeal, past the Senate of the Republic, to the people.<sup>139</sup> There was something attractive about his “no-nonsense” approach. All too many Roman Senators contributed to this attractiveness by their inability to see or to do what was needed in that troubled Republic. The Founders of the American republic warned that we should be vigilant against such Caesarism, even if it is promoted with the best of intentions, as it no doubt often is.

## VI.

Caesarism stands for a repudiation of politicians. We can see the prelude to such repudiation in the way we condemn politicians from time to time. Consider, for example, the campaign for term limits. Experience and institutional memory are important in politics and government, more so than in business where innovation and risk-taking can be more important. Businesses are routinely bought, sold, merged, and even liquidated. A country, on the other hand, assumes perpetuity. Government and statesmen, like a community, depend on traditions, much more so than business and

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137. On plebiscitary government, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 120-21, 552; ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 445-46 n.251.

138. On “coordinated electorates,” see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 31, 222-23.

139. See, e.g., Plutarch’s biography of Julius Caesar; see also ANASTAPLO, *THE ARTIST AS THINKER*, *supra* note 4, at 22-23.

businessmen.<sup>140</sup>

My opinions here were reinforced by a C-SPAN broadcast yesterday of the October 21st debates in the House of Commons about the Government's proposed closing of a number of British coal mines. One could see in the course of those debates that such wholesale mine-closings should depend on much more than the economic or business factors that originally moved the British Government on the current issue. This sort of action is certain to be a political decision, and not only when an economy is partly socialist.<sup>141</sup>

One could also see, in those House of Commons debates, reliance on traditions and well-established practices. It was heartening as well to listen to politicians who are able to talk coherently and at length about the matters in which they and the public are interested.

It is instructive in assessing popular repudiations of politicians, and especially when the British setting is immediately before us, to recall Shakespeare's Jack Cade (from the *History Plays*). He, too, made direct appeals to the people. It is also appropriate, considering the intemperate condemnations we have heard recently of the legal profession, that Jack Cade's demagogic appeals should have included the exhortation that all the lawyers be killed.<sup>142</sup> Lawyers and judges, perhaps even more than politicians, are, or at least should be, the guardians of worthy traditions among us.

## VII.

It is only politic to notice the contribution Mr. Perot has made by raising critical issues for public debate. I venture to add, however, that there seems to me to be something both naive and presumptuous in much of what he says and in the way he says it.

Mr. Perot, as well as the somewhat a-political people he influences, was mistaken both about what is needed to understand things and about what it takes to be prepared to deal with the considerable variety of matters that the politician must confront. The fact is that but for his personal fortune, which may be due more to chance than he appreciates, Mr. Perot would not have been taken seriously at this time in his self-proclaimed role as champion of the people.<sup>143</sup>

Businessmen, who are the bulk of obviously successful men in this country these days, *are* likely to be influential in their communities. Their

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140. On term limitations, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 465. See also *infra* note 148.

141. On the case for (as well as the limits of) private property, see *supra* notes 114, 121. See also Anastaplo, *Constitutionalism and the Good*, *supra* note 2, Parts 2 and 3.

142. On Jack Cade, see WILLIAM SHAKESPEARE, 2 HENRY VI; *THE READER'S ENCYCLOPEDIA OF SHAKESPEARE* 93 (Oscar James Campbell ed., 1966).

143. Here we can again recall the considerably more gifted Julius Caesar, a man also celebrated for his clemency.

presence and experiences shape the standards and expectations of many people who are moved by the facile argument that the government should be run like a business, and so forth.

The successful businessman who ventures into politics runs the risk of being (or at least of seeming) superficial, however shrewd he may be in certain respects. He can easily mislead his fellow citizens as to what is needed both to understand the issues of the day and to deal sensibly with difficult, usually complex, matters. There can be a kind of pandering to the electorate, especially when it is suggested that there are “plans” lying around Washington that an experienced “fixer” should be able to find and implement.<sup>144</sup> It is also naive to believe, as Mr. Perot evidently does, that there should be no serious difficulty for a President in bringing people together in Congress once the obviously proper “plan” has been found in the national-policies cupboard in Washington.

The kind of naivete I have described has its presumptuous features as well. It fails to see how most competent, hardworking, and conscientious most career politicians are. It should be remembered, moreover, that the Founders we admire spent much, if not most, of their own lives in public service. A number of them were lawyers, which itself can be a kind of public service. Relatively few of them were businessmen.<sup>145</sup>

The presumptuousness of some wealthy men is that they seem to believe that the money the political order has permitted them to make and to keep is entirely theirs to use as they happen to please.

### VIII.

What seems to be paramount for Mr. Perot are not experience and knowledge with respect to political things, but rather *the will*. In the more conscientious cases of willfulness, a natural or innate goodness may be presupposed in human beings, if not also in the universe at large.

This kind of political fundamentalism elevates leaders who are both stronger and weaker than regular political leaders. They are, or at least may seem, stronger because they can bypass familiar institutions, rituals, and processes. They find themselves armed with a popular mandate, if not a determined righteousness, independent of party ties and other such inconveniences.

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144. This kind of naivete with respect to political matters may sometimes be seen in so competent and genial an economist as Milton Friedman. For an instructive essay by Mr. Friedman on the relation between freedom of the press and private property, see II *LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM: A SOURCE BOOK* 138 (George Anastaplo ed., 1999). See also *supra* note 122; *infra* note 313.

145. On the “bad habits” that the successful businessman is apt to acquire, see ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 661-62 n.115.

But such leaders are not likely, over the long run, to be effective without the support of an organized and enduring political party. Consider how Mr. Nixon eventually collapsed because he had alienated many of his own party, partly because of the way that he, as if an outsider, had conducted his 1972 re-election campaign.<sup>146</sup> Mr. Carter's difficulties are also instructive here, for he too acted like an outsider. The way all too many Democrats conducted themselves in the late 1960s and 1970s may have contributed to undermining the salutary influence of political parties in American life. Mr. Clinton [I could say in 1992] has had thus far a good influence here, coming in part from his being an adept politician who has weathered one storm after another.<sup>147</sup>

Which is worse in these circumstances, that such a man in Mr. Perot's circumstances should be effective in power or that he should not be? The country which Mr. Perot sincerely wants to defend and to continue to benefit from was not built without institutions, statesmanship, and consensus, all of which do depend on experienced politicians and a healthy political life.

## IX.

We the People need to recognize and reaffirm the ancient teaching that politics is the master art. A political career, if it is not to be a flash in the pan, requires talking, persuading, and graceful responses to victories as well as to defeats. The politician who campaigns properly not only helps instruct the people; he can also learn much from contacts with people and from a lot of give-and-take.<sup>148</sup> One contribution Mr. Perot has made was to help us see that television audiences can be convinced to sit still for extended expositions of complicated matters.

Political men in a republic should practice the master art of politics in such a way as to rein in the occasional well-financed Caesar. For one thing, thoughtful politicians should make clear the limits of money-making and money-spending. We see in one Platonic dialogue after another the ways in which successful money-making can foster selfishness and arrogance if it does not even depend on them.<sup>149</sup>

Competent political men, in order to be able to curb the potential (however well-intentioned) Caesar, must act prudently in their conduct of the

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146. On Mr. Nixon, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 616 (Index).

147. I did come to believe, however, that the time came for Mr. Clinton to resign. See Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, *supra* note 44, at 103 n.6, 105 n.17. See also *infra* text accompanying note 295-96.

148. Term-limitations for Presidents make more sense than they do for Members of Congress, partly because the latter are, even when in office, rarely insulated from the daily lives of their constituents. See *supra* note 140.

149. Mr. Perot's short-lived naval career is instructive as to what drives this remarkably talented man.

community's affairs. It is well to repeat the ancient teaching that no man of wealth or of reputation, however well-earned, should be permitted to exploit, to the detriment of a republic's constitution, the resources that his country has permitted him to accumulate.<sup>150</sup> The common good, for the moment and in perpetuity, should be paramount here.

A key question remains: What have been the deficiencies and misunderstandings on the part of our political men and women, as well as on the part of our educators, that have opened the way to the kind of troubleing intervention we are now seeing by Mr. Perot? His appeal depends partly upon the breakdown of civility and mutual respect among politicians, something to which the mass media have contributed. Partisanship, including recourse to anything that looks like "dirty tricks," should give way to a lively awareness of the common good, an awareness that is vital to a healthy political life but is not expected to guide the typical businessman as businessman.

We should be grateful to Mr. Perot, an ex-sailor of sorts, for having served as an early warning of what lies ahead for the Ship of State if we do not prudently change course.

#### 7. THE PROPER OVERCOMING OF SELF-ASSERTIVENESS<sup>151</sup>

This day is called the Feast of Crispian.  
 He that outlives this day and comes safe home  
 Will stand a-tiptoe when this day is named  
 And rouse him at the name of Crispian.  
 He that shall see this day, and live old age  
 Will yearly on the vigil feast his neighbors  
 And say, "Tomorrow is Saint Crispian."  
 Then will he strip his sleeve and show his scars,  
 And say, "These wounds I had on Crispin's Day."  
 Old men forget; yet all shall be forgot,  
 But he'll remember with advantages  
 What feats he did that day. . . .  
 This story shall the good man teach his son;  
 And Crispin Crispian shall ne'er go by  
 From this day to the ending of the world,  
 But we in it shall be remembered—  
 We few, we happy few, we band of brothers. . . .

Henry V<sup>152</sup>

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150. See, e.g., *supra* notes 132-33. Consider, also, the somewhat dubious institution of ostracism in ancient Athens.

151. A talk given at the Summer Program of the Loyola University of Chicago School of Law in the Rome Center, Rome, Italy, June 6, 1994.

152. WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 3.

## I.

The newspapers and television screens have been filled this week with reports about celebrations all over Western Europe of the anniversary of the D-Day landings in Normandy fifty years ago today, the climactic moment of the Second World War in which your grandparents served. The celebrations in Britain, France, Italy, and elsewhere are dramatized for us Americans by the public appearances in Europe by the President of the United States, beginning with that welcoming ceremony on the Capitoline Hill here in Rome last Thursday, which some of us could attend. That ceremony anticipated the celebration Saturday night of the liberation of Rome on June 4, 1944.

Much of what I will say, on this deliberately ceremonial occasion, is an elaboration of a faxed message sent back home to Maurice F. X. Donohue, the dean who, almost forty years ago, first hired me as a university teacher:

A SALUTE FROM A GRATEFUL EUROPE TO A FELLOW OFFICER  
IN THE ARMY AIR CORPS WHO, A HALF CENTURY AGO TODAY,  
HELPED LAUNCH THE LIBERATION OF A CONTINENT IN  
SHACKLES.<sup>153</sup>

When we reflect on the Second World War, perhaps "the last good war," we can be reminded of what soldiers are for.

The scope of the operations and effects of the Second World War is hard, perhaps even impossible, to grasp. One historian opens his useful account of that war, which extended for 2,174 days between the German attack on Poland in September 1939 and the surrender of Japan in August 1945, with this report: "The Second World War was among the most destructive conflicts in human history; more than forty-six million soldiers and civilians perished, many in circumstances of prolonged and horrifying cruelty."<sup>154</sup>

Within two weeks of the initial D-Day landing in Normandy, half a million Allied soldiers were ashore in France. During that fortnight, four thousand of those soldiers were killed, three thousand of them on the first day on the Normandy beaches.<sup>155</sup> The Allied campaign up the Italian peninsula and the massive Russian campaign against the Germans on the Eastern Front were coordinated with the sweep across France to Germany itself, which was first reached by Allied forces on September 10th, three months after D-Day.<sup>156</sup>

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153. See George Anastaplo, *Maurice F. X. Donohue, 1911-1995*, U. OF CHI. RECORD, May 29, 1997, at 16; see also Maurice F. X. Donohue, *Making a Living, Making a Life*, in LAW AND PHILOSOPHY, *supra* note 7, at 597.

154. MARTIN GILBERT, *THE SECOND WORLD WAR: A COMPLETE HISTORY* 1 (1989); see also *id.* at 745-47.

155. *Id.* at 543.

156. See *id.* at 540.

There is a tendency, perhaps a natural tendency, to identify oneself with great events, if only by recalling where one was when they happened.<sup>157</sup> This tendency to locate oneself in the grand sweep of history was illustrated this week by the introduction of seven Romans on the Capitoline Hill to President Clinton, Romans who had been born on the day that Rome was liberated and who had been given variations of the name *America*.

The self-asserting tendency to identify oneself with the great events of one's country is intimately related to what citizenship, if not humanity as well, can mean. Furthermore, one not only exhibits an interest in the whole, but one also tries to grasp that whole, if only in a limited and temporary way. I recall my own inadvertently accurate prediction of the D-Day invasion. I was not yet nineteen years old, an Air Cadet in a program preparing us for the Pacific War and for the final assault on Japan, which would have been launched in late 1945 or early 1946.<sup>158</sup> I was stationed in Jackson, Tennessee. On the night of June 5, 1944, I was visiting a family I knew in that town, sitting with them that balmy evening on their front porch. I explained to my civilian hosts (after all, I was by then a six-month veteran of military service)—I explained that it looked like the long-anticipated invasion was *not* going to come that summer after all. I explained, that is, that the lack of it thus far meant further delays of at least one or two more months (because of the timing of the tides) and by then an early winter could prove disastrous for the invading army and so forth.

As I was solemnly speculating in that fashion, Allied troops were moving that very hour across the Channel—156,000 troops went ashore during the first day of the invasion. That is, I had been inadvertently correct in speculating, in effect, that it was either *now or much later*. It is prudent, at the outset of these remarks, to recognize thus the limitations of the citizen-observer.<sup>159</sup>

## II.

The fifty years since the massive D-Day efforts of June 1944 naturally invite our attention. We may be able to see that half-century better if we go back still another fifty years to the 1890s, the decade that ushered in what Winston Churchill, at its mid-term, was perhaps the first to call "This Terrible Twentieth Century."<sup>160</sup>

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157. This may be seen, for example, in Walt Whitman's Civil War chronicles, especially in his accounts of Abraham Lincoln.

158. See, e.g., GILBERT, *supra* note 154, at 711, 725.

159. See ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 225 ("Vietnam and the Presumption of Citizenship").

160. I draw here upon Maurice F. X. Donohue's unpublished D-Day report, *D-Day, Fifty Years Later*.



The 1890s included the spectacular Columbian Exposition in Chicago. This was an exuberant celebration of the accomplishments, marvels, and prospects of the Industrial Revolution, with considerable emphasis placed upon the magic of electricity.<sup>161</sup> The Columbian Exposition in turn looked back to the voyages of Columbus, four hundred years earlier.<sup>162</sup>

One of the most serious attractions of the Columbian Exposition was the Parliament of the World's Religions. Religious leaders from around the world gathered in Chicago to seek common ground in the promotion of mutual understanding and harmony. This good-natured and hopeful effort, dominated by "mainstream" American Protestant churches, was considered appropriate for the Age of Enlightenment celebrated by the Columbian Exposition.<sup>163</sup>

At the same time, however, the European scramble for colonies was going on in Africa and Asia. Furthermore, the seeds of the First World War (which came to be known, at least for a couple of decades, as "the Great War") had been planted at least since the Franco-German War of 1870, if not during the French Revolution of 1789-1815 and the German Revolution of 1848-1849. Indeed, it can be argued, the Second World War was really a continuation of the First World War (of 1914-1918), making them a Thirty-Year War, in effect.

I suggested to an Italian press association reporter on the Capitoline Hill, who happened to interview me while we awaited the President's arrival, that the date we should be most alert to these days was not the fiftieth anniversary of the D-Day Invasion but the eightieth anniversary of the July 1914 ultimatums and stiffness of diplomatic protocol that led to the unbelievable folly of the First World War, a war that was triggered by an assassination in Sarajevo.<sup>164</sup>

I have come to appreciate more and more one of my law school teacher's characterization of the First World War as an instance of "governmental insanity."<sup>165</sup> David Lloyd George, one of the British Leaders during that war, could say in 1920 that "all nations tumbled into war," that all participants equally shared in the responsibility for the outbreak of the war.<sup>166</sup> Even worse than allowing such a war to begin were the ways in which it was carried on,

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161. Henry Adams, in his *The Education of Henry Adams*, reports on the Chicago spectacle, having been particularly challenged by the power of the dynamo that he saw there.

162. On what should have been another great exposition in 1992, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 366 n.4.

163. *See id.* at 345.

164. *See* George Anastaplo, *Did Anyone "In Charge" Know What He was Doing? The Thirty Years War of the Twentieth Century*, in *CAMPUS HATE-SPEECH CODES, NATURAL RIGHT, AND TWENTIETH CENTURY ATROCITIES* 49 (1999) [hereinafter Anastaplo, *Did Anyone "In Charge" Know What He Was Doing?*].

165. On this teacher, Malcolm P. Sharp, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 621 (Index).

166. *See* JULY 1914: THE OUTBREAK OF THE FIRST WORLD WAR: SELECTED DOCUMENTS 10 (Immanuel Geiss ed., 1967). *Compare id.* at 365.

and for four years, such ways that almost wrecked (perhaps, in the long run, did wreck) European civilization. There were intellectual and moral blunders all around, with an undue emphasis placed upon "honor."

It is worth recording that only two things "marred" Mr. Clinton's welcome on the Capitoline Hill last Thursday: a young man's raising a banner on behalf of the Bosnians and of Rwanda, and the anti-Fascist booping that greeted the introduction of the newly-installed Italian prime minister. We are reminded thereby of the underlying causes, respectively, of the First World War and the Second World War.<sup>167</sup>

### III.

So much, at least for the moment, for the fifty years before D-Day, 1944. Also remarkable, of course, have been the fifty years since June 6, 1944.

It is now apparent that once the beachheads were established in Normandy in June 1944, the end of the Second World War was in view, not only in Europe but also in the Far East. Some commentators on these matters dwell upon what a "near thing" the invasion was, how the Germans might have destroyed the invading forces and so forth, but this may be mostly dramatics conjured up for the fans of such things.

Critical errors of the First World War were avoided by the Allies in their prosecution of the Second World War. This time they would not permit the savage trench warfare of the First World War. The devastation of such warfare is testified to by the rosters of young men (the best men of their generation) sacrificed in that war, long lists that may be seen on the walls of churches in Italy, Germany, France, and Britain. It can be difficult now to determine what *that* war was all about, but it is not difficult to trace the demoralizing effects it had on the European political and social order for a generation, not least in the enthronement it permitted of the worst elements in Germany, France, Italy, and Russia.

