How to Read the Constitution of the United States

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And now, like a dream, these same opinions have just now been set at motion in [the slave boy]. If someone were to ask him these same questions many times and in many different ways, you know that he would finally understand them no less accurately than anyone else.

—Plato, *Meno* 85C

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INTRODUCTION

1.

A vital constitutionalism depends upon the ability of Americans to read the constitutional documents entrusted to their care and use. The seven parts of this article, drawing upon talks I have made on various occasions over the past quarter-century, can be said to be devoted to the art of reading.

The sovereignty of the American people means that no one else—no one in government or out—can do for the American people the thinking continuously required not only for reading the

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Constitution but also for assessing from time to time both how well
the Constitution is serving its proper purposes and what changes, if
any, are needed in our institutions and in the character of our
people.

\[\text{ii.}\]

We begin with suggestions about how to read the Constitution
itself. These suggestions are found in the first (and by far the larg-
est) part of this article.

The half-dozen talks thereafter (in Parts II-VII) are devoted to
suggestions about how to read the Speech and Press Clause of the
First Amendment, that part of the Constitution which may be
most concerned with reading itself. For it is the First Amendment
which is critical to the right and power of the American people to
discuss what is in the Constitution and how the powers of govern-
ment should be used.

Upon moving to an extended consideration of the First Amend-
ment, we begin (in Part II) with observations upon reading in gen-
eral, with special attention paid to the classics in which may be
found those enduring principles of the West upon which both our
Constitution and the Anglo-American common-law system
depend.

We end (in Part VII) with observations upon contemporary ef-
forts to move beyond the Constitution, and even beyond the West,
to a constitution for the world community. One can see thereby
the limits of freedom of speech and perhaps even of traditional
constitutional government.

Within the timeless frame glimpsed in Parts II and VII, there
are four talks (Parts III-VI) which address contemporary problems
in First Amendment interpretation. The suggestions made there
draw upon and reinforce the mode of reading recommended for the
Constitution as a whole.

Each of the seven talks used in this article was fashioned with
the interests and needs of its particular audience in mind. (This
accounts for whatever repetitions may be found in the pages that
follow.) It is not useful to speak altogether abstractly about practi-
cal matters.

Similar considerations may be seen in the fashioning of this arti-
cle—in the talks which have been used, in how they have been put
together, and in the notes provided for this occasion. Much of
what I say here and elsewhere consists of counsels of moderation
addressed especially to intellectuals—among whom can be in-
cluded, of course, lawyers, judges and teachers of law.¹

I. THE CONSTITUTION OF THE UNITED STATES²

It is in general not such a common thing for psycho-analysis to deny something asserted by other people; as a rule it merely adds something new—though no doubt it occasionally happens that this thing that has hitherto been overlooked and is now brought up as a fresh addition is in fact the essence of the matter.

—Sigmund Freud³

Fundamental to any serious effort to think about the Constitution of the United States is the recognition of an elementary fact, or at least a vital presupposition, which is often overlooked in practice, whatever may be said about it in “theory”—the elementary fact that the Constitution is something that can be thought about.⁴

¹. See, e.g., Anastaplo, Human Nature and the First Amendment, 40 U. Pitt. L. Rev. 661, 666 (1979) [hereinafter cited as Human Nature]. For a summary of my interpretation of the First Amendment, see infra text accompanying note 143. Since I say a good deal in this article both about the Commerce Clause and about the First Amendment, the following comment is well to keep in mind:

Rivalling the Commerce Clause in importance, the principle expressed [in the Speech and Press Clause] is one of humanity as well as freedom, and an assertion of the important place occupied by the citizen in considering the decisions on public affairs which in our society are ultimately his. He is to have the benefit of all available views on public matters, expressed in speech or in the press.


For the most part, only minor changes have been made in the texts of the seven talks collected in this article. Among the things I have learned, during the two decades over which these talks extend, is to shy away from the use of such existentialist terms as “values” and “commitment.” I also have reservations about “appreciation”, “individual” and “society,” even though I do continue to use them.

The reader is urged, as with my other publications, to begin by reading the text of this article without reference to its notes. These notes include numerous citations to other discussions by me of points barely touched upon here.

². This talk was given at the Louisiana State University Law Center, Baton Rouge, Louisiana, March 16, 1983. The occasions for the other six talks which follow this one in this article are recorded below. See infra notes 72, 121, 128, 135, 138 and 147.

³. S. Freud, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 45 (Lecture III) (1966) (emphasis in the original).

That this fact is overlooked in practice may be seen in the neglect of the Constitution itself in most constitutional law courses in this country, where the attention of students is usually directed exclusively, or almost exclusively, to what courts have happened to say about the document, not to the document itself. And since the courts, for the most part, talk about what other courts have in turn said about the document, rather than about the document itself, what the Constitution does say and mean is hardly noticed.

But, one might respond, these exercises, too, surely require thinking. Yes, perhaps, but not the most serious, or the most fruitful, thinking. For, as Immanuel Kant noticed, there is a significant difference between questions directed to the understanding and questions directed merely to the memory. What we have then, in the typical law school course, is constitutional history, not constitutional law, with all the problems raised by any study of history, which is so much dependent upon chance both in its subject-matter and in its scholarship.

One consequence of this reliance upon history is that it is often difficult to remember what the courts have said hitherto. It is also difficult to predict what the courts will do hereafter. Courts (as they try, independent of the Constitution, to resolve disputes) become more like legislatures; they tend thereby to reflect popular trends or intellectual fashions. Closely-divided courts are familiar to us, year after year: this means (in effect) that no argument has been truly persuasive, but rather merely that one argument has happened, temporarily, to get a vote or two more than another.