The liberation of one European colony after another in Asia and in Africa was among the unintended consequences of the Second World War. The colonies of those Allies around the world took seriously and put to effective use the language of freedom that the Allies depended on so much in mobilizing their forces against Germany and Japan. Our own misreading of these developments contributed to our unfortunate entanglement for a decade in Vietnam and to our capricious assaults upon countries such as Laos and Cambodia.<sup>168</sup> The final step in this formal development is [I could say in 1994] the recent surrender of white rule in the Republic of South Africa. I say "formal" because much remains to be done in many of the ex-colonies, not

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167. See, e.g., Anastaplo, *Did Anyone "In Charge" Know What He Was Doing?*, *supra* note 164, at 49, 71, 81.

168. On the Vietnam War, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 623; ANASTAPLO, *HUMAN BEING AND CITIZEN*, *supra* note 4, at 151.

least in South Africa, if truly civilized and productive ways of life are to be established or sustained. The current Rwandan massacres, with at least a half million (and perhaps as many as two million) people dead in a very small "country," warn us of what could be dreadful days ahead in much of Africa and in parts of Asia.<sup>169</sup>

The consequences of the Second World War include, of course, the Cold War and its ramifications. There was, it has long seemed to me, considerable misinterpretation of both the threats and the possibilities facing the United States. We never appreciated what it meant to Soviet-American relations that the Soviets lost in excess of twenty million citizens during the Second World War while the United States (with very little damage suffered on its Home Front) lost fewer than four hundred thousand, almost all of these military personnel.<sup>170</sup> Had we been more sensitive with respect to these matters, we could perhaps have been able to work out with the Russians a more sensible transition from the Cold War, possibly avoiding disasters such as the dismemberment of Yugoslavia with the risks thereby run in the volatile Balkans region (where Turkey, Greece, Macedonia, Croatia, Kosovo, Albania, and Serbia are all stirring things up). After I pointed out the risks to my Italian reporter, he observed in turn that "things are not so good in Italy" these days either. (A proper sensitivity toward the Russians, without whom the Nazis could not have been defeated anywhere near as soon as they were, would have included inviting them to participate in the D-Day celebrations in Western Europe. But then, had we not shut them off from the West after 1917? We told the Bolsheviks to make their own world—and they did, which was good for neither them nor us. Similar reservations may be entered about our relations with the Castro regime in Cuba.)

However this may be, we *are* groping toward a New World Order. How Western that order will be remains to be seen. The most recent Parliament of the World's Religions, also held in Chicago (in 1993), was dominated far more by non-Western delegates and far less by mainstream Christians than its 1893 predecessor. The 1993 meeting was, perhaps because of this, more exotic but also less sober than the 1893 meeting.<sup>171</sup>

#### IV.

I have suggested that D-Day 1944 was both a powerful culmination and a revolutionary beginning. The Allied efforts in the Second World War took on the form of what General Eisenhower called "a Great Crusade." What such a crusade presupposes and where it aims may take decades, if not

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169. On African thought and on Asian thought, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 31, 67, 99, 147.

170. See GILBERT, *supra* note 154, at 746.

171. See ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 345.

centuries, to assess properly.<sup>172</sup>

The efforts of the Western Allies in the Second World War were characterized by high-minded purposes and by large-scale organization. Organization on such a large scale was unprecedented, a testimonial both to Western technology and to a moral vision. That vision took it for granted that tyranny should be suppressed and that freedom and the self-determination of peoples are good. It was also believed that sacrifices could be reasonably called for in the cause of liberty and decency.

The moral ascendancy of the Western Allies, even with Stalin on their side, was evident throughout the war. The strength of the Russians and the other Soviets, however tyrannical their regime, drew upon the defensive character of their situation. However hateful Stalinism might have been, the typical Russian could recognize the wickedness of their Nazi invaders.<sup>173</sup> Even so, the principles and passions brought to bear against Hitler's regime eventually undermined Stalin's regime as well.

The almost-incredible evil of the Axis Powers became a significant burden for their leaders to bear, even though those leaders may have had in the German army the best single fighting force (for its size) in the world.<sup>174</sup> All sides are bound to do terrible things during a fiercely-contested war. However, the terrible things routinely done by the Nazis, and to a perhaps lesser extent by the Japanese military, had to be systematically concealed from public view, even though such deeds were characteristic of their regimes.<sup>175</sup> No account of those regimes can ignore the atrocities and treachery that were systematically promoted there. The most prestigious thinker in Hitler's regime made much of "self-assertion" in his public identification with the Nazis. Nothing—certainly nothing conventionally moral—seemed to matter wherever Germany's drive to overcome its many enemies (at home as well as abroad) was threatened. However vigorous the rationalizations developed in support of the Nazi regime, one is moved to conclude that that regime was simply mad at its core, mad with an obsession with the perpetual elevation of one's own.<sup>176</sup>

172. We do know that not all Crusades have been worthy enterprises. Let A.D. 1204 and the assault on Constantinople stand for that recognition. See also YITZHAK F. BAER, *GALUT* 22-26 (1947). The term "crusade," used at first for our "war on terrorism" after September 11, 2001, was soon dropped as particularly offensive to Islamic peoples.

173. See GILBERT, *supra* note 154, at 571 (quoting Ilya Ehrenburg as saying "Woe to this land of the evil-doers!" when Russian troops first entered Germany).

174. There was, at the core of the Nazi regime, that fierce, if not even insane, implementation of principles which simply could not be publicly acknowledged. See, e.g., ANASTAPLO, *On Trial*, *supra* note 110, at 977; see also *infra* notes 175, 191.

175. See, e.g., GILBERT, *supra* note 154, at 6, 8, 11-12, 14, 557, 559, 744.

176. On Martin Heidegger's remarkably troubling relations with the Nazis, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 144. See also Geiss, *supra* note 167 (commenting on Kurt Riezler's political theory). Compare LEO STRAUSS, *WHAT IS POLITICAL PHILOSOPHY?* 233 (1959) (discussing Kurt Riezler in Chapter 10). See also Anastaplo,

All this helps explain the unceasing and considerable Resistance activity against the German occupiers of Europe during the Second World War, activity that could be usefully relied upon by the Allies. This also helps explain the involvement of eminently respectable people in the few plots against Hitler during the War.<sup>177</sup> This may help explain as well why the Germans proved to be more vulnerable to organized deception than the Allies.<sup>178</sup> Certainly, the Germans had few volunteers both willing to make sacrifices in their morally bankrupt cause and anxious to keep people informed of what was really going on.<sup>179</sup>

In short, however tangled human affairs often are, there may be an inherent tendency for right to make might, something that the so-called realists (including those in law) may not sufficiently appreciate.

## V.

More needs to be said about the moral vision guiding the Allied cause during the Second World War. But first, we should return, however briefly, to the large-scale organization that the cause relied on and fashioned.

The gigantic military campaigns on three continents (Africa, Europe, and Asia) led eventually to the transformation of the post-First World War League of Nations into the United Nations. It also led to the development of significant treaties and conventions, such as the 1948 Universal Declaration of Human Rights. These movements reflect, in large part, the Westernization of the world.<sup>180</sup> To a considerable extent, the world is becoming Westernized—and that means, in large part, secularized—because of the influence (theoretical as well as technological) of the scientific development grounded in philosophy. This is a development that can be expected to continue to arouse fierce resistance in the Muslim world in the decades ahead.<sup>181</sup>

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*Constitutionalism and the Good*, *supra* note 2, at Parts 6 and 7. Compare Friedrich Nietzsche's more humane approach to these matters, testified to by his admiration of Ralph Waldo Emerson (perhaps, in part, because of Emerson's advocacy of "self-reliance").

177. See, e.g., GILBERT, *supra* note 154, at 404-05, 410-14, 551, 553, 645.

178. See, e.g., *id.* at 523.

179. Here, as elsewhere, Shakespeare's *Macbeth* is instructive. See, e.g., ANASTAPLO, *THE ARTIST AS THINKER*, *supra* note 4, at 21-22. This may bear upon the inability of the Nazi regime to develop the atomic bomb. *But see*, e.g., GILBERT, *supra* note 154, at 14, 319, 379, 404, 500, 645, 649-50, 667. It may also bear upon the fact that there was no significant Nazi or other German resistance to the Occupation of Germany after 1945.

180. The West may be defined as a distinctive, more or less industrialized, combination of the Biblical heritage and the Greek/Roman heritage. See ANASTAPLO, *BUT NOT PHILOSOPHY*, *supra* note 3, at xv; see also *supra* text accompanying note 3.

181. This could be said in June 1994, well before the revealing September 11, 2001 attacks in New York and Washington. On Islamic thought, see ANASTAPLO, *BUT NOT PHILOSOPHY*, *supra* note 3, at 175.

We may wonder how far the political unity of the peoples of the earth may go. We heard much about a New World Order in connection with the Gulf War of 1990-1991, but the limitations of *that* Crusade are already apparent. The achievements of the European Economic Union seem more substantial, but the ability of the Union to integrate Eastern Europe into its remarkably prosperous economic system remains to be seen, especially if Russia should undergo the convulsions that a proper phasing out of the Cold War might have avoided. Even so, it should be noticed that the devastation of the continent of Europe by the great wars of this century did contribute to the Franco-German reconciliation upon which European stability in part depends, supported as it has been by the generous contributions of the United States and by a deep-seated fear of nuclear war.

The limits of world government are evident when we consider how difficult it is for the great powers to deal effectively today with trouble spots such as Bosnia, North Korea, Rwanda, and Haiti. Does world government tend to be temporary in character, linked as it has been in effect to massive military enterprises? Certainly, the contributions of the United States to North American peace testify to the political, legal, and social/economic presuppositions upon which our constitutional system depends.<sup>182</sup>

Still, it can be instructive to notice the extent and effectiveness of the system of international relations upon which we all rely. It is that system which guides the postal, crime control, financial, health, and transportation services now considered vital to our everyday life. Perhaps even more critical here is the worldwide market that is developing, a market (with its mixed blessings) of which the mass media are an essential part (as may be seen in how Western dress, "culture," and conduct have become routine worldwide).

For example, the transformation, even liberalization, of mainland China seems inevitable, whatever its official ideology may be. In the decades immediately ahead, however, the vital interests of the United States will depend far more upon what happens in and to Russia (and not only because of its nuclear power) than upon what happens in such places as Central Europe, Africa, the Middle East, China, Japan, North Korea, and Latin America. What is truly best for, as well as from, the Russians themselves [I could say in 1994] remains to be discovered. For example, usefully self-serving cooperation between Russia and the Western Europeans could help develop a humane resolution of the Bosnian questions.<sup>183</sup>

## VI.

A challenge confronts us whenever we rely on a moral vision, whether in the course of massive military enterprises or in the furtherance of world order.

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182. On the Constitutions of the Americans, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 1.

183. See, e.g., ANASTAPLO, *CAMPUS HATE-SPEECH CODES*, *supra* note 164, at 81.

Are there enduring ethical standards that do not depend upon particular, or accidental, "cultures"? Are there standards that do not ultimately depend upon particular times and places? We should recognize, in any event, that there may be tension between the universalism of enduring ethical standards and the universalism of world government with its many accommodations to a variety of circumstances.

Winston Churchill had occasion to warn the commander of the British air forces, after a series of devastating Allied air raids in 1944, "You are piling up an awful load of hatred."<sup>184</sup> A fundamentally moral approach may also be seen in what Churchill wrote, upon learning in 1944 of the murder of 1,700,000 Jews at Auschwitz in the previous two years: "There is no doubt that this is probably the greatest and the most horrible crime ever committed in the whole history of the world, and it has been done by scientific machinery by nominally civilized men in the name of a great State and one of the leading races of Europe."<sup>185</sup> Churchill then added: "It is quite clear that all concerned in this crime who may fall into our hands, including the people who only obeyed orders by carrying out the butcheries, should be put to death after their association with the murders has been proved."<sup>186</sup> The Nuremberg Trial of 1945-1946 was a particularly dramatic (and quite salutary) implementation of this Churchill proposal.<sup>187</sup>

The basis of this distinction between *good* and *evil* should be a critical concern of the inquiry we will make in our study of the recent papal encyclical on morality. What is at the foundation of the Pope's ethical system? Does he rely on anything, available to non-Christians as well as to Christians, that is independent of divinely-inspired revelation? Something more than particular revelation, however devoutly accepted that may be in some quarters, may be needed as the basis for an effective world order. Does nature provide a guide here, including even a guide to the proper development and use of particular revelations?<sup>188</sup>

If there are indeed universal standards of right and wrong and of good and evil, we should not be surprised to notice that even the most terrible deeds by human beings may draw on ethical aspirations and, hence, may themselves aim (however perversely) at the good.<sup>189</sup> Consider, as an example of evil

184. See GILBERT, *supra* note 154, at 529.

185. *Id.* at 554.

186. *Id.* at 554.

187. See *id.* at 720f; see also Anastaplo, *On Trial*, *supra* note 110, at 977.

188. See HARRY V. JAFFA, THOMISM AND ARISTOTELIANISM: A STUDY OF THE COMMENTARY BY THOMAS AQUINAS ON THE NICOMACHEAN ETHICS 193 (1952); see also ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 323.

189. This observation is related to the argument that if anything could ever become completely evil, it would necessarily cease to exist. See, e.g., AUGUSTINE, CONFESSIONS, at VIII, 18; James Lehrberger, *Intelligo Ut Credam: St. Augustine's Confessions*, 52 THOMIST 31 (1988). On Augustine, see Anastaplo, *Rome, Piety, and Law*, *supra* note 35, at 83; ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 376 (Index).

deeds being perceived by their perpetrators as just, how the German government responded in 1950 (that is, five years after the War) to the claims for reparations made on behalf of the one hundred thousand Gypsies who, despite their Aryan origins, had been slaughtered by the Nazis: "It should be borne in mind that Gypsies have been persecuted under the Nazis not for any racial reason but because of an asocial and criminal record."<sup>190</sup> We can sense what it was that helped the Nazis to commit so many acts of inhumanity against the unfortunate Gypsies when we notice among ourselves the exaggerated wariness, even loathing, inspired by the miserable-looking Gypsy women and children by whom we are accosted every day on the streets of Rome.<sup>191</sup>

Another way of putting this is to say that we need all the help we can get if we are to curb both corrosive self-righteousness and a devastating fearfulness in ourselves and in those for whom we happen to be responsible.

## VII.

I suggest that there is in the human being a natural tendency both to prefer one's own and to identify oneself with something grander than oneself, perhaps attempting thereby to nurture the best in oneself. Unless there is a healthy sense of one's own—a sturdy self-respect—there is not likely to be a reliable grasp of the whole, if only because one does not have a soul capable of responding to genuine grandeur.<sup>192</sup>

The vitality of local attachments, a healthy self-centeredness, may be seen in the following observation by Oliver Wendell Holmes: "The axis of the earth sticks out visibly through the center of each and every town or city."<sup>193</sup> Another observation, made by a man as he looked upon the body of his dead wife, reminds us of how self-centered local attachments can indeed be: "Though no regrets are proper for the manner of her death, who can contemplate the fact of it and not call the world irrational if out of deference to a few particles of disordered matter, it excludes so fair a spirit?"<sup>194</sup> The

190. GILBERT, *supra* note 154, at 734; *see also id.* at 355, 361-62, 735.

191. One can imagine what men, such as the German Minister of the Interior I have quoted, might have said a decade earlier (and perhaps still thought in 1950) about the "asocial and criminal record" of the Jews in Europe. A diary entry by Joseph Goebbels noted, for example, that "It's a life-and-death struggle between the Aryan race and the Jewish bacillus." GILBERT, *supra* note 154, at 312; *see supra* note 174. On the Gypsies, *see* Anastaplo, *Lessons for the Student of Law*, *supra* note 73, at 159-60. On Goebbels, *see* Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 5; *infra* note 375.

192. *See infra* text accompanying note 199; *see also*, ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 7.

193. *Epigraph for Richard Hoggart*, TOWNSCAPE WITH FIGURES—FARMHAM: PORTRAIT OF AN ENGLISH TOWN (1994). The Holmes quoted here is the father of the Supreme Court Justice; the text drawn upon is *The Autocrat of the Breakfast Table*.

194. John Haynes Holmes, *The Affirmation of Immortality*, HARV. DIVINITY SCH. BULL.



bearing of death upon morality and upon the meaning of life should be considered in our study of the Pope's encyclical with its emphasis upon the quest for "eternal life." It may not be rational for us to "call the world irrational" merely because of the presence of death among us.<sup>195</sup>

The identification of oneself with something grander than oneself could be sensed last Thursday night (June 2) when we joined the mile-long Corpus Christi procession ("la processione eucarista") from St. Giovanni in Lateran to Santa Maria Maggiore.<sup>196</sup> We walked three to five abreast, on each side of a wide, trafficless street (Via Matulana), which first sloped downhill from San Giovanni and then uphill to Santa Maria Maggiore. All around us that balmy evening were incense, candles, bells, music, chanting, and devotional readings, with many more people (mostly women) in the procession than among the spectators on the sidewalks. Banners and other decorations lined the way that we walked at a sedate but steady pace. I expect that this will turn out to be for us the most memorable single event during this [1994] visit to Rome. Something is to be said for well-established ways—ways which, as in this case, may go back to pre-Christian times (just as does, for example, the impressive Papal title, Pontifex Maximus).<sup>197</sup> The more firmly a way is established, the more likely it is that nature had a hand in shaping or refining it. One can derive considerable satisfaction from the sense of community generated by and manifested in such a procession as this, even when one does not share the faith upon which that community somewhat depends.

I return, for my closing illustrations about the natural identification of oneself with grander matters, to my opening remarks about the significance of D-Day for people of my generation, one of many D-Days during the Second World War that became *the* D-Day. The role played in our lives by that war—a war made necessary by the follies of the First World War and of the corrosive "peace" that followed it—the role of the Second World War for us may be seen in the dedication I provided for my most recent book, *The American Moralist*:

TO  
THE SACRED MEMORY OF SEVEN VERY YOUNG MEN  
we grew up with in Carterville, Illinois  
and who went off to war with us a half-century ago  
but  
WHO NEVER RETURNED.<sup>198</sup>

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16 (1947) (quoting G.H. Palmer).

195. See ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 214.

196. See *L'Osservatore Romano*, Weekly Edition in English, June 8, 1994, at 1.

197. See, e.g., Anastaplo, *Rome, Piety, and Law*, *supra* note 35, at 13, 121.

198. See ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at xiii (note). On the relation between the post-First World War "peace" and the Nazi regime, see Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 7.

The spirit of D-Day itself happens to be best captured for me by what an Air Corps Colonel said in briefing his pilots who were providing air support for the men hitting the Normandy beaches on the morning of June 6, 1944: "If you think you have engine trouble, think of the men in the 4,000 landing craft below you, and make sure in your soul that the trouble's in the engine."<sup>199</sup>

A sound morality, as well as the community that both serves and depends upon it, helps us make sure that the troubles we do confront from time to time are only in the circumstances (including the institutions and equipment) all around us and not in our own souls.

#### 8. THE COMMON LAW AND THE JUDICIARY ACT OF 1789<sup>200</sup>

I went on [the United States Court of Appeals] with a prejudice against [the diversity jurisdiction of the Courts of the United States]. I thought it must be a big waste of time. I have now become very fond of diversity. It takes me back to first year law school studies of contracts, property, and torts. Diversity cases are a very good variation from federal statutory questions. They are good for the judges to get them back into a common law mode of interpreting law. The best recipe for preventing the judiciary from becoming a bureaucracy is to have variety. That is a great argument against any specialization, and against getting rid of diversity. As long as we have variety, our minds are stretched in various ways; so diversity is a good thing.

John T. Noonan, Jr.<sup>201</sup>

#### I.

The Judiciary Act of 1789<sup>202</sup> has been described in this way:

Article III of the Constitution constitutes an authorizing charter for a system of national courts to exercise the Judicial Power of the United States, but it is not self-executing, needing legislation to bring it to life. Accordingly, the First Congress, in its twentieth enactment, turned to the creation of a judicial system for the new nation. Its work—the First Judiciary Act, approved September 24, 1789—has ever since been celebrated as "a great law." The statute, obeying a constitutional command, constituted a Supreme Court. It

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199. Maurice F. X. Donohue, *D-Day, Fifty Years Later*, *supra* note 160, at 10 (quoting Colonel John Murphy of the 359th Fighter Group); *see also supra* text accompanying note 192.

200. A talk given to the law panels at the Annual Convention, American Culture Association, New Orleans, Louisiana, April 10, 1993. *See also supra* text accompanying notes 247-48.

201. John T. Noonan, Jr., *Judicial Impartiality and the Judiciary Act of 1789*, 14 NOVA L. REV. 123, 152 (1989).

202. 1 Stat. 73 (1789).

created the office of Attorney General of the United States. It devised a judicial organization that was destined to survive for a century. And, by providing for Supreme Court review of state court judgments involving issues of federal law, it created a profoundly significant instrument for consolidating and protecting national power.<sup>203</sup>

This Judiciary Act takes for granted various judicial institutions and legal processes, institutions and processes that are both extensive and technical. These include a general understanding of the nature and workings of trial courts, appellate courts, and their functionaries, including justices, judges, clerks, and marshals. These also include such safeguards for citizens as trial by jury and the writ of *habeas corpus*.<sup>204</sup>

Provisions for trial by jury take account both of the customary features of such a proceeding and of the circumstances in which it should be relied upon.<sup>205</sup> Writs of *habeas corpus* may be granted, we are told, "for the purpose of an inquiry into the cause of commitment."<sup>206</sup> A limitation is placed upon recourse to what is a familiar remedy:

Provided, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.<sup>207</sup>

We may well wonder whether this is a limitation, perhaps even an unwarranted limitation, placed by the Judiciary Act on the traditional reach of the writ of *habeas corpus* in the courts to which Americans and their English predecessors had had access for centuries. This writ's existence was recognized, *not created*, in the Constitution of 1787.<sup>208</sup>

In any event, we are reminded by the detailed provisions of the Judiciary Act how much courts rely upon legislative guidance with respect to the very

203. Paul M. Bator, *Judiciary Act of 1789*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1075 (Leonard W. Levy ed., 1986).

204. See, e.g., ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 209, 217.

205. See, e.g., *Judiciary Act of 1789*, §§ 9, 12, 26, 29, 1 Stat. 73 (1789).

206. *Id.* § 14.

207. *Id.* The remarkable scope of *habeas corpus* is suggested by how it was used in the great case of *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772). On the *Somerset* case, see ANASTAPLO, *ABRAHAM LINCOLN*, *supra* note 9, at 2-9.

208. There are not to be found, either in the Constitution of 1787 or in the 1791 Bill of Rights, a completely new set of rights, but rather (for the most part) rights that had been carefully developed and long accepted over centuries. Otherwise, the invocation of such rights would not have been as effective as it has been for two centuries now. This observation, central to the principles of our regimes, applies as well to most of the other provisions of the Constitution. All this bears upon how the Ninth Amendment should be interpreted and applied. On the Ninth Amendment, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 461. See also *infra* note 214; text accompanying notes 259, 283.

existence, personnel, places, and times of courts as well as with respect to the rules, processes, and substantive law employed by courts. This legislative guidance can include, as in the Judiciary Act, reaffirmation of already established "principles and usages of law."<sup>209</sup> The importance assumed by Congress here is reflected in the fact that the Courts of the United States (which we call the Federal Courts) still do not have recognized in statutes all of the jurisdiction assigned to them by the Constitution of the United States.<sup>210</sup> It was evident from the Judiciary Act that courts in this country would continue to do what they had always done, including conforming themselves to adjustments of the law made from time to time by legislatures.<sup>211</sup>

In the Constitution of 1787 and the Bill of Rights of 1791, too, various judicial institutions and legal processes are taken for granted. We remain more familiar with these institutions and processes, however, because we are reminded of them repeatedly upon reading those documents and have used them continually since the Eighteenth Century. Other institutions and processes that we do not still use, such as some provided for in the Articles of Confederation, are far less familiar to us.<sup>212</sup>

## II.

Also taken for granted in the Judiciary Act of 1789 are many terms, legal and otherwise, that are not likely to be known to the layman now (nor, perhaps, to many laymen then). These terms, which are in addition to the names of the States and the elements of the calendar that do remain familiar, may be found by the dozens in the Judiciary Act.

These terms are, for the most part, not defined in the Judiciary Act. They are terms which take for granted the judicial institutions and legal processes with which Englishmen (and, hence, Americans) had long been familiar. These terms were developed and applied routinely in the Anglo-American constitutional tradition, a tradition which included the common law as an integral part. Common law actions, processes, and remedies are casually referred to in the Judiciary Act.<sup>213</sup> The common law supplies not only many of the terms used but also guidance as to when and how the processes referred

209. See Judiciary Act of 1789, §§ 13, 17, 30, 33, 1 Stat. 73 (1789).

210. See Bator, *supra* note 203, at 1075.

211. See George Anastaplo, *The Supreme Court Is Indeed a Court, in IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 22 (Robert A. Licht ed., 1993) [hereinafter Anastaplo, *The Supreme Court Is Indeed a Court*].

212. Consider, for example, the provisions in the Articles of Confederation for the adjudication of controversies between States and for the exercise of various powers of Congress. On the Articles of Confederation, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 361 (Index). Consider, also, the reference to now-obsolete "Letters of Marque and Reprisal" in the Constitution of 1787.

213. See, e.g., Judiciary Act of 1789, §§ 9, 30, 34, 1 Stat. 73 (1789).

to are to be used.<sup>214</sup>

The judges and lawyers directed by this legislation are expected to know what the processes referred to are and how they are to be used. It also seems obvious that whatever differences there may have been from State to State in this country, there should be no difficulty in applying the provisions laid down in this Act. That is, it seems obvious that the common law was assumed to be indeed common for the country at large in its principal features.<sup>215</sup>

### III.

We have noticed that various judicial institutions and legal processes are taken for granted in the Judiciary Act of 1789. We have noticed as well that many legal and other terms are also taken for granted, with the British constitutional tradition and its common law as a principal source.

Similarly taken for granted, of course, is the Constitution of the United States, along with the law of nations, with the relations between the States of the Union representing perhaps a special form of the law of nations.<sup>216</sup> A reminder of what is taken for granted in such documents should help us understand the meaning and aims of the Constitution of 1787.

It is difficult to exaggerate the significance of the common law as a part of the foundation of the American constitutional system. The common law, as well as the British Constitution generally, is drawn upon again and again in the Declaration of Independence, the statement that provides the authoritative account of the principles and ends to which the American people are dedicated.<sup>217</sup>

### IV.

All of the things taken for granted—whether the Constitution and the law of nations, or various judicial institutions and legal processes, or the common law and the British Constitution—are shaped by moral assumptions and purposes. They may also draw upon religious doctrines, however much they reflect a wariness about age-old religious sensibilities, as may be seen in the

214. On the common law and its relevance for constitutional understanding, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 332; ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 456. May not the workings of the common law affect not only the development of rights before 1791 but also the emergence of rights since 1791 (with a view to Ninth Amendment applications)? See *supra* note 208.

215. Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See *infra* text accompanying notes 239-47; see also *supra* text accompanying note 66.

216. On the law of nations, see the Judiciary Act of 1789, §§ 9, 13, 1 Stat. 73 (1789). On the Constitutions of the Americans, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 1.

217. On the Declaration of Independence, see ANASTAPLO, *ABRAHAM LINCOLN*, *supra* note 9, at 1, 9.

allowances in the Judiciary Act made for those who prefer to “affirm” rather than to “swear” upon taking a required oath.<sup>218</sup>

Moral standards are implicitly drawn upon throughout the Judiciary Act, as in its reliance upon the discretion of judges.<sup>219</sup> A moral sense is also depended on in the reliance on oaths that reinforce moral obligations.<sup>220</sup> The oaths provided for in the Act are tailored to the offices addressed, with the distinctive failings or temptations of each office anticipated.<sup>221</sup> The judicial oath, for example, recognizes that the juxtaposition of rich and poor is fundamental, so much so that such language may be seen in the English prototypes upon which American legislators drew in 1789.<sup>222</sup> Other language in the judicial oath, “without respect to person,” seems to be a departure from the British mode, where persons *are* recognized to have hereditary, as well as perhaps other, advantages. One must wonder whether this kind of disavowal of special advantages, which may be seen as well in the Constitution’s prohibitions of the granting of titles of nobility, ultimately calls into question also the special status claimed by the owners of slaves. The principle of equality may even be reflected in the provision, in the last section of the Judiciary Act, that “in all the courts of the United States, the parties may plead and manage their own causes personally.” Even so, this does not preclude the recognition elsewhere of the prerogatives as well as the liabilities of age, other things being equal.<sup>223</sup>

It is evident throughout the Judiciary Act of 1789 that the drafters believed that they knew, and expected judges and others to know, what *justice* is. Justice, it seems, depended for them on what the laws say, on what is right, and on what is expected.<sup>224</sup> Upon which of these three elements the emphasis should be placed, in any particular situation, itself depends on the circumstances, with prudence being brought to bear in the interest of an enduring justice.<sup>225</sup> Consider how this determination to have justice done is expressed:

*And be it further enacted*, That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any

218. See Judiciary Act of 1789, § 7, 1 Stat. 73 (1789).

219. See, e.g., *id.* §§ 3, 5.

220. See, e.g., *id.* §§ 7, 8, 27, 29, 35.

221. On the judicial oath, see Noonan, *supra* note 201, at 124, 127.

222. The prototype of prototypes here may be the story told by Nathan to King David about his appropriation of Bathsheba, as recorded in 2 *Samuel* 12:1-24. See, e.g., George Anastaplo, *Law & Literature and the Bible: Explorations*, 23 OKLA. CITY U. L. REV. 515, 641 (1998) [hereinafter Anastaplo, *Law & Literature and the Bible*]; ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 491.

223. Judiciary Act of 1789, §§ 1, 30, 1 Stat. 73 (1789).

224. See, e.g., *id.* §§ 23, 27, 30.

225. See, e.g., ANASTAPLO, *BUT NOT PHILOSOPHY*, *supra* note 3, at 303.

defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects, or want of form in such writ, declaration, . . . or course of proceeding whatsoever, except only in cases of demurrer . . . .<sup>226</sup>

All this seems to be in the spirit of the Framers of the Constitution of 1787 who, in devising the Fugitive Slave Clause, refused to say that slaves were being "lawfully" held in any of the States, lest it be implied by the use of this term that they were being justly held.<sup>227</sup>

## V.

There are, in addition to the ways we have already noticed, other indications of the moral concerns and standards relied upon by the drafters of the Judiciary Act of 1789.

Concerns are evident in the anticipations seen not only in the oaths of office that we have referred to, but also in an awareness of the ways that people are likely to conduct themselves if they are not curbed.<sup>228</sup> The Constitution of 1787 also reflects an awareness of likely temptations, as may be seen, for example, in its provision for diversity of citizenship jurisdiction to counter the possible bias of local attachments.<sup>229</sup>

Thus, the Judiciary Act of 1789 provides that "no district judge shall [when sitting on the circuit court of appeals] give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision."<sup>230</sup> Thus, also, sureties are required in various situations,<sup>231</sup> the facts of a case should be made "fully to appear upon the record" on appeals,<sup>232</sup> "disinterested" persons should be used to execute and return writs,<sup>233</sup> and "unnecessary expense" and undue burdens for citizens are to be avoided.<sup>234</sup> The Act insists on keeping adversaries informed of proceedings.<sup>235</sup> Also insisted upon is how depositions should be secured and dealt with:

226. Judiciary Act of 1789, § 32, 1 Stat. 73 (1789).

227. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 170, 176-77.

228. See, e.g., Noonan, *supra* note 201, at 130f.

229. See U.S. CONST. art. III (1787); ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 127, 139.

230. Judiciary Act of 1789, §4, 1 Stat. 73 (1789). United States Supreme Court Justices, however, are not similarly constrained when they sit on appeals from decisions of circuit courts in which they have participated.

231. See, e.g., *id.* §§ 12, 17, 22.

232. *Id.* § 19.

233. *Id.* §§ 28, 29.

234. *Id.* § 29.

235. See *id.* § 30.

And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify to the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence.<sup>236</sup>

## VI.

Perhaps the most pervasive expression of moral concerns and the implementation of moral standards may be seen in the Judiciary Act's considerable reliance on the common law. We have already noticed that a number of the provisions in the Judiciary Act, as in the Constitution and in the Bill of Rights, draw upon the common law.<sup>237</sup>

The common law incorporated moral standards as well as constitutional principles and long-established rights and privileges. These privileges look to traditional notions of both ordered liberty and equal justice under law. It remains to be seen how these notions are affected by the ever-increasing influence of the emphasis on equality in our constitutional and political system. However much equality the Declaration of Independence celebrated, it is the determination to do justice, and to seem to do justice, that pervades the Judiciary Act of 1789.<sup>238</sup>

## VII.

The things taken for granted in the Judiciary Act of 1789, as in the Constitution of 1787 before it, bear both upon what those great instruments aimed and upon how they are to be interpreted.

It should be evident from both the Constitution and the Judiciary Act that a national common law was relied upon, a common law which the Courts of the United States would help keep national and, hence, truly common. For many practical purposes, the common law is still studied, at least in law schools, as basically national. This is reflected in what is routinely said about "the better rule" when diverse routes have been taken in different States. Congressional legislation, especially with respect to transactions in "interstate commerce," tends to nudge the States toward a national rule in various areas of the common law.

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236. *Id.* § 30.

237. *See, e.g., supra* text accompanying notes 213-15.

238. On the tension between adherence to the equality principle and adherence to the liberty principle, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 333 (Index), 335 (Index); ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 205. *See also infra* text accompanying note 311.



The spirit, as well as the requirements, of the Judiciary Act looked to a national common law, a conclusion recognized in *Swift v. Tyson* in 1842<sup>239</sup> but repudiated in *Erie Railroad Company v. Tompkins* in 1938.<sup>240</sup> Critical to the *Erie* argument is the insistence that “laws of the several states” (in Section 34 of the Judiciary Act of 1789) included the common law as it happens to be set forth in the various States. However, there is much in the Judiciary Act to support Justice Story’s assumption in *Swift v. Tyson* that “laws of the several states” did *not* include the common law.<sup>241</sup> For example, the repeated references to the “laws of the United States” in the Judiciary Act seem to be to statutes.

If we keep in mind what the common law ultimately draws upon, we should see that it does not make sense for it to be significantly and permanently different from State to State, something that *Erie* is prepared to accept. Of course, State court judges may chance to go off on questionable tangents from time to time—and if the United States Supreme Court, with its somewhat limited jurisdiction, does not happen to be in the position to correct them, some legislature should be empowered to do so.<sup>242</sup>

Judges, who are dependent upon chance in the cases they decide and in the circumstances in which they decide them, cannot be left ultimately in control of “readings” either of the common law or of the Constitution. Legislative rules of decisions must take precedence over the common law, especially because legislatures can provide deliberate and comprehensive statutes that take account of changing circumstances.<sup>243</sup>

Even so, it is salutary to return, in closing, to a recognition of the moral standards that have always permeated the common law, that common law which the Constitution of 1787 very much takes for granted.<sup>244</sup> Moral standards are implicit in the branches of the common law referred to by Judge Noonan in the epigraph for this talk.<sup>245</sup> I have had this to say, in my constitutional commentary, about the common law:

The common law is a way of applying, case-by-case, the enduring standards of the community, and in such a way as to bring the community along, even

239. 41 U.S. (16 Pet.) 1 (1842).

240. 304 U.S. 64 (1938).

241. See, e.g., ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 128-29; William T. Braithwaite, *The Common Law and the Judiciary Power: An Introduction to Swift-Erie and the Problem of Transcendental Versus Positive Law*, in *LAW AND PHILOSOPHY*, *supra* note 7, at 774; Anastaplo, *Constitutionalism, The Rule of Rules*, *supra* note 7, at 177.

242. On legislative supremacy in our constitutional system, see *supra* note 97.

243. Is it not implied, by Section 34 and other provisions in the Judiciary Act, that Congress could make the common law, especially as defined by the United States Supreme Court in diversity cases, superior to State statutes?

244. See, e.g., ANASTAPLO, *BUT NOT PHILOSOPHY*, *supra* note 3, at 303; *supra* text accompanying note 218 and following.

245. See *supra* text accompanying note 201.

as reforms are being made. It is salutary to emphasize here that common-law judges discover the law; they do not simply make it. Reason looks to nature (instead of will looking to desire) in declaring the rule that is to be followed.<sup>246</sup>

I go on to suggest that our federal judges “would be enlivened if the National Courts had old-fashioned common-law questions put to them routinely to consider properly, thereby linking them with great common-law judges across the centuries.”<sup>247</sup>

If our judges and legislators and scholars as well, were more securely linked with great common law judges across the centuries, they would be better equipped to notice and to pay due deference to the moral and other presuppositions of the Judiciary Act of 1789.<sup>248</sup> This should lead, in turn, to sounder readings both of the Constitution of 1787 and of the Bill of Rights of 1791.

#### 9. A RETURN TO *BARRON V. BALTIMORE*<sup>249</sup>

The plaintiff. . . contends that [he] comes within the clause in the fifth amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favour of the liberty of the citizens, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, [this tribunal] can take no jurisdiction of the cause. The question thus presented is, we think, of great importance, but not of much difficulty.

John Marshall<sup>250</sup>

#### I.

A colleague of ours, who is quite experienced in constitutional law, has observed that *Barron v. City of Baltimore*<sup>251</sup> requires no more than twenty minutes of class discussion. This assessment is reflected in the single paragraph allowed for this case in the four-volume *Encyclopedia of the*

246. ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 138.

247. *Id.* at 138-39. Is not this recognized in the quotation taken from Judge Noonan in the text at *supra* note 201?

248. See *supra* note 241. That is, it would be recognized that the Courts of the United States are indeed courts. See *supra* note 211.

249. A talk given in the Faculty Workshop at Loyola University of Chicago School of Law, Chicago, Illinois, April 7, 1998.

250. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). This is how the Chief Justice assessed the issues in this case.

251. 32 U.S. (7 Pet.) 243 (1833). On *Barron*, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 455 (Index).

*American Constitution* where it is said:

When James Madison proposed to the First Congress the amendments that became the Bill of Rights, he included a provision that no state shall violate Freedom of Religion, Freedom of Press, or Trial by Jury in criminal cases; the proposal to restrict the states was defeated. The amendments constituting a Bill of Rights were understood to be a bill of restraints upon the United States only. In *Barron*, Chief Justice John Marshall for a unanimous Supreme Court ruled in conformance with the clear history of the matter. [The plaintiff] invoked against Baltimore the clause of the Fifth Amendment prohibiting the taking of private property without just compensation. The "fifth amendment," the Court held, "must be understood as restraining the power of the general government, not as applicable to the states."<sup>252</sup>

On the other hand, I have had my students in constitutional law this semester write one of their papers on *Barron v. Baltimore*, an assignment which could suggest that there is still more to this case than is generally recognized.

The account of this 1833 case provided in the United States Reports opens with these facts:

... Craig and Barron, of whom the plaintiff is survivor, were owners of an extensive and highly productive wharf in the eastern section of Baltimore, enjoying, at the period of their purchase of it, the deepest water in the harbour.

The city, in the asserted exercise of its corporate authority over the harbour, the paving of the streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water which flow from the range of hills bordering the city, and diverted them, partly by adopting new grades of streets, and partly by the necessary results of paving, and partly by mounds, embankments and other artificial means, purposely adapted to bend the course of the water to the wharf in question. These streams becoming very full and violent in rains, carried down with them from the hills and the soil over which they ran, large masses of sand and earth, which they deposited along, and widely in front of the wharf of the plaintiff. The alleged consequence was, that the water was rendered so shallow that it ceased to be useful for vessels of any important burthen, lost its income, and became of little or no value as a wharf.<sup>253</sup>

This account includes the following recapitulation of the litigation in Maryland which ended up in the United States Supreme Court:

At the trial of the cause in Baltimore County Court, the plaintiff gave

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252. Leonard W. Levy, *Barron v. City of Baltimore*, in 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 102 (Leonard W. Levy ed., 1986).

253. 32 U.S. (7 Pet.) at 243-44.

evidence tending to prove the original and natural course of the streams, the various works of the corporation from time to time to turn them in the direction of this wharf, and the ruinous consequences of these measures to the interests of the plaintiff. It was not asserted by the defendants that any compensation for the injury was ever made or proffered; but they justified under the authority they deduced from the charter of the city, granted by the Legislature of Maryland, and under several acts of the Legislature conferring powers on the corporation in regard to the grading and paving of streets, the regulation of the harbour and its waters, and to the health of the city.<sup>254</sup>

## II.

We should notice some preliminary questions, if only in passing, before we turn to our principal inquiry on this occasion. One such question is whether there had indeed been the uncompensated “taking” by the City of Baltimore of which the plaintiff complained. Although this may not have been, strictly speaking, a “taking,” it is likely that the plaintiff suffered a tortious injury inflicted by the City of Baltimore.

It seems, however, that there was no remedy available under either count—“taking” or “tort”—pursuant to the Constitution of the State of Maryland. Nor, it seems, did the City of Baltimore or the State of Maryland provide compensation for the plaintiff, which could have been done whether or not a legal remedy was available for him. It should be noticed that a Baltimore County Court jury did render a verdict on behalf of the plaintiff in this case, a verdict for \$4,500 which the Court of Appeals in Maryland reversed.<sup>255</sup>

The plaintiff had argued that he was entitled to take advantage, in his Maryland litigation, of the provision in the Fifth Amendment of the United States Constitution which says that “private property shall not be taken for public use without just compensation.”

The issues before the United States Supreme Court in this case are disposed of by Chief Justice Marshall in a couple of pages, which are summed up in the Syllabus found in the Reports:

The provision in the fifth amendment to the Constitution of the United States, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states.

The Constitution was ordained and established by the people of the United States, for themselves; for their own government; and not for the government of individual States. Each State established a constitution for

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254. *Id.* at 244.

255. *See id.*

itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms are naturally and necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes.<sup>256</sup>

Critical to the Chief Justice's opinion is the following argument about the Ninth and Tenth Sections of Article I of the Constitution:

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty;" &c. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the States.<sup>257</sup>

This argument, reinforced by historical and other data, has long been taken to be both simple and conclusive.

### III.

Even so, it might be useful to consider what might have encouraged Barron's counsel to invoke the United States Constitution here, aside from the difficulties faced by the plaintiff under the constitution and laws of Maryland.

Some lawyers of that day, it seems, did regard the Bill of Rights to be applicable to the State governments as well as to the National government. Article I, Section 9 of the Constitution is directed against the United States and Article I, Section 10 is directed against the States—this is made clear by the context in each case. But the Bill of Rights (except for the First Amendment and part of the Seventh Amendment) is general in its terms.

The "legislative history" of the Bill of Rights can be read in at least two ways. If the Bill of Rights provisions had been placed in the parts of the Constitution which James Madison had suggested for them when he introduced them in the House of Representatives on June 10, 1789, it would

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256. *Id.* at 243.

257. *Id.* at 248-49.

have been obvious that all of the proposed restraints were directed only against the United States.<sup>258</sup> This conclusion would have been reinforced, no matter where these provisions were placed, if the provision had been retained in which several restraints were directed explicitly against the States.<sup>259</sup> Furthermore, as Chief Justice Marshall notices, much (if not all) of the 1787-1789 agitation in the States for amendments had been with the powers of the government of the United States in view.

Still, the final placement of the Bill of Rights does not provide a context in which the United States government alone is addressed (as it is in Article I, Section 9). Put another way, the only places that that government is explicitly addressed in the Bill of Rights are the First and Seventh Amendments. Not only are the Bill of Rights provisions set forth in general terms, they are obviously declaratory of rights that had long been claimed by the English-speaking peoples.<sup>260</sup>

A separate problem here is what, if anything, the Courts of the United States can properly do to make State governments (1) respect longstanding (if not “unalienable”) rights, whether or not found in an American constitutional document, (2) implement the Privileges and Immunities Clause of Article IV of the Constitution, and (3) respect the Bill of Rights provisions that do sound general in their application.<sup>261</sup>

#### IV.

I venture to suggest that constitutional law scholars have yet to face up to the significance of the fact—if “fact” it is—that the prevailing opinion in the United States ever since the beginning has been that some rights are general, if not inalienable and universal. For example, common usage has long, if not always, considered “the First Amendment” as generally available against all governments in this country (and indeed against other powerful bodies as well). This usage does not depend upon any public awareness of the “incorporation” exercises to which the courts have resorted.<sup>262</sup>

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258. For the originally proposed arrangement of June 10, 1789, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 315-20.

259. The amendments proposed by the House of Representatives, passed on August 24, 1789, included this provision: “No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.” ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 323-24.

260. See *supra* note 208.

261. The Fourteenth Amendment can be understood as having been designed to have these effects on State governments. On the Fourteenth Amendment, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 458 (Index).

262. The “incorporation” referred to is that effected primarily through the interpretation of one or more phrases in the Fourteenth Amendment. Article II of Section 14 of the Northwest Ordinance of 1787 expresses the understanding that various traditional rights of the people, especially in a republican regime, should be recognized for all of the inhabitants of the

It has been evident for more than two hundred years now that if one method for extending various fundamental rights against all governments in this Country is denied, then another method is apt to be resorted to. Thus, we have seen the attempts made with *Barron* in the 1820s, with the Privileges and Immunities Clause of the Fourteenth Amendment in the 1860s and thereafter, and with the Due Process Clause of the Fourteenth Amendment in the 1920s and thereafter.<sup>263</sup>

The Civil War stands for this tendency, which has culminated in the virtually complete "incorporation" of the Bill of Rights as against the States. That is to say, the nationalization of fundamental rights, implicit from the beginning, will not be permanently denied, however thwarted and delayed it may be in the Courts and elsewhere, especially when there is here a population as mobile as ours has always been in principle and for the last century or so in practice. This development is anticipated even in *Barron*, for it should not be forgotten that the local jury did find that the plaintiff was entitled to compensation for what had been done to his wharf by the local government.

In short, there is, in critical respects, *one people* in the United States, whatever the courts and their interpreters may seem to say from time to time. This has been evident in the compelling arguments of civil rights activists in the Twentieth Century.

## V.

It is salutary in these matters not to rely simply upon the courts, something testified to by the profound consequences of the voting rights and other legislation enacted by Congress in the 1960s.<sup>264</sup>

Because there is in the people at large a healthy desire for nationally recognized rights, what more can Congress do to promote them? Perhaps more use should be made than heretofore of the Privileges and Immunities Clauses of Article IV of the Constitution and of Section 1 of the Fourteenth Amendment. The use of the Commerce Clause to justify some of the civil rights legislation in the 1960s is a monument to mistakes made by the Supreme Court in reading the Fourteenth Amendment in the late Nineteenth

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Northwest Territory. See ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 262-63, 265 n.; see also *supra* note 208.

263. The same kind of flexibility has been seen in the understandable determination to have the government regulate effectively the economy of the United States, however the Commerce Clause may happen to be read (or misread) by the Courts at any particular time. See, e.g., *supra* note 65; *infra* text accompanying notes 277-78, 285; see also Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 2.

264. See, e.g., ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 439 n.209.

Century.<sup>265</sup>

It may also be salutary to rely much more on the Republican Form of Government Guaranty in Article IV of the Constitution, a provision which has been pretty much neglected, except for President Lincoln's invocation of it in 1861.<sup>266</sup> Congress should have drawn upon that Guaranty in correcting the legislative malapportionment that finally became such a scandal that the Supreme Court was moved to intervene in the 1960s, but not as effectively as Congress could have done.<sup>267</sup>

Perhaps Congress could experiment with providing the courts more directions for the protection and implementation of various fundamental rights, keeping in mind the "Blessings of Liberty" featured in the Preamble to the Constitution.<sup>268</sup>

## VI.

It is prudent to notice that the "constitutional" is often intertwined with the "political," a relation which should encourage us to expect more constitutional determinations to be made in the legislature, the branch of government that is equipped and expected to take both elements into account. The importance here of the enduring opinion of the people should be emphasized.<sup>269</sup>

It is that opinion, grounded in an instinctive respect for morality, that has long been evident in the common law. The common law was traditionally regarded as a set of rules to be discovered by judges (and modified, as circumstances changed, not only by judges but also by legislatures). These rules were regarded as dictates of nature which were open to rational development and implementation.<sup>270</sup>

To the extent that the traditional understanding of the common law has been eclipsed, to that extent the foundations of the rights recognized in the Constitution may have been weakened. It should be emphasized, again and again, that the soundness of the people—that soundness to which the common law ministered—is required if a constitutional system is to be sustained for

265. See *supra* text accompanying note 51.

266. On republican government, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 337 (Index).

267. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); see also ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 173-74.

268. On the Preamble and its uses, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2 at 337 (Index); Anastaplo, *Constitutionalism, the Rule of Rules*, *supra* note 7, at 68; see also *infra* text accompanying note 334.

269. Consider a quotation taken from Benjamin R. Curtis's dissenting opinion in *Dred Scott v. Sandford* in ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at xiii.

270. See, e.g., *supra* note 66; see also ANASTAPLO, *BUT NOT PHILOSOPHY*, *supra* note 3, at 303.



centuries.<sup>271</sup>

## VII.

It is difficult to overestimate the significance in these matters of the Declaration of Independence.<sup>272</sup> It should be remembered, for example, that various rights were invoked by the American people against the British government without a written Colonial Bill of Rights, just as Barron can be said to have done against the Baltimore government. The Colonists evidently expected governments to respect those rights, or else face the consequences.

It may be instructive to recall here the warning recorded in *Federalist No. 84* against adding any bill of rights to the proposed American constitution. Such an addition, it was said, might be interpreted to negate any rights not listed therein. The Ninth Amendment was added, it seems, to guard against this interpretation.<sup>273</sup>

Publius could also have warned that the listing of rights that the Government of the United States should respect might be interpreted to "liberate" any governments not considered to be covered directly by the Constitution of the United States. That is, this could be taken to dilute the universality of those rights which had previously been regarded as naturally available against all governments, certainly wherever the common law and its attendant constitutionalism had been ordained and established. As I have argued, however, the people can be depended upon to insist that critical rights should be considered "universal"—and they will be established generally one way or another.<sup>274</sup>

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271. The required soundness of the people depends, in large part, upon intelligent community direction. See, e.g., *supra* Part 5; see also ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 452 n.259.

272. Also difficult to overestimate is the significance, in the entire Anglo-American constitutional arrangement, of the *English* "Declaration of Independence"—that is, Magna Carta, "the Great Charter of Liberties." It took half a millennium to bring the Magna Carta's presuppositions to the surface. See, e.g., Anastaplo, *On Freedom*, *supra* note 104, at 481.

273. On the Ninth Amendment, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 461. See also *supra* notes 208, 214; *supra* text accompanying note 74 (the Ninth Amendment).

274. Consider, however, the limitations of the Universal Declaration of Human Rights. See Anastaplo, *How to Read the Constitution*, *supra* note 61, at 55.

10. POLITICAL WILL, THE COMMON GOOD, AND THE CONSTITUTION<sup>275</sup>

He who gave our nature to be perfected by our virtue, willed also the necessary means of its perfection—He willed therefore the state.

Edmund Burke<sup>276</sup>

## I.

The United States Supreme Court has recently made various efforts to check what a few of the Justices consider the tendency of the National Government to disregard the federalism elements in our constitutional arrangements. My impression is that such judicial efforts—as in *National League of Cities v. Usery* in 1976<sup>277</sup> and *United States v. Lopez* in 1995<sup>278</sup>—are futile, attempting as they do to check social and political movements that are longstanding, powerful, and (in our circumstances) mostly salutary. These movements are reflected in the widespread recourse to abortion in our time. That recourse in this Country, however questionable it may be, is not due, ultimately, to our courts. After all, similar recourse may be found in Europe, but without the intervention there of judges—that is, among peoples and in regimes as decent as ours (with considerable respect among them, too, for natural right). Cases such as *Roe v. Wade* in 1973<sup>279</sup> did dramatize in this Country the changes taking place worldwide, but our courts were not as critical here as is often assumed.

The last explicit constitutional check of a federalism-protecting character was the adoption of the Eleventh Amendment in 1798. None of the preceding Amendments to the Constitution, including what we have long known as the Bill of Rights, was of this character, not even the often-invoked Tenth Amendment, which simply confirms, in effect, that the Constitution means what it says.<sup>280</sup> Even the Eleventh Amendment has been effectively countered by the Fourteenth Amendment, subjecting the States to far more scrutiny and risk in the Courts of the United States than had been the concern of the

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275. A talk given at a panel of The Center for the Study of the Constitution, Annual Convention of the American Political Science Association, Boston, Massachusetts, September 4, 1998. The other participants on this panel were Hadley Arkes, Gary Glenn, and Ralph Rossum.

276. EDMUND BURKE, WORKS, at V, 186 (Rivington ed., 1803-1827); see *supra* text accompanying note 6.

277. 426 U.S. 833 (1976).

278. 514 U.S. 549 (1995); see *supra* note 263.

279. 410 U.S. 113 (1973); see *supra* note 40; see also *infra* text accompanying note 345.

280. On the Tenth Amendment, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 465 (Index).

drafters of the Eleventh Amendment.<sup>281</sup> As for the original Constitution itself, it should be remembered that the title of the papers most famous in its advocacy, *The Federalist*, was a title better suited for those more ardent champions of federalism who were maneuvered (not altogether fairly) into being identified as Anti-Federalists.<sup>282</sup>

Particular emphasis as a federalism-subverting measure can be placed on the Seventeenth Amendment, providing as it does for the popular election of Senators. Once political parties were firmly established early in the Nineteenth Century, it was only a matter of time before the role of State legislatures in the selection of Senators would become anachronistic.

The Seventeenth Amendment was anticipated in this respect by the Twelfth Amendment. That 1804 amendment provided for changes in the original mode of identifying and counting electoral votes for President and Vice President, changes that became necessary because the Framers had evidently not foreseen in 1787 the emergence of strong party allegiances in *national* politics. Similarly, it can be said, the Fourteenth Amendment was anticipated, in critical implications, by the Ninth Amendment with its recognition of rights which exist independently of the Constitution.<sup>283</sup> Another consequence of the emergence of political parties has been to moderate the political difficulties that may have been provoked by the equal representation of the States in the Senate of the United States.<sup>284</sup>

## II.

It can be expected, in the decade ahead, that the Supreme Court will have little permanent effect in controlling the legislative powers of Congress, even when the exercise of those powers places severe checks upon State governmental activity. Virtually certain, for example, is the continued

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281. On the Eleventh Amendment, see *id.* at 458 (Index).

282. It should also be remembered that much more was done with federalism in the founding of the Canadian Confederation in the Nineteenth Century, something of which we have been reminded by the opinion a few years ago of the Supreme Court of Canada with respect to the prospect of Quebec Separation. We can see in that opinion that the Supreme Court of Canada does *not* suggest that *it* will eventually have to rule upon whether a valid separation from the rest of Canada has been effected by Quebec. Rather, the Court defers to "a clear majority" and to a "clear expression . . . of will" by the people of that Province. On Quebec separatism, see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 139. On *The Federalist*, see George Anastaplo, *The Constitution at Two Hundred, Explorations*, 22 TEX. TECH. L. REV. 967, 1042 (1991); ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 334; ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 458; Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 13.

283. See *supra* note 208; see also *supra* text accompanying note 260.

284. Thus, there is far greater interest shown today in whether a Senator is a Republican or a Democrat than in whether he or she is from a large State or a small State or even from a Southern State or a Northern State.

exercise of the Commerce Power in such a way as to regulate, to whatever degree the Congress deems expedient, the economic life of this Country. Why should the United States be different in this respect from all of the other industrialized nations on Earth? The vital issues here will be as to the wisdom, not as to the constitutionality, of the regulation Congress undertakes.

This is not usurpation on the part of Congress, but rather a necessary adaptation to an ever-more-complicated economic life, with very little purely local "commercial" activity remaining, at least in this Country. A quite broad Congressional power in this respect was recognized in *Gibbons v. Ogden* in 1824,<sup>285</sup> a recognition that was acknowledged by Justice Jackson when he said in 1942: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."<sup>286</sup>

All this was prepared for in the Constitution itself, in a roundabout way, by the Article I, Section 9 clause prohibiting Congressional interference with the international slave trade before 1808. This clause recognized, in effect, that "from the beginning" Congress had the power to interfere even with the "interstate" slave trade, a Commerce Clause power that could override state pretensions when Congress had the political will to do so.<sup>287</sup> The South made its desperate move to secede in 1860-1861 when it became apparent that the National Government was likely to exhibit, within the coming generation, the political will to begin to put slavery "out of business."<sup>288</sup>

It is hard to exaggerate the importance of political will in these matters. It will be remembered, for instance, that in 1883 and thereafter the United States Supreme Court severely limited the usefulness of the Privileges and Immunities Clause of the Fourteenth Amendment as the principal means for making fundamental rights applicable in the Courts against the States. Within a few decades, however, the Due Process Clause of the Fourteenth Amendment, although ill-suited for this sensible and humane use, was pressed into service to do what had been intended to be done by means of the Privileges and Immunities Clause.<sup>289</sup>

### III.

The political will evident here is related to what could be expected as one of the major consequences of the Civil War; that is, the States would be bound by most of the restraints placed upon the National Government for the sake of personal liberty and decent government. It is to be hoped that the same kind of legislative adaptation will be resorted to if the Supreme Court should ever

285. 22 U.S. (9 Wheat.) 1 (1824).

286. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942); *see supra* note 263.

287. *See* ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 64-65. On the international slave trade, *see* ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 369 (Index).

288. *See* ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 113, 149, 157, 177.

289. *See also supra* text accompanying notes 51-52.

presume to declare all affirmative-action measures “unconstitutional.”<sup>290</sup>

The importance of political will is evident also in how lines of authority are laid out in the Constitution. Among the three branches of the National Government, the Congress is ultimately in control. We have been reminded of this in times of crisis, such as the Watergate fiasco of the 1970s,<sup>291</sup> the Iran arms-Contra aid usurpation of the 1980s,<sup>292</sup> and the Presidential scandals of the 1990s.<sup>293</sup> This also means that the assumption by the Supreme Court of the function of judicial review, a more benign form of usurpation (but usurpation nevertheless), cannot have a permanent effect, however much it may oblige Congress to contrive means (such as using, perhaps even misusing, its taxing and spending powers) in order for it to get on with what “has” to be done.<sup>294</sup> Permit me [I could say in 1998] to add, if only in passing, the opinion that the least serious of the crises I have just listed is, by far, that generated by the current Presidential scandals. But that which we have now *is* serious enough to call both for a Presidential resignation (as, unfortunately, the only honorable option left to Mr. Clinton)<sup>295</sup> and for an informed repudiation of the Independent Counsel Act (still another, perhaps more dangerous, form of dubious usurpation).<sup>296</sup>

290. On affirmative-action measures, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 455 (Index); George Anastaplo, *The O.J. Simpson Case Revisited*, 28 LOY. U. CHI. L.J. 461, 489 (1997) [hereinafter Anastaplo, *The O.J. Simpson Case Revisited*].

291. On the Watergate fiasco, see ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 623 (Index).

292. On the Iran arms-Contra aid usurpation, see *id.* at 612 (Index); ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 335 (Index); ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 459 (Index).

293. See George Anastaplo, *Constitution Doesn't—and Shouldn't—Shield President from Trial*, CHI. DAILY L. BULL., Feb. 24, 1998, at 2; George Anastaplo, *Crisis and Continuity in the Clinton Presidency*, PUB. INT. L. REP. (Loyola Univ. Chicago School of Law), July 1998, at 1; George Anastaplo, *What Do We Really Want to Learn About the President?*, PUB. INT. L. REP. (Loyola Univ. Chicago School of Law), Apr. 1998, at 2.

294. On judicial review, see *supra* note 41.

295. See *supra* note 147.

296. The Independent Counsel Act *has* been allowed to lapse. Much *is* to be said for having automatic expiration dates built into questionable legislation. Consider, for example, my letter to the editor of September 2001:

It is likely that the current anti-terrorist legislative proposals of the national administration, some of which are apt to be enacted in these troubled times, include provisions that will turn out to be dubious for security purposes as well as for liberty interests.

Would it not be prudent, therefore, for Congress to follow the lead of the Congress which enacted the now-much-criticized Alien and Sedition Acts of 1798? That Congress, aware of the distorting passions of that day, limited the life of the Alien and Sedition Acts to two years, subject to renewal by Congress.

Those acts were not renewed once the people of this country had had time to assess both

The precise meaning and use of the Bill of Rights provisions depend upon what the Legislature and the Executive, as well as upon what the Judiciary, say and do. The legal principles found in those provisions are *not* “to be applied by the courts” alone, whatever Justice Jackson assumed in *West Virginia Board of Education v. Barnette* in 1943.<sup>297</sup>

One source of confusion here can be traced to a common misreading of the Supremacy Clause: the “supreme Law of the Land” identified there, it needs to be pointed out, includes “the Laws of the United States which shall be made in Pursuance” of the Constitution. If Congress’s ultimate control is recognized, it is more likely to be recognized as well that “in Pursuance thereof” need not mean what it is taken to mean for the sake of judicial review, to wit, “in conformity thereto.” That is, the “in Pursuance” language may be primarily concerned to identify the authoritative legislation here, that which is enacted by Congress according to the constitutionally-prescribed forms.<sup>298</sup> Congress, of course, is duty-bound to keep the Constitution in view in enacting whatever it does, but a failure on its part to do so does not necessarily invalidate what it has done, any more than what the Supreme Court has done in any particular case is invalidated because of a like failure on *its* part. Very much in need of qualification, then, is the assertion in *Marbury v. Madison* that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>299</sup>

In short, politicians and, hence, political scientists should appreciate, at least better than law professors and hence lawyers are likely to do, the decisive role of the “political,” even in judicial determinations and legal applications, especially when, as is the case of the Constitution of 1787, the political is regarded as paramount in the proper ordering of human affairs. This sovereignty of the political is reflected, according to the men of 1776-1787, even in the divine governance of the world.<sup>300</sup>

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risks and remedies properly.

CHI. DAILY L. BULL., Sept. 28, 2001, at 2; CHI. SUN-TIMES, Oct. 2, 2001, at 38; *see infra* notes 326, 369.

297. 319 U.S. 624, 638 (1943).

298. On the Supremacy Clause, *see* ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 338 (Index); *see also supra* text accompanying note 42.

299. 5 U.S. (1 Cranch) 137, 177 (1803); *see supra* text accompanying notes 62-64; *infra* note 360.

300. An oblique anticipation of the separation of powers established in the Constitution may be seen in the references to divinity in the Declaration of Independence. *See* ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 25-26.

11. TOCQUEVILLE ON THE ROADS TO EQUALITY<sup>301</sup>

Tocqueville in his famous book on democracy in America seems to say, at least at first glance, that the case for democracy is in itself not stronger than the case for aristocracy. Democracy has its particular virtues and vices and so has aristocracy. But, Tocqueville continues, Providence has decided in favor of democracy. Practically there is no longer a choice. We have to make the best of democracy; we cannot have a romantic longing for aristocracy. Now what Tocqueville understands by Providence is now called by most people who speak in these terms, History, with a capital "H." History has decided in favor of democracy.

Leo Strauss<sup>302</sup>

## PROLOGUE

Seventeen years ago the Fall Weekend of the Basic Program also here at the Alpine Valley Resort was devoted to George Orwell's *1984*. This was a couple of months before the onset of the fateful year described in Orwell's novel. I observed, in the course of my talk about the *1984* novel:

All men, we have been taught by Aristotle, aim at the good in all that they do. (There may even be *something* good in mere perseverance, in the perpetuation of even a bad regime. Existence itself is thus celebrated, however much that existence is outweighed in some instances by the evil of the regime.) One must wonder about the morale of [such cynical leaders as those depicted in *1984*]. Do they not need some sincere belief, aside from mere self-interest, if they are to consider their own lives meaningful and worthwhile? Otherwise, would there not be a void that they or their successors, the youth of the following generation, will fall into and be engulfed by?<sup>303</sup>

I then added in 1983 this sentiment: "This is, it has long seemed to me, one of the serious problems faced by Russian leaders since at least the Second World War."<sup>304</sup> This sentiment, looking, as it turned out, to the collapse of the Soviet Union within a decade, was reinforced by what we had observed during

301. A talk given at a Weekend Conference of the Basic Program of Liberal Education for Adults of the University of Chicago, held at the Alpine Valley Resort, East Troy, Wisconsin, Nov. 5, 2000. The original title of this talk was *Tocqueville on the Roads to Equality: Is It the Same No Matter How You Get There?* On Tocqueville, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 81.

302. This epigraph is taken from Leo Strauss's Spring 1966 course on Plato's *Meno* at the University of Chicago. See ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 288 n. 206.

303. ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 165.

304. *Id.*

a camping visit to the Soviet Union in 1960, prompting me to ask at that time whether anyone in that country really “believed in” the established system.<sup>305</sup>

Thus, I could wonder, in my remarks at the Fall 1983 Basic Program Weekend, about the staying power of the Soviet Union. But a Tocquevillian analysis of modern egalitarianism and its passions should alert us, despite the collapse of the Soviet Union, to anticipate the revival of the revolutionary spirit upon which Marxism depends.<sup>306</sup>

## I.

The French Revolution, according to Alexis de Tocqueville, drew upon and intensified developments which had been centuries in the making. Particularly important, according to him, was the longstanding tendency of the French toward centralization of both their political and their social organization. The United States of Tocqueville’s day, on the other hand, still made more of local government than did the French.

The centralization of much of French life was dramatized for us, many years ago, when we took a boat train from Le Havre to Paris. (Le Havre happened also to be the port from which Tocqueville sailed to the United States.) Traveling with us in our compartment was a couple whose automobile had already been delivered at another French port, Cherbourg, which is not far from Le Havre. Even so, it proved to be easier for our fellow travelers to go all the way into Paris in order to catch another train back to Cherbourg (to collect their automobile)—it was far easier for them to do this than to try to go by public transportation directly from Le Havre to Cherbourg.

Similar centralization could be seen, in those years (and perhaps to some extent still today), in the role that Les Halles, the central markets of Paris, played in the economy of France.<sup>307</sup> Much of the foodstuff collected each night in Les Halles came from all over the country, mostly by trucks. It would be bought by dealers who would truck it out that very night all over the country for sale the next day in local markets.

Other indications of centralization may be seen in the opening lines of Stendahl’s *The Red and the Black*, where it is recorded that a minor construction project in a provincial town had to be approved by a Ministry in Paris.<sup>308</sup> Then there is the constant effort made by the Academie Francaise to control changes in their revered language.

305. See, e.g., ANASTAPLO, *HUMAN BEING AND CITIZEN*, *supra* note 4, at 3; see also ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 555.

306. The revolutionary spirit upon which Marxism depends seems now to be drawn upon by various Islamist radical movements. On Islamic thought, see ANASTAPLO, *BUT NOT PHILOSOPHY*, *supra* note 3, at 175. See also *infra* note 332.

307. These markets are now found in a Paris suburb.

308. On Stendahl, see Anastaplo, *Law & Literature and the Moderns*, *supra* note 7, at 358.



With centralization come reverberations throughout the entire community whenever anything unplanned happens in any realm that is controlled centrally. We can see this, for example, in disruptions to commercial air traffic all over the United States when something goes wrong in one part of the country (because of weather conditions or labor difficulties or whatever).

It is obvious to us that a number of mundane activities have to be controlled by some central authority. These activities can include the designation of time zones, the regulation of the money supply, the allocation of broadcast frequencies, the monitoring of and responses to epidemics, and the defense of the country from foreign enemies. Even so, some see centralization as a threat to liberty, even while others see it as a means of controlling the whole efficiently for the common good.<sup>309</sup>

Centralization is also seen as promoting uniformity, which, too, can have both good and bad aspects. Uniformity, in turn, is regarded as closely allied to equality.

## II.

Tocqueville, a member of the French aristocracy, argued that the movement toward equality was dominant in his time—and that it was apt to become even stronger, at least in the Western World, for some time to come.

Equality means, in political terms, the emergence of democracy, or rule by (or at least for) the people. Democracy can appear, in these circumstances, as the form of government very much in the ascendancy. Tocqueville counsels the partisans of aristocracy, or of the traditional way in France, to accommodate themselves to what was virtually inevitable. If they should do that, he seems to say, they might be able to guide somewhat and hence moderate the emerging democratic movement. He develops this argument in, among other places, his major treatise, *On Democracy in America* (1835, 1840).<sup>310</sup>

Technological and other developments, for which superior people may have been in large part responsible, had made a recognition of equality feasible and more effective—and people at large would continue to demand such recognition in one form or another. That demand may even draw upon the egalitarianism, which can be said to be at the core of the Christian faith (about which I will say more further on).

The struggle between the aristocratic movement and the egalitarian movement can be translated into the struggle between those dedicated primarily to liberty and those dedicated primarily to equality, insofar as these find themselves in conflict. A particularly telling argument for aristocracy is the fact that Tocqueville, in his thirties, could produce the book that he did.

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309. On the Confederate Constitution of 1861 and its tendencies and consequences, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 2, at 125. See also *infra* text accompanying note 345.

310. Tocqueville's dates are 1805-1859.

## III.

There has traditionally been, at least in the West, tension (if not even conflict) between liberty and equality. Insofar as liberty and equality are distinguished, one can be seen to stand for *excellence*, the other can be seen to stand for *justice*.<sup>311</sup>

Circumstances and personal temperament may affect where and how one places the emphasis in such matters. And circumstances can help shape one's habits and perhaps even one's temperament.

It is fairly easy these days to accept the attacks made, in the name of equality, against those who claim privileges, especially hereditary privileges.<sup>312</sup> These attacks can include an insistence upon liberty as a condition naturally due to every human being.

It is more difficult to recognize any merit in the claims of the privileged, even when those claims are made in the name of superior talents and of recognized accomplishments, whether in an earlier generation or even in the present. Particularly troublesome today is any suggestion that one's liberty or entitlements can extend to any sustained exploitation of beings considered inferior.<sup>313</sup>

A recognized champion of equality these days has been Martin Luther King, Jr. He could look forward to a time when all of the downtrodden can proclaim themselves to be "free at last," but his emphasis did seem to be more on the desire to make everyone free than it was on the quality of that freedom. On the other hand, Martin Luther, a champion of Christian liberty, insisted that a healthy society cannot do without inequality.<sup>314</sup> Tocqueville anticipated by decades the *Old Regime* sentiments I have been discussing, having concluded *On Democracy in America* with this thought: "The nations of our day cannot prevent conditions of equality from spreading in their midst. But it depends upon themselves whether equality is to lead to servitude or freedom, knowledge or barbarism, prosperity or wretchedness."<sup>315</sup>

311. See *supra* note 238.

312. The Constitution of 1787, we recall, keeps both the State Governments and the General Government from granting titles to nobility on anyone. For the 1810 attempt to keep American citizens from holding any title of nobility granted by a foreign government, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 298-99.

313. The issue of what one may do with the property one happens to accumulate may be critical here. On the relation between liberty and property, see ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 213; Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 2 and 3. See also *supra* note 144.

314. On Martin Luther, see George Anastaplo, *Law & Literature and the Christian Heritage*, 40 *BRANDEIS L.J.* 191, 318 (2001) [hereinafter Anastaplo, *Law & Literature and the Christian Heritage*].

315. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 765 (J.P. Mayer ed., 1969) [hereinafter TOCQUEVILLE, *DEMOCRACY IN AMERICA*]. A more careful translation of this text, by Harvey Mansfield, Jr. and Delba Winthrop, is now available.

## IV.

A passage in Tocqueville's book, *The Old Regime and the Revolution* (published in 1856), suggests what the emergence of a dedication to equality and hence to democracy does, and does not, mean for him.<sup>316</sup> Our passage from *The Old Regime* begins with the observation: "It is in colonies that one can best judge the form of the metropolitan [the home] government, because there all its characteristic traits are usually enlarged, and become more visible."<sup>317</sup>

Tocqueville describes the centralizing tendencies of the French government, particularly as seen in the time of Louis XIV:

In Canada the government never adopted the great principles which can render a colony populous and prosperous, but, on the contrary, employed all kinds of petty artificial procedures and little regulatory tyrannies to increase and spread the population: forced cultivation, all lawsuits arising from land concessions taken away from the courts and returned to the judgment of the government alone, requirements to farm in a certain way, obligations to live in certain places rather than others, etc. . . .<sup>318</sup>

He continues by noticing that there was in French Canada a government "that is almost as numerous as the population, dominant, active, regulatory, constraining, wanting to foresee everything, taking everything over, always more familiar with the interests of the governed than they are themselves, constantly active and sterile."<sup>319</sup>

Tocqueville then sketches the English alternative mode of colonization in North America as he describes how matters stood there in his own time:

In the United States, on the contrary, the English system of decentralization is exaggerated: the towns become almost independent municipalities, kinds of democratic republics. The republican element which is the base of English mores and the English constitution displays itself without opposition and develops. Government, properly speaking, does little in England, and individuals do much; in America, the government is no longer involved in anything, so to speak, and individuals uniting together do everything. The absence of upper classes, which made the inhabitant of Canada still more submissive to the government than the inhabitant of France was at that time, made the inhabitant of the English colonies more and more independent of

316. Comparable passages may be found in the *Democracy in America* book, such as at the end of its third chapter.

317. ALEXIS DE TOCQUEVILLE, *I THE OLD REGIME AND THE REVOLUTION* 180 (Alan S. Kahan trans., 1998) (1856). This passage continues, "When I want to judge the spirit of the government of Louis XIV and its vices, it is to Canada I must go." *Id.*

318. *Id.* at 281.

319. *Id.*

authority.<sup>320</sup>

Tocqueville then adds an observation that challenges, in an instructive way, our own notions of democracy: "In both colonies one ended up with the foundation of an entirely democratic society; but in Canada, at least as long as Canada remained French, equality was joined with absolute government; in the United States it was combined with freedom."<sup>321</sup> The passage concludes with this report: "And as for the material consequences of these two methods of colonization, we know that in 1763, the time of the English conquest of Canada, its population was 60,000, and the population of the English colonies 3 million."<sup>322</sup>

We can be reminded here of Tocqueville's insistence, two decades earlier in his *America* book, that the emergence of democracy or the ascendancy of the movement to equality, was virtually inevitable.<sup>323</sup> But we can also see, here in *The Old Regime*, that critical aspects of the democratic regimes thereupon established in various countries depend greatly on fundamental tendencies already long established (one way or another) among the peoples thus provided for. Particularly to be noticed is that democratic government, or the political enthronement of the principle of equality, does not mean (for Tocqueville) that the regime either will be grounded in or will promote freedom. Indeed, a democratic regime, expressive of egalitarian principles, can be in some circumstances what we (coming out of a liberty-minded tradition) would consider quite oppressive. Tocqueville anticipated by decades *The Old Regime* sentiments I have been discussing, having concluded *On Democracy in America* (as we have seen) with this thought:

The nations of our day cannot prevent conditions of equality from spreading in their midst. But it depends upon themselves whether equality is to lead to servitude or freedom, knowledge or barbarism, prosperity or wretchedness.<sup>324</sup>

## V.

The scientific student of regimes might be tempted to argue, in response to the use of such terms as "oppressive" and "barbarism," that the formal aspects of forms of government are all that can be reliably studied, that preferences for, say, freedom as against absolutism depend primarily, if not even solely, upon incalculable and hence unknowable temperamental and

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320. *Id.*

321. *Id.*

322. *Id.*

323. See *supra* text accompanying note 302.

324. TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 315, at 765.

other accidental differences among peoples.<sup>325</sup>

The underlying need here may be to determine the proper relations between, to use old-fashioned terms, *ends* and *means*. Does the absolutist, with his proneness toward centralization, look more to the ends, with everything marshaled to serve those ends? People thus dedicated to equality may ultimately look not simply to equality of opportunity but even more to equality of results, aiming at a general homogeneity.

On the other hand, do not the liberty-minded look more, often without knowing it, to the means and hence to the state of being, especially to the condition of one's soul? It is expected, among other things, that one should act humanely and sensibly, again to use old-fashioned terms. Humanity depends, in part, upon the means used in securing both personal and political ends. Should we not be reluctant, therefore, to permit something called either "policy" or "prudence" to be used to override routinely one's reluctance to be harsh in the measures resorted to from time to time? Care must be taken lest one's "realism" and even "rationalism" lead to callousness, if not also to cruelty.<sup>326</sup>

Invaluable guidance is provided here by Socrates, who recalls in Plato's *Apology* his defiance of the authorities of his day on two different occasions. On one occasion, he refused to do what the democratic forces in the assembly wanted him to do; on another occasion he refused to do what the oligarchic forces in the city (the Thirty Tyrants) wanted him to do.<sup>327</sup> In both cases he balked at cooperating in unseemly executions. In both cases, also, his innate decency and self-respect asserted itself, aside from (not necessarily in opposition to) calculations as to what the city needed. And in both cases he risked his own life by refusing to do what was demanded of him.<sup>328</sup>

325. On the guidance provided by nature in these and like matters, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303. See also *supra* Part 4 of this Article.

326. In his *Second Discourse* Jean-Jacques Rousseau criticizes the philosopher who, immersed in his books, can ignore the calls for help by a fellow creature being attacked in the street below his study window. See *infra* text accompanying note 330. Consider, for example, the opening paragraphs of a *Chicago Tribune* editorial, *Security and Liberty*, June 9, 2003, at 18:

In his testimony Thursday [June 5, 2003] before the House Judiciary Committee, Atty. Gen. John Ashcroft displayed poor timing and tone-deafness to rising concerns about whether the delicate balance between national security and liberty is tipping in the wrong direction.

Three days earlier, Ashcroft's own inspector general had released a 239-page report highly critical of the Justice Department for overreaching in the handling of hundreds of immigrants who were detained for weeks and months after the Sept. 11 terrorist attacks.

Ashcroft's response: He's asking for broader powers.

See *supra* note 296; *infra* note 369.

327. See PLATO, *APOLOGY* 32A-E.

328. On Plato's *Apology*, see ANASTAPLO, *HUMAN BEING AND CITIZEN*, *supra* note 4, at

A systematic failure to be concerned enough about the means employed by the authorities contributed to the worst atrocities in the Twentieth Century.<sup>329</sup> The elementary demands of humanity were deliberately suppressed on a large scale and for years at a time, with reluctant executioners being urged to disregard their natural instincts for compassion.<sup>330</sup>

## VI.

The oppressiveness that can be encountered here is not cured simply by a regime becoming “democratic.” The regimes of both Hitler and Stalin could be regarded as “democratic” in the sense that Tocqueville uses the term, a term which encompasses regimes that come out of and employ absolutism as well as regimes that come out of and employ freedom. Both of these regimes (with the Hitler approach culminating in the grotesque death camps and with the Stalin approach culminating in the ferocious Pol Pot regime in Cambodia) proclaimed that various distinctions among a people should be ruthlessly eliminated.<sup>331</sup>

It is significant that the term “democratic” was insisted upon for the names of the Communist regimes in Eastern Europe and in mainland China. The case for equality is, in principle, insisted upon when such nomenclature is used; the official doctrines of those regimes (and perhaps of Nazi Germany as well) depended upon a radical egalitarianism. This was not mere hypocrisy, however corrupt various men in authority became in implementing their high-minded doctrines so as to look out primarily for themselves and for their families.

Even with the corruption and cruelty of the Soviet regime, for example, it was evident that traditional privileges (especially those associated with either aristocratic or wealthy families) were systematically attacked, and educational and other opportunities were made available to vast numbers of peasants and workers who had long been little more than serfs—or, at least, this was widely believed for some time.

It can be expected, therefore, that the fundamental appeal of Marxism, perhaps under another name, will be revived in the decades ahead.<sup>332</sup> One consequence of modern technology is not only to make unprecedented

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329. See ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 99-100, 108.

330. See *supra* note 326; see also *John* 18:14.

331. On the Pol Pot regime, see ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 96, 171; *infra* text accompanying notes 344, 347. Consider in the light of such atrocities how “practical” an insistence upon “the good, the true, and the beautiful” can seem. See *infra* note 349.

332. Something of the Marxist appeal has been aroused by the disclosures in 2001-02 of remarkably blatant abuse of their shareholders’ and employees’ trust by the principal officers of several very large corporations in the United States. See also *supra* note 306.

prosperity and great fortunes possible but also to make it painfully apparent to everyone that there are great discrepancies in the distribution of the goods of a society. It is almost natural, in such circumstances, that the “haves” will arouse the envy of the “have nots,” especially if the “haves” act and even talk as if they do not owe much, if anything at all, to society for the wealth they both enjoy and are protected by society in possessing.<sup>333</sup>

When the equality movement is successful in circumstances where the temperament and habits of a people have been shaped by absolutism, the controls by government tend to be comprehensive. One can be reminded of an old joke: The agitator for change proclaims, “Come the Revolution, we will all have peaches and cream.” “But,” someone protests, “I don’t like peaches and cream.” To this the response is made, “Come the Revolution, we will all have peaches and cream—and *you* will like it!”

A democratic regime that comes out of a freedom-minded background, on the other hand, is likely to try to leave options for something other than “peaches and cream.”

## VII.

Unfortunately, a simple reliance upon a comprehensive liberty does not suffice to assure the decent and the humane. It should be remembered, for example, that the Preamble to the Constitution of the United States speaks of securing “the *Blessings* of Liberty.” This suggests that there may be consequences of exercises of liberty which are anything but blessings.<sup>334</sup>

An undue emphasis upon liberty can lead, in some instances, to mere lawlessness, with citizens coming to believe that no one is entitled to tell *them* how to behave. Abraham Lincoln’s first notable speech was in 1838, when he was not yet thirty. He dedicated that speech to promoting law-abidingness,

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333. See *supra* note 133. Still, the “have nots” of our day should be encouraged to appreciate what the more enterprising among us do contribute to the general welfare. Consider, for example, the introductory paragraph in a recent paper by D. Gale Johnson, *Population, Food, and Knowledge*:

People today have more adequate nutrition than ever before and acquire that nutrition at the lowest cost in all human history, while the world has more people than ever before—not by a little, but by a lot. This is an achievement that many have argued could not be realized. Throughout history there have been those who believed that food shortages and famine were the fate of humanity and that the world’s population was restricted not by human decisions on fertility but by limitations imposed by nature. Unfortunately for nearly all of human history and for the vast majority of the world’s people, this pessimism was justified. In the last two centuries, and especially in the twentieth century, all has changed to a remarkable degree. The twentieth century can be remembered as the century in which hunger could have been eliminated and, to a significant extent, has been.

90 AM. ECONOMIC REV. 1 (2000). This remarkable (anti-Malthusian?) statement was quoted by Chauncey D. Harris at a memorial service in Chicago for Mr. Johnson, June 7, 2003.

334. On the Preamble, see *supra* note 268.

attempting thereby to counter the growing lawlessness of his day.<sup>335</sup> That lawlessness culminated in a civil war when Secessionists claimed the liberty to repudiate the American dedication to the proposition that “all men are created equal.”

An apparently benign form of lawlessness may be seen in the current promotion of personal privacy among us. The emphasis here is not on defiance of law but rather on immunity from regulation by law—or by the community at large. Each of us is to be insulated, far more than was ever possible, from supervision by any authority, official or unofficial. This liberation extends to calling into question both the right and the ability of the community to insist upon distinguishing the good from the bad, except perhaps to protect people from physical violence and theft at the hands of others.<sup>336</sup>

Liberation of the individual is reinforced by a free-enterprise economy. This, too, tends to depreciate the opinions and authority of the community, with massive economic forces on a global scale coming to be regarded as almost a deity to which all must defer. A promotion of novelty and innovation is implicit in this development. This can mean, in effect, the rule of chance and history in human affairs—and hence anything but the continuing rule of that very systematized rationality which has made possible the astonishing development in technology, productivity, and world markets that we have seen, a development which both draws upon and reinforces the worldwide movement to equality.<sup>337</sup>

The dubious consequences sometimes associated with personal liberty and individualism can remind us of the serious reservations about democracy expressed in Plato’s *Republic*.<sup>338</sup> Indeed, liberty can take decentralization to an extreme; that is, it comes to be believed that the autonomous person is entitled to do virtually whatever he happens to please.<sup>339</sup> The supreme importance of the individual, of each soul looking out primarily for itself, may be grounded for us in Christianity. An ethereal self-centeredness is reflected in the refrain of the hymn, *In the Garden*. The hymn opens with this stanza:

I come to the garden alone,  
While the dew is still on the roses;  
And the voice I hear, falling on my ear;  
The Son of God discloses.<sup>340</sup>

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335. On this speech (the Lyceum Speech, *On the Perpetuation of Our Political Institutions*), see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 366 (Index).

336. The very meaning of “community” is thus radically reconsidered. See, e.g., ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 46, 74, 97.

337. See *supra* text accompanying note 121; see also *supra* note 333.

338. See PLATO, REPUBLIC, bks. VIII, IX.

339. On the soulless “self,” see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 87.

340. C. Austin Miles, *In the Garden*, in WORSHIP AND SERVICE HYMNAL (1912).



And here is the refrain:

And He walks with me, and He talks with me,  
And He tells me I am his own,  
And the joy we share as we tarry there,  
None other has ever known.<sup>341</sup>

These do not seem to be the sentiments of the citizen who selflessly identifies his interests with those of his community.<sup>342</sup>

### VIII.

Be that as it may, how is a truly humane spirit developed and protected, both in the human being and in the citizen body? The form of government may not be all that counts. Certainly, democracy, in its broadest scope, does not suffice to guarantee the existence of decent people and a humane way of life. There is a need to be reminded—to be continually reminded—of what the “good” looks like.

Art, philosophy, and sensible politics can provide useful instruction in goodness. A sound religious revelation can also provide this instruction, but that may be harder to come by, however much Providence rules our destinies.<sup>343</sup> It is well to remain aware of our personal mortality, which means

341. *Id.*

342. Consider, for example, the career of Junius Brutus and how he “had” to deal with two of his children. See ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 361.

343. On prophecy, see Anastaplo, *Law & Literature and the Bible*, *supra* note 222, at 521; Anastaplo, *Law & Literature and the Christian Heritage*, *supra* note 314, at 193-94, 228. Consider, also, this epilogue, that I prepared after a discussion at a Loyola University of Chicago School of Law Faculty Workshop on October 22, 2002, where I presented a paper, *Aeschylus’ Orestes, His Companion Pylades, and the Nature of Justice*:

One should avoid the temptation to discount any reliance upon Apollo, in such circumstances as confronted Orestes, because it happens to be obvious *to us* that Apollo never existed, etc.—unless one is prepared to argue as well that all revelations should be suspect. Of course, one might respond that the true revelation *should* be relied upon—but most people usually do not receive and accept even the true revelation upon any better ground than the Greeks received their principal stories about Apollo and his fellow-divinities.

Besides, there always remains the question, then as now, of who provides the appropriate interpretation of *the* revelation of one’s day. In any event, even Apollo’s directives may not *seem* sufficient to everyone, as may be seen in how the Furies persist in their deadly pursuit of Orestes despite Apollo’s emphatic endorsement of him.

The persistence of the Furies testifies to, at least, the enormity of matricide, which might not seem to matter much to the homicidal child (when ambition and revenge move one) if there is not an authoritative set of opinions about the divine to guide a community. It testifies as well to the importance for Orestes of Pylades’

(among other things) that neither social perfection nor earthly immortality is available to us. No form of government is likely to be immune indefinitely from delusion and corruption—and precautions should be taken against the consequences of such infections.

The democratic form of government must particularly concern us at this time, considering the centuries-long, world-wide movement toward the recognition of equality. The absolutism (or should we say, the extremism?) with which equality may be established and implemented can lead to monstrous measures.<sup>344</sup> A sensible people, accustomed to and shaped by sound politics, should be able to recognize the limits of the dogmatic “theories” that they are relying upon. Also in need of recognition are the inherent temperament and established habits of a people. Such recognition permits appropriate adjustments in whatever form of government happens to be in vogue at any particular time or place.

Implicit in much of what I have said on this occasion is the assumption (and perhaps our experience and reason permit us to believe it is more than an assumption) that nature, properly studied, can serve as a reliable guide in these matters. Nature teaches us, for example, that there is something to be said for each side in any enduring controversy. Nature also teaches us, therefore, that prudence calls for shifting one’s support from one side to the other in political alignments as circumstances change. Among other things, this can mean that absolutism as well as liberty may be needed on occasion, just as they are subject to abuse. One should keep in mind here both the fact that the divine is the model for absolutism and the fact that Socrates flourished for decades in a regime characterized by liberty.

## IX.

I have noticed, on this occasion, the risks of that questionable absolutism that some people may be “naturally” inclined toward. Such risks are very much in the calculations of those who resist centralization as an absolutist threat to liberty.

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support, inducing us perhaps to wonder about what the considerations are that a Pylades should himself take into account in the most “awkward” situations. . . .

Whatever Pylades is like in the tradition, and however he is used in the matricide-scene by other artists, Aeschylus does seem to present him in a way, with his lone dramatic intervention, which invites speculations about the respect that decent human beings should indeed exhibit when they venture to challenge the authoritative opinions of the community which has already nurtured their families for generations and upon which their families will thereafter rely for generations to come.

For the complete 2002 Aeschylus paper, see Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 4.

344. See *supra* text accompanying note 331.

But the refusal, almost on principle, to permit any centralization can eventually be destructive of a productive liberty, especially if it is believed that the community at large is thereby prevented from dealing adequately with massive problems that simply will not “go away” and that cannot be addressed effectively at the local level. The usefulness of centralization, especially in the service of self-defense and nationwide efficiency in response to an unprecedented globalization, can become apparent to conscientious citizens who are not limited in their deliberations by the constitutional dogmas of their day.<sup>345</sup>

This is not to deny that constitutional arrangements can be helpful here. The threatening aspects of any necessary centralization can be moderated among us by a substantial “separation of powers,” not least by that separation of powers inherent in a bicameral legislature, and even more so when one chamber of that legislature is dependent on local constituents. An additional source of moderation for us in these matters is our Electoral College arrangement (rather than a nationwide popular vote) for the election of Presidents. That arrangement, which seems to many to subvert the “democratic” principle, helps keep useful local differences more significant than they might otherwise be, thereby placing a brake on mindless centralization and perhaps upon demagoguery.<sup>346</sup>

I notice in passing that Tocqueville’s grasp of American constitutionalism may be somewhat faulty. This may be symptomatic of his limitations as an observer of the United States. In the final analysis, however, institutional arrangements—whether grounded ultimately in absolutism or grounded ultimately in liberty—must take second place to the character and judgment of citizens. Here, as elsewhere, the good that is reflected in enduring moral standards must somehow be grasped. It is that good that judgment takes into account in weighing alternatives in ever-changing circumstances, even as it recognizes that “not all is permitted” even in good causes.<sup>347</sup>

It is such judgment that Tocqueville himself brings to bear upon the various situations that he examines, suggesting as he does the course that we moderns should chart. In doing so, he would have us distinguish between principles and doctrines, especially when fashionable doctrines urge us to disregard the venerable principled promptings of humanity, including that form of humanity seen in a disciplined effort to understand the highest things.

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345. See *supra* text accompanying notes 279, 309.

346. On the Electoral College, see *supra* note 136. It was a curious aspect of the year 2000 political campaign that the Presidential candidates of both of our major political parties could blithely talk about ever more intensive regulation by the National Government of what goes on in the thousands of local school districts in this country.

347. See TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 315, at 292; see also *supra* note 331.

## EPILOGUE

There can be, depending upon the long-established temperament of a people, salutary limits placed on political dogmas and social movements by the circumstances of a community. I began my comments on Tocqueville's work by recalling a train trip from Le Havre to Paris several decades ago. I return, in closing, to another visit to Paris and to a lesson taught us on that occasion:

Some [fifty] years ago we rented an apartment in Paris. In the course of things—one is tempted to say, “in the natural course of things”—we came to need a plumber. Our landlord, a successful businessman who had recently purchased and remodeled our building, instructed me to make the necessary arrangements with the plumbing shop in our neighborhood, which I did. I reported to my wife, after leaving the shop, that the proprietor—a short, fat man in his seventies—had positively glowered at me when I gave him our address, “12, rue Pierre Mille.” She blamed the man's reaction on my poor French.

A plumber did come from the shop but, unfortunately, he was not sober enough to be entrusted with the serious operation that he wanted *us* to take the responsibility for. (Our consent was sought and denied as he poised a sledgehammer over the offending porcelain fixture.) A second plumber had to be sent a day or two later. Thereafter, the plumbing shop charged for two calls. Our landlord and the proprietor had to settle accounts between them—out of which heated negotiations came the proprietor's angry declaration, “When I heard ‘12, rue Pierre Mille,’ I knew there would be trouble.” Only then did we learn that the last time that that proprietor had sent a plumber to our address there had also been an argument about the bill. That, it turned out, had been a few years before the *First World War*, more than a decade before I was even born—and here I was, in my middle twenties, several years after the *Second World War*.<sup>348</sup>

This proved for us a most useful lesson in the French, perhaps the European, way of life. Indeed, perhaps, this can remind us of limits upon the malleability of human communities once Providence or History has done the decisive shaping of them. Such shaping, if it should happen to be somewhat respectful of nature, can help those among us who are privileged to resist that decline to barbarism which ill-conceived doctrines can sometimes seem to require and even to legitimate.

It is here that the partisan of egalitarianism should welcome guidance by the truly aristocratic—that is, by *the very best* to which both human beings and citizens aspire and are surely somehow capable of.<sup>349</sup>

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348. ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 17-18

349. The very best should be able to deal properly with the tension between “the noble” and “the just.” On that tension, see ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 182. See also *supra* note 331.

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The moderate natures look for a partner like themselves, and so far as they can, they choose their wives from women of this quiet type. When they have daughters to bestow in marriage, once again they look for this type of character in the prospective husband. The courageous class does just the same thing and looks for others of the same type. All this goes on, though both types should be doing exactly the opposite. . . . Because if a courageous character is reproduced for many generations without any admixture of the moderate type, the natural course of development is that at first it becomes superlatively powerful but in the end it breaks out into sheer fury and madness. . . . But the character which is too full of modest reticence and untinged by valour and audacity, if reproduced after its kind for many generations, becomes too dull to respond to the challenges of life and in the end becomes quite incapable of acting at all.

The Elean Stranger<sup>351</sup>

## I.

A proper celebration of St. George's Day, as our Constitutional Law course draws to its end, should include a forthright confrontation of the Dragons that prowl in this field.<sup>352</sup> These Dragons include both illusions about what "really happens" and obstacles to a sensible grasp of things.

One needs a reliable view of the law to be effective in one's forays. Also needed is instruction in how one should prepare and conduct oneself, not only with respect to constitutional law but also with respect to the law generally.<sup>353</sup>

I have several times counseled the reading of complete cases (as well as complete documents, both constitutional and statutory). One should not be confident in one's reading of any part of the thing studied unless one has an informed sense of the whole in which that part is to be found. The folly of excessive reliance in law schools upon casebooks, with their snippets of opinions, should be evident to anyone who is familiar with how the facts, arguments, and counter-arguments are developed in the opinions in a case. Matters are likely to be made worse because of the growing use of the Internet to locate ever more snippets, often undocumented, which seem to illuminate

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350. A talk given at the Loyola University of Chicago School of Law, Chicago, Illinois, April 23, 2001. The original title of this talk was *Statesmanship and Constitutional Law: On the Dragons of Our Day*.

351. PLATO, STATESMAN 310C-E; see ARISTOTLE, RHETORIC 1390b25-31; see also *supra* text accompanying note 6.

352. On St. George and his Dragon, see George Anastaplo, *Law, Education, and Legal Education: Explorations*, 37 BRANDEIS L.J. 585, 744 (1998) [hereinafter Anastaplo, *Law, Education, and Legal Education*].

353. See, e.g., George Anastaplo, *Lawyers, First Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. U. L. REV. 353 (1999).

the issues in which one is interested.<sup>354</sup>

Related to this is the need to identify and to study properly the fundamental documents of the regime. Of course, the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the Constitution of 1787 with its Amendments are essential.<sup>355</sup> Also important are key English documents, such as Magna Carta and the English Bill of Rights.<sup>356</sup> It should not need to be said that our entire way of life continues to be grounded in lessons taught by Shakespeare and the Bible, a thorough knowledge of which can be invaluable for the lawyer.<sup>357</sup>

## II.

How should we understand the constitutional law that we have been studying? I have argued again and again that it is virtually impossible to separate the political from the legal when the great issues of one's day are to be resolved.<sup>358</sup>

This means, among other things, that constitutional adjudications by courts, except perhaps when individual rights of citizens (usually in criminal proceedings) are invoked, tend to be dubious. Great debates about the major powers of the National Government are not usually suitable for courts to pass judgment.

Legislatures do not need to distinguish, as courts are said to do, between the political and the legal. Nor should legislators be encouraged to rely upon judges to tell them whether they have constitutional authority for what they do. Rather, legislators should be taught that they, too, are obliged to take the Constitution into account when they act, especially since much, if not most of the things legislators do are not subject to effective judicial scrutiny.<sup>359</sup>

What courts can be good at is not what they have claimed for themselves through *Marbury v. Madison*,<sup>360</sup> but rather what they have given up from

354. On the scope and limitations of the Internet, see Anastaplo, *Legal Education, Economics, and Law School Governance*, *supra* note 121, at 219. See also *supra* text accompanying notes 119, 135.

355. On the Organic Laws of the United States, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 9, at 267 n.14 (which draws on the work of Richard Cox).

356. See, e.g., George Anastaplo, *Individualism, Professional Ethics, and the Sense of Community: From Runnymede to a London Telephone Booth*, 28 LOY. U. CHI. L.J. 285, 286 (1996); Anastaplo, *On Freedom*, *supra* note 104, at 481; *supra* text accompanying notes 77, 92.

357. See, e.g., George Anastaplo, *Law & Literature and Shakespeare: Explorations*, 26 OKLA. CITY U. L. REV. 1 (2001); Anastaplo, *Law & Literature and the Bible*, *supra* note 222.

358. This has recently been seen most dramatically in the case of *Bush v. Gore*, 531 U.S. 98 (2000). See, e.g., *supra* note 44.

359. On judicial review, see *supra* note 41.

360. 5 U.S. (1 Cranch) 137 (1803); see *supra* text accompanying notes 62-63, 299.

themselves in *Erie Railroad Company v. Tompkins*.<sup>361</sup>

### III.

The deeper issues here extend beyond questions about the propriety and effectiveness of judicial review. They are issues that oblige us to consider the very nature of government.

It can be instructive to consider from time to time the guidance provided by such texts as Plato's *Statesman*, a dialogue in which the nature of statesmanship is examined. There can be said to be here a somewhat technical and far less interesting, yet still instructive, version of what may be found in a much more familiar dialogue, Plato's *Republic*.<sup>362</sup>

The technicalities in the *Statesman* include a series of divisions and subdivisions designed to separate out the art of the statesman from all the other arts on which human beings depend. The first extended series of divisions assumes that statesmanship is a kind of herding, and so the question becomes precisely what kind of herding is involved.<sup>363</sup> The final extended series of divisions assumes that statesmanship is a kind of weaving, and so the question becomes precisely what kind of weaving is involved.<sup>364</sup>

Each of these divisions and subdivisions contains something forced, if not even perverse, but yet instructive (as well as somewhat comical). The interconnectedness of all things may be seen here, something which is developed elsewhere in the Platonic dialogues.<sup>365</sup>

### IV.

The "herding" that is investigated is something we can accept as relevant to political life, at least to a limited extent. This herding may be what we know as the police power. The "animals in the herd"—that is, the people in the community—should be protected and they can well be provided services that contribute to their comfort and efficiency, services such as traffic control and public utilities. Such services permit people to live together and to do much of what they want to do.

On the other hand, the "weaving" that is investigated is much more of a problem for us, especially if it includes the shaping of the character and expectations of people so that they can work together with a view to the common good, as well as to their own interest.

Particularly challenging, if not even troublesome, for us is the following inquiry: What is the character that is needed for a regime such as ours, and

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361. 304 U.S. 64 (1938); see also *supra* text accompanying note 66; *supra* notes 211, 241.

362. On Plato, see ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 279.

363. See PLATO, *STATESMAN* 261D *et seq.*

364. See PLATO, *STATESMAN* 279A *et seq.*

365. See, e.g., PLATO, *MENO* 81B-D.

what needs to be done to the community to secure it? We are reluctant to ask such questions today, which may be seen in what incipient libertarians have tried to do both with the Speech and Press Clauses in the First Amendment and with the Takings Clause of the Fifth Amendment.<sup>366</sup>

Thus, the First Amendment now tends to be read as primarily a defense of a virtually unlimited "freedom of expression" rather than as protection for the political discourse needed for effective self-government.<sup>367</sup> The Takings Clause is beginning to be read as protecting one's assets against any governmental measures which diminish their value, almost as if it is forgotten that most property depends on government, and that government may have to change its policies from time to time.<sup>368</sup>

It is not generally appreciated, by the libertarian advocates here, how much of a departure from our long-established constitutional principles their approach to these matters represents.

## V.

The question of whether the Country has become far too large for its institutions bears upon these developments. About four million people lived in this country when its institutions were given the form that they more or less have today. But we now have almost a third of a billion people.

We can wonder what holds us all together to the extent that we are united. Many subordinate associations in the country, some of them larger than the total population of the country in 1776, provide the guidance that multitudes rely upon. Most of those associations are still, by and large, fairly patriotic.

In addition, the economic system itself, which is reinforced by "globalization," promotes efficiency and, hence, discipline. But it also promotes considerable personal autonomy, which can deteriorate into irresponsibility. It promotes as well a sense of personal vulnerability, which can at times be so distressing as to threaten political stability.<sup>369</sup>

## VI.

Citizens of the United States generally respect the rule of law, partly perhaps because of what it means for the security of property. One can

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366. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922); see also Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at Part 2.

367. On "freedom of speech," see ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 93.

368. On property, see *id.* at 213.

369. We have seen this in the sometimes exaggerated, or at least misdirected, responses in the United States to the treacherous assaults of September 11, 2001. See, e.g., Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, *supra* note 44, at 106 n.21, 107 n.26, 118 n.63; *supra* note 295; see also *supra* notes 296, 326.



wonder, however, what developments such as the growing disregard for traffic regulations portend. A minor illustration of this, which is particularly aggravating for me as a cyclist, is the growing recourse by bicyclists to riding sidewalks when there are pedestrians present, a rather uncivilized form of self-expression. It seems that they feel safer there than out in traffic—but at least they know enough, while on the streets, to watch out for automobiles, while pedestrians cannot be expected to be on the watch for cyclists.<sup>370</sup>

The rule of law is recognized, in Plato's *Statesman*, as second-best. Even so, it is also recognized that for such rule to be as good as it can be depends on the character of a people.<sup>371</sup> This becomes evident when attempts are made to export to other countries the institutions that we are accustomed to—and which we continue to be fairly adept in using.

Much of our reliance on the rule of law takes place in the political arena, not in the judicial arena (although it is obviously of importance there also). It is usually better to have controversial social issues resolved politically rather than judicially—issues such as what to do about abortion, about school financing, about race relations, and about whether war should be entered into.<sup>372</sup> A political resolution tends to have enough give-and-take involved to provide something for everybody, including the sense that one has played a part in determining what is to happen in the community at large.<sup>373</sup>

## VII.

It is difficult to ignore completely the powers and obligations of the community in shaping the character of the people who will respect the rule of law and who will make more or less sensible use of the institutions they have inherited.

The best contribution that courts can make to maintaining and refining the character of a people is through the adjudication of common-law cases and in the application of statutes. Courts make moral judgments both in common-law adjudications and in the interpretation of statutes. Standards of right and wrong, of the good and the bad, are naturally brought to bear upon the resolution of particular controversies, more reliably so than when courts decide “constitutional” issues—for it is difficult for judges to do so without leaving observers suspicious that they have dressed up their political preferences in constitutional garb.<sup>374</sup>

One more lesson can be drawn from all this, which should be of use to you as practitioners: we continue to enjoy a regime that produces judges who,

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370. See Anastaplo, *Prudence and the Constitution*, *supra* note 133, at 216 n.53.

371. See, e.g., *supra* Part 5 of this Article.

372. This means, among other things, that Congress should both insist upon its prerogatives and face up to its duties.

373. See, e.g., *supra* text accompanying note 45.

374. See *supra* note 44.

by and large, would much prefer, in the typical case, to do justice when it can be shown how that might be done in plausible conformity with the apparently controlling rule on that occasion.<sup>375</sup>

### 13. ON BEING AN OPPOTUNIST<sup>376</sup>

As for Socrates, I have no knowledge of his words, but of old . . . I have had experience of his deeds, and his deeds show that he is entitled to noble sentiments and complete freedom of speech. And if his words accord [with his deeds], then I am of one mind with him, and shall be delighted to be interrogated by a man such as he is, and shall not be annoyed at having to learn of him, for I agree with Solon, "that I would fain grow old, learning many things."

Laches<sup>377</sup>

#### I.

Seventy-five years ago this week I was born in St. Louis, Missouri. This has been commented on at a birthday party mounted a few days ago by my Basic Program alumni class. We did not anticipate then that my birthday would be made so memorable this year by the way that the Presidential election, held that very day, happened to turn out.<sup>378</sup>

However important November 7 may be, there is in some ways an even more significant date: November 10. Fifty years ago today, three days after my twenty-fifth birthday, I first ran afoul of the Committee on Character and Fitness for the Illinois Bar, down at the Chicago Bar Association headquarters at 29 South LaSalle Street. This was, in some ways, a chance event, or rather a perhaps predictable response by me to a chance challenge. However it is understood, this represented for me a new birth, which led to profound changes in my life. That is, I was directed to a career quite different from what seemed to follow from my military service and my schooling up to that point.

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375. One can see, in the propaganda speeches crafted by Joseph Goebbels, how even the most ruthlessly evil leaders of the German Nazi Party had to appeal to justice as commonly understood. See, e.g., Goebbel's Sportpalast Speech of February 18, 1943; see also Anastaplo, *On Trial*, *supra* note 110, at 977; *supra* note 191.

376. A talk given at a seventy-fifth birthday celebration organized by the Staff of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, November 10, 2000. The original title of this talk was *On Being an Opportunist: Thoughts at Seventy-five*.

377. PLATO, LACHES 188E-189A.

378. On that election and its outcome, see Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, *supra* note 44, at 101; Anastaplo, *Prudence and the Constitution*, *supra* note 133, at 181.

It can be argued, of course, that if it had not been this, then something else would have led me into an unconventional course. But things *had* been more or less conventional for me up to that point.<sup>379</sup>

## II.

The immediate consequences of my November 10th encounter with the Character and Fitness Committee were the derailment of a legal career, the substantial prolongation of my formal education, and, of course, a decade of litigation.<sup>380</sup>

The case began in November 1950 and continued into 1961, when the United States Supreme Court finally disposed of my appeal, a disposition which included a magnificent dissenting opinion by Justice Hugo L. Black, part of which he later directed to be read at his funeral.<sup>381</sup> I notice in passing that two of our children, who were in college out East at the time, were in the congregation at that funeral in the Washington National Cathedral.

This decade of litigation permitted a steady refinement of my position. If I had not had the opportunity to work and rework what I meant and why, my position would have seemed far more "ideological" than it was. The entire

379. That there might have been "something else" is suggested by this recapitulation of my career by C. Herman Pritchett, a former President of the American Political Science Association:

On 24 April 1961 the Supreme Court of the United States, by a vote of five to four, affirmed the action of the Illinois Supreme Court which, by a vote of four to three, had upheld the decision of the Committee on Character and Fitness of the Illinois bar which, by a vote of eleven to six, had decided that George Anastaplo was unfit for admission to the Illinois bar. This was not Anastaplo's only such experience with power structures. In 1960 he was expelled from Soviet Russia for protesting harassment of another American, and in 1970 from the Greece of the Colonels. As W. C. Fields might have said, any man who is kicked out of Russia, Greece, and the Illinois bar can't be all bad.

C. Herman Pritchett, *Review of George Anastaplo, The Constitutionalist: Notes on the First Amendment*, in *LAW AND PHILOSOPHY*, *supra* note 7, at 539; *see infra* note 387; *infra* text accompanying note 391.

380. *See, e.g.*, ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 2, at 331; George Anastaplo, *What Is Still Wrong with George Anastaplo? A Sequel to 366 U.S. 82 (1961)*, 35 *DEPAUL L. REV.* 551 (1986) [hereinafter Anastaplo, *What is Still Wrong with George Anastaplo?*].

381. That was in 1971. Justice Black's selection was the closing passage of his dissent in *In re Anastaplo*, 366 U.S. 82 (1961). *See also* Irving Dilliard, *Mr. Justice Black and In re Anastaplo*, in *LAW AND PHILOSOPHY*, *supra* note 7, at 478-79; HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 570-74, 673 (1988); Harry Kalven, Jr., *Wondrous Complexity: The Bar Admission Cases*, in *LAW AND PHILOSOPHY*, *supra* note 7, at 413; ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 503-07 (1994); George Anastaplo, *Mr. Justice Black, His Generous Common Sense and the Bar Admission Cases*, 9 *SW. U. L. REV.* 977 (1977).

matter thereby assumed a form with which I could easily live thereafter, a form which no organized group found fully attractive.<sup>382</sup>

Perhaps the most sensible decision I made in that matter was to drop all efforts on my part to secure admission to the bar after 1961. Nor did I encourage others to act on my behalf, although friendly organizations have done so from time to time, including the Committee on Character and Fitness itself when a brother of Justice John Paul Stevens became its chairman.<sup>383</sup> But those well-meaning efforts have not been enough to persuade the Illinois Supreme Court to admit me to the bar, the difficulty now being (in the Court's view) my refusal to renew my application.<sup>384</sup>

After a while, such a contest as the one in which I found myself can take on the aura of inevitability, so much as to make one appreciate the Oedipus

382. See, e.g., George Anastaplo's Petition for Rehearing, *In re Anastaplo*, 361 U.S. 82 (1961). This petition was drawn upon by John A. Murley, *In re George Anastaplo*, in LEO STRAUSS, THE STRAUSSIANS, AND THE AMERICAN REGIME 159, 177-79 (Kenneth L. Deutsch & John A. Murley eds., 1999).

383. I made the following remarks, *Richard James Stevens (1915-2001)*, on the occasion of a talk I gave in the First Friday Lecture Series of the University of Chicago at the Chicago Cultural Center on December 7, 2001:

I hold up for emulation, in my talk today about William Shakespeare's *King Lear*, the faithful son of the Earl of Gloucester. That much-imposed-upon son displays what it can mean to be both highminded and practical in the everyday affairs of the world. It seems to me fitting, therefore, to dedicate this talk to the memory of a distinguished Chicago attorney, American civil libertarian, and fellow Hyde Parker, Richard James Stevens, who died on September 29. The somewhat philosophic hero in *King Lear* could well have served as a model for this distinguished lawyer's career.

Mr. Stevens (a devoted son of the University of Chicago) was cheerful and modest, yet properly confident about his capabilities (which included, besides lawyering, bridge-playing and choral singing). He was determined, again and again, to see that the right thing be done and (whenever possible) that the wrong thing be undone, in the community that he considered himself privileged to serve. It is a community which continues to be graced by the celebrated Stevens Hotel for which his family had originally been responsible.

Not only was Mr. Stevens able and willing to be helpful when applied to, but he could also be troubled by longstanding inequities which he believed could and therefore should be addressed by him on his own motion. That is, he could be deeply disturbed by what he took to be blatant injustice, but not in such a way as to produce in him either blinding indignation or a sense of helplessness. Just because one could not do everything, this forthright man seemed to say again and again, one should not be discouraged from doing something—and in this resolution he, as a man of good will, was very much our genial mentor.

For a sampling of Richard James Stevens's public service, see Anastaplo, *What Is Still Wrong with George Anastaplo?*, *supra* note 380, at 611-23.

384. See, e.g., Anastaplo, "McCarthyism," *the Cold War, and Their Aftermath*, *supra* note 72, at 125; Anastaplo, *Legal Education, Economics, and Law School Governance*, *supra* note 121, at 295.

story better than one might otherwise have.<sup>385</sup> Happily, my story is far less momentous and far less grim, and so I can continue to see, and continue to want to see, what is going on all around me.

### III.

I must confess to having been, in this matter, an *opportunist*, taking advantage of what Machiavelli called an *occasione*, one which proved decisive.<sup>386</sup> Others around me, including in my law school class, chanced to have similar *occasioni* of which they were not able to take advantage. And, as a poet has observed, "that made all the difference."<sup>387</sup>

But then, I have been an opportunist all my life. Thus, I was able to take advantage of the Second World War, which proved for me a wonderfully liberating experience. Related to this was the opportunism reflected in my response upon encountering a particularly engaging, eventually captivating, college student in Austin, Texas.

Thereafter, of course, were the opportunities provided by the University of Chicago during my years as a student and my decades in the Basic Program.<sup>388</sup> Thus, I never refuse invitations to give staff briefings or to deliver lectures, no matter what the subject. Invariably these are matters that I should investigate and think about.<sup>389</sup>

In recent years, I have had the opportunity to resist the demands of *political correctness*, especially in academic life.<sup>390</sup> This follows the resistance I was privileged to express in 1960 against the Soviet regime in Russia and in 1970 against the Colonels' regime in Greece.<sup>391</sup>

It is inevitable, therefore, that I should now take advantage of the opportunity provided me by this *occasione*, an opportunity to bring my autobiographical sketches up-to-date.

385. See, e.g., ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 119.

386. On Machiavelli, see *supra* Part I of this Article. See also Anastaplo, *Law, Education, and Legal Education*, *supra* note 352, at 636.

387. In *The Prince*, Machiavelli speaks of the "conquest of fortune." To what extent, one might wonder, does one "make one's breaks"? See *supra* note 379.

388. See, e.g., Maurice F. X. Donohue, *Making a Living, Making a Life*, in LAW AND PHILOSOPHY, *supra* note 7, at 597.

389. For the Basic Program reading list, see ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 284.

390. See George Anastaplo, "Racism," *Political Correctness, and Constitutional Law: A Law School Case Study*, 42 S.D. L. REV. 108 (1997); Anastaplo, "McCarthyism," *the Cold War, and Their Aftermath*, *supra* note 72, at 103; Anastaplo, *Legal Education, Economics, and Law School Governance*, *supra* note 121, at 103, 300-01.

391. See *supra* note 379.

## IV.

It is salutary to emphasize at this time that one should *see fully* whatever one happens to encounter from time to time.<sup>392</sup>

Among the things one should notice in the light provided by my anniversaries this week is the remarkable fact that I have been alive for one-third of the life of the United States, counting from 1776. That one's country is so young points to how different it is, in critical respects, from most of the nations on this earth. This bears upon the status among us of myths and legends, most of which we must import since we are bound by knowable history from the earliest days of the Country. This may be related to the continuing vitality (as well as the sometimes troubling volatility) of the United States.<sup>393</sup>

One should also notice, of course, the texts we read, year after year, in the Basic Program. The texts we read, and the way we read them, are both rejuvenating and maturing. They encourage us to *see* what is going on all around us and within us—to see these things and to think about them, and then *really* to see them.

Fellow-travelers along this road are very much needed; most of us, if not all of us, need to check with others whatever we discover from time to time, as well as to build upon what others have discovered. One may even get the sense, from participation in such a common endeavor, that one is associating oneself with something that goes on forever. In short, these texts help do for us what the questioning Socrates did for those who encountered him.<sup>394</sup>

## V.

A caution is in order here, however confident one's sense of vitality may happen to be. One's mortality does place limitations on one's existence as a thinking being.

Mortality means, among other things, that chance occurrences can be critical, if not decisive, in what one learns and how. Thus, the languages one is fluent in may affect precisely how one understands things, if not even what things one undertakes to understand. One's experiences with fatigue, from very early on, warn one that the quality and reliability of one's grasp of things may be seriously affected, if not even marred, by a debilitating illness or by the seeping away of one's energy.<sup>395</sup>

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392. See George Anastaplo, *The Forms of Our Knowing: A Somewhat Socratic Introduction*, in JACQUES MARITAIN AND THE MANY WAYS OF KNOWING I (Douglas A. Ollivant ed., 2002); see also *supra* note 31.

393. See, e.g., Anastaplo, *The O.J. Simpson Case Revisited*, *supra* note 290, at 463.

394. See, e.g., PLATO, MENO 81D-E.

395. A dramatic reminder of one's mortality may also have this effect. This may be seen perhaps in how Americans have generally responded to the assaults of September 11, 2001. See

I do not yet feel physically vulnerable. That is, I have been blessed with good health ever since I almost died of diphtheria as a child. Once I recovered from that disease, I have never missed a class either as student or as teacher because of illness. Obviously, this “streak” is hardly likely to extend much longer.

I have come to believe that no matter how long one lives and remains in good health, there is probably a limit to what one is apt to learn. One is usually limited to that seeing and understanding which is keyed to how one happens to have been shaped. My study of non-Western texts and movements over several years has suggested that however carefully we work at this, only a limited (perhaps somewhat unreliable) grasp of such things is possible by us.<sup>396</sup> There are things drawn upon in such texts and movements which are not only not in our languages but also not “in our bones.”<sup>397</sup>

Furthermore, I find myself rediscovering things previously learned—and things forgotten. I can thus discover “nice things” in a text which I find, upon consulting another copy of the text that I marked up years before, that I had discovered and enjoyed before. Should this keep one young in spirit—and is that good? I hasten to add that forgetting need not be a function of *age*, but rather of *time* (which is not the same thing). After all, one did forget many things when one was young as is revealed in exams taken on materials studied as a youngster the day before.

The fact that one does learn makes it likely that one will forget; learning is a process of change, and because one is constantly changing, it is likely that forgetting is part of that natural process. Another way of putting this is to say that change does not stop; the process of learning and forgetting can and perhaps should go both ways.<sup>398</sup> It can be instructive to discover this, to reflect upon its significance, and not to forget it.

The phenomena I have described—learning and forgetting—are not new for me. They are, I have argued, not the consequences, at least for me, simply of old age.

In fact, I have yet to *feel* my age. I do not regard myself as increasingly aged, even though more and more people obviously so regard me—and to which the celebration, graciously hosted by Joel and Nancy Rich testifies.<sup>399</sup> Nor do I have a feel for any debilitating illness or any accident of a serious

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*supra* note 309.

396. See ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at xv.

397. Those things that do *happen* to be in our languages and in our bones are likely to have for us the “feel” of the natural. Even so, we seem to need the help of conventions-heavy languages in order to reason our way beyond conventions and accidents to the natural.

398. Some things—such as the errors one has happened to accumulate—may have to be discarded if genuine learning is to take place. The things to be discarded (often as prudently as possible) may include opinions cherished by one’s associates.

399. Mr. and Mrs. Rich operate a website that includes materials of interest to those associated with the Basic Program of Liberal Education for Adults of The University of Chicago. The address of this website is [www.cygneis.com](http://www.cygneis.com).

character. Even headaches have become rare in recent decades (and hyperventilating, I have learned, is quite good when a headache threatens). Nor do I personally remember my bout with near-fatal diphtheria, although it may be that my body somehow remembers it.

There is, of course, something desirable in not feeling old, so much so that some people make great efforts not to appear to be old. Even so, not-feeling-old, when one is up in years, may mean that one is not learning what one could, and perhaps should, learn. That is, one may not, in such circumstances, truly know oneself.

## VII.

I have already shared with you one lesson of an advanced age: one discovers that one may, unawares, learn the same things again and again.

An advanced age can also affect one's judgment, including one's moral judgment. One can especially come to appreciate what *can* be said for "the other side" in any continuing controversy. It is rare for the sane human being to be without *any* defensible grounding for a position taken.<sup>400</sup>

Related to these observations is the fact that an advanced age can permit one to *see*, from "the outside," the things in which one was involved long ago. When I glance back at the bar admission matter which began fifty years ago today, I find ever more questionable the conduct of those all around me (except for my family, a few friends, and a few teachers)—the conduct of those who acted as they did in the 1950s.

After all, they were destroying, or at least permitting the destruction of, the career of a rash young man, who was still an officer in the Air Force Reserve, with a wife and child and no financial reserves, and with a very good record. The conduct of the Character Committee (and then of the courts) was bad enough; but even worse, perhaps, was the conduct of those in my law school and elsewhere, who really knew me and should have known better than to allow all this to happen as it did. These were people of considerable influence who could probably have, with relatively little risk to themselves, stopped what the Character Committee was doing.<sup>401</sup>

Such people, who were really good people at heart but who were intimidated by the political tone of the day, had *their* chance to rise to the occasion—and they simply failed. The shamelessness they exhibited was far too general to make them personally blameworthy.<sup>402</sup>

It is sad to recognize that people with noteworthy talents and aspirations simply could not recognize and do what was called for by the situation they

400. See, e.g., the opening lines of Aristotle's *Nicomachean Ethics* and *Politics*.

401. See, e.g., Anastaplo, *Legal Education, Economics, and Law School Governance*, *supra* note 121, at 304.

402. See, e.g., Anastaplo, "McCarthyism," *the Cold War, and Their Aftermath*, *supra* note 72, at 108, 118.



confronted, something that some of them did come to regret over the years. The worse they conducted themselves, the better I came to seem. Certainly, they did not foresee that the Character Committee may really have been doing me a favor. All this is not to deny that I have been treated generously by faculty members here and there in the University of Chicago. For instance, David Bevington, who is here this evening, was instrumental in having the University of Chicago Archives solicit my papers. My wife, for one, was delighted to see a van-load of those papers (the first of many such loads, she hopes) removed from our attic.

### VIII.

I had occasion last Sunday, in the course of a lecture on Tocqueville's discourses on modern democracy, to argue that attachments to forms of government should be moderated by the demands of decency and a sense of proportion.<sup>403</sup> One should not permit "ideology" to suppress the demands of humanity, even as one attempts to be rigorous in one's thinking. All this bears upon an assessment of the systematic atrocities witnessed in the Twentieth Century.

It is decency, no doubt, that tends to make people tolerant of the elderly. Perhaps this has contributed to my becoming more respectable in recent decades.<sup>404</sup> Respectability can take the form of one telephone call after another, the last few days, from newspapers all over the country, asking for guidance and opinions with respect to the current Presidential standoff.<sup>405</sup>

I am reminded of the days when the Colonels tried to run Greek affairs. In those days, the calls came in from across the Atlantic as well. It was believed that I knew something about what was going on in Greece, at least enough to have been declared *persona non grata*.<sup>406</sup>

I am also reminded of the Bicentennial Years of 1976 and 1987. Those were the years when anybody with a reputation in constitutional studies was much in demand. There was one period, for example, when I made repeated trips to the East and West coasts, moving across the continent several times in one month.

The current political controversy [I could say on November 10, 2000] elicited one of my Letters to the Editor, which I will be passing out with the party favors previously prepared for this occasion, copies of the birthday talks

403. On Tocqueville, see *supra* Part 11 of this Article.

404. See, e.g., Cornelia Grumman, *The Wrong Question*, CHI. TRIB. MAG., Nov. 26, 2000, sc. 10, at 14; see also *Letters to the Editor*, CHI. TRIB. MAG. (in subsequent issues).

405. On that standoff, see Anastaplo, *Prudence and the Constitution*, *supra* note 133, at 184; Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, *supra* note 44, at 102.

406. See ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 3; ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 501; *supra* note 379. See also my contribution to the article on modern Greece in the current edition of the *Encyclopedia Britannica*.

I have given on other occasions, talks prompted by my desire to figure out what is really going on.<sup>407</sup> This most recent Letter to the Editor, suggesting a resort to the drawing of lots to resolve the current Presidential Election difficulty, is designed to encourage looking beyond personal ambition and ordinary party politics.<sup>408</sup>

I have been moved, by a recent visit to my barber, to wonder whether there was anything truly distinctive to my career. The stimulus here was an article in *Sports Illustrated* (read in the barber shop) about the greatest records in sports history, records which (it was said) would never be surpassed:

1. Wilt Chamberlain's 100 points in a game (1962) . . . .
2. Joe DiMaggio's 56-game hitting streak (1941) . . . .
3. Wayne Gretzky's 2,857 career points (1979-99) . . . .
4. Rickey Henderson's 1,370 career steals (1979-present) . . . .
5. Byron Nelson's 11 straight PGA Tour victories (1945) . . . .<sup>409</sup>

I digress by noticing that immediately after my visit to my barber I went to a Physics Colloquium during which it was recognized that it is "obvious" to all of us that there are only four dimensions (three spatial and one temporal), and that each is infinite in extent.<sup>410</sup> But, it was argued, the prevailing theories in physics today make sense only if there are at least ten dimensions. Indeed, it was said that "in all likelihood they exist," even though it was also said that we may never be able to discover and confirm extra dimensions.

I was puzzled by how one could say that "in all likelihood" things could be said to exist (with their virtual certainty spoken of) which we may not ever be able to confirm.<sup>411</sup> The mysterious character of such talk was nicely

407. For earlier "birthday talks," see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 582 (at age 50); Anastaplo, *On Freedom*, *supra* note 104, at 153 (at age 65); *id.* at 174 (at age 70).

408. For my November 10, 2000 letter, see Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, *supra* note 44, at 102; CHI. D. L. BULL., Nov. 13, 2000, at 20, CHI. TRIB., Nov. 15, 2000, sc. 1, at 20.

409. Albert Kim & Mark Mravic, *The Untouchables*, SPORTS ILLUS., Oct. 23, 2000, at 27.

410. On the weekly Physics Colloquium, see George Anastaplo, *Thursday Afternoons*, in S. CHANDRASEKHAR: *THE MAN BEHIND THE LEGEND* 122 (Kameshwar C. Wali ed., 1997). There is, at page 127, note 4 of that article, a recollection of my 1974 speculations about something that I called an "ultron." It has recently been suggested to me, by Laurence Berns (of St. John's College), that what I have called an "ultron" resembles what the ancient Greeks called an "atom." Mr. Berns and I are collaborating in a translation of Plato's *Meno* to be published in 2003 by the Focus Publishing Company. On the Physics Colloquium, see also Hellmut Fritzsche, *Of Things That Are Not*, in LAW AND PHILOSOPHY, *supra* note 7, at 3; Anastaplo, *Constitutionalism and the Good*, *supra* note 2, at n.64.

411. Some scientists seem to be confident that there are other rational beings in the Universe, beings which they do not believe will ever make contact with human beings on this planet. On UFOs, see Anastaplo, *Lessons for the Student of Law*, *supra* note 73, at 187.

dramatized by something I had never before witnessed at that weekly Colloquium: a telephone, being carried in the lecturer's handbag which was lying on the podium, suddenly began ringing. What, one may well ask, was that a sign of? Out of which dimension did *it* come?

Back to the barber shop and the unbreakable records: I wondered whether I had any such distinction. I finally realized that I surely did, although it may not be a truly distinguished distinction. I believe it is highly unlikely that anyone will ever surpass my record as a member of the Basic Program Staff, which membership is now in its forty-fourth year. This distinction I owe, in part, to my bar admissions troubles. Besides, graduate students are better able than some of us once were to go on to other positions after a few years—and they are not likely to be able to support themselves with other work in this area as I have been. Few have been as privileged as I have been, because of circumstances, to keep on trying to educate myself in this adult education program.

I have been both surprised and pleased to learn this evening that the University of Chicago has been generous enough to name after me “in perpetuity,” the annual Works of the Mind Lecture in November. And I can be thankful that it is not yet the George Anastaplo Memorial Lecture.<sup>412</sup>

But the most interesting thing about my barbershop visit was the exchange I had with the lively, self-confident, Italian-born barber as we prepared to part. I asked him whether there was a difference in the rates of growth of hair on various parts of the head. His first “reaction” was that of shock and then a look of befuddlement as he confessed that he had never been asked this before. He did tell me other things, told to him by his teachers many years ago: that the hair grows one-half inch a month, that the rate of growth does vary with the seasons although it may appear otherwise, and that no hair restoratives work.

It was obvious because of the way that he was shaken by my question that it reached him “where he lived,” as they say.<sup>413</sup> He ventured a couple of surmises, working from the growth of sideburns, but it soon became evident to both of us that he simply did not know. That did not seem to bother him for long, for his startled look eventually turned to that of pleasure as he concluded our conversation with a nicely ambiguous comment that I should be glad to have as an epitaph: “That is *some* question!”<sup>414</sup>

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412. See Anastaplo, *Legal Education, Economics, and Law School Governance*, *supra* note 121, at 313.

413. On questions which can appear distressingly “relevant,” see ANASTAPLO, *THE ARTIST AS THINKER*, *supra* note 4, at 2-3 (about the Golden Gate Bridge).

414. For fundamental questions about war, property and one's way of life, see Anastaplo, *Legal Education, Economics, and Law School Governance*, *supra* note 121, at 253-95; see also *supra* note 208.