Compare fields of the law other than constitutional law. Once one grasps a few principles in a field, one can apply those principles to new cases, keeping in mind those exceptions or aberrations that do happen to have been produced by "history." Thus, the intelligent student who begins his assessment of an everyday case with a determination of what justice and the common good seem to call

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5. See G. ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD 277 n.43 (1975) [hereinafter cited as HUMAN BEING AND CITIZEN]; see also Id. at 82-84.

6. On history, see Id. at 326; see also G. ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE (1983) [hereinafter cited as THE ARTIST AS THINKER]; see infra text accompanying notes 68-69.
for is usually well on his way to a sound resolution of the problem before him. The memory-work, there, is not with respect to the principles—which tend to be those shared by the community at large—but rather with respect to the chance exceptions, the troublesome precedents and the resulting expectations that should be kept in mind. Thus, it can be said, the most demanding law school faculty members are teachers of constitutional law—for they do have to require their students to rely so much on memory, so little on plausible rationales.

But, I should at once add, something of what has happened to constitutional law is now happening as well to other fields of law (which development, as we shall see, in turn affects constitutional law still more). Thus, common-law rulings have come to be said to be primarily, or decisively, products of the exercise of a sovereign will, rather than products of reasoning by lawyers and judges about justice. This development has been anticipated and furthered by such sentiments as those from Oliver Wendell Holmes, Jr., to the effect that the life of the law has been history, not logic, and that the common law is not a brooding omnipresence in the sky—facile sentiments which have had a most mischievous effect, whatever merit they may have happened to have had in the circumstances in which they were uttered.7

In order to be able to think clearly about how to read the Constitution, assuming as I do (and as I will indicate here and there) that it is well-crafted, and crafted by men rooted in constitutional principles and in the common-law tradition, one has to have clarity about the very nature of law and of natural right.8 Otherwise, one has no basis for guidance among the digressions and errors that are bound to be encountered in the political and legal life of any community, digressions and errors due sometimes to passions, sometimes to partisan interests, sometimes to misunderstanding (because of limited intelligence or faulty information). It simply will not do to take one's guidance only from what the courts say: that is good neither for the courts, which are themselves always in need of respectful examination and correction, nor for the commu-

7. See, e.g., O. W. HOLMES, THE COMMON LAW 1f, 35f (1886); Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917); see also Anastaplo, Mr. Crosskey, the American Constitution, and the Natures of Things, 15 LOY. U. CHI. L.J. 181, 186, 221 n.35, 244 n.140 (1984) [hereinafter cited as Mr. Crosskey]. See infra text accompanying notes 61, 68-71.

8. See HUMAN BEING AND CITIZEN, supra note 5, at 46-60, 74-86; THE ARTIST AS THINKER, supra note 6, at 275, 279-80, 284-85. See also Mr. Crosskey, supra note 7, at 208-15, 238 n.116, 249 n.176, 252 n.186, 252 n.187, 253 n.188.
nity and its regard for the Constitution.\(^9\)

When constitutional law is developed as it has been for more than a century, the feeling grows among informed citizens that there is no sense to it all, or that the courts are really legislating in that they are acting on the basis of political considerations. The eventual consequence of this is likely to be the repudiation of the judges, something which may not be (I should add) an immediate prospect. People prefer to believe that judges act on the basis of the principles of justice and of eternal right and wrong reflected in the Constitution. Thus, people still tend to believe something that the judges themselves, and their attendant constitutional scholars, do not act as if they believe: that it is indeed a constitution that the courts are expounding.\(^{10}\)

\(\text{ii.}\)

I should now like to touch upon a sampling of constitutional decisions by the courts (usually the Supreme Court of the United States). I hope thereby to suggest the considerable divergence from the Constitution to which I have referred. In some of these instances, it is not the ruling itself that is the problem but the way it is explained and justified. In each instance, I will merely touch upon the case or issue used. Thus, I am drawing upon each case not for itself alone but as it happens to bear upon my argument. No doubt, it is partly a matter of chance which cases I do draw upon in this discussion, a discussion which can be seen as the distillation of a year-long constitutional law course in which jurisprudence very much matters.\(^{11}\)

Our first case is, of course, \textit{Marbury v. Madison}, the traditional introduction for students of constitutional law, the 1803 case in which judicial review of acts of Congress for their constitutionality was "settled."\(^{12}\) The first thing to notice about judicial review, for our immediate purposes, is that it surely was not anticipated by the

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10. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Of course, legislatures should also be guided by principles: to develop "policy" is not to leave legislative determinations wide open to chance tastes.

11. Not all of my readers may be familiar with all of the cases I use here, but those they are familiar with should provide a basis for giving them a reliable indication of my overall argument. No doubt, also, some of my readers are familiar with other cases with which I am not familiar, cases (and the dubious scholarly interpretations leading to or resulting from them) which might provide even better illustrations for my argument.

12. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (in an opinion written by
Framers of the Constitution, however salutary it may be in practice. It is difficult to believe that the Framers who provided so carefully for the contingencies following upon a Presidential veto should have neglected to indicate how judicial review would work if they indeed expected it to be exercised by courts against Congress. 13 Among the things that would probably have been provided for, if judicial review had been intended, is a mode for more systematic presentation of constitutional issues to the Supreme Court, instead of allowing such issues to rise pretty much by chance in “ordinary litigation between parties in personal actions.” 14 Even the statutory provision voided in Marbury had been on the books for more than a decade. 15

How salutary judicial review really is, in practice, remains an open question. Perhaps the prospect of judicial review is more important than the rare instances in which an act of Congress is actually declared unconstitutional. The prospect of judicial review may encourage Congress to be more scrupulous than it might otherwise be. But, it should be noticed, there are many serious issues on which judicial review has never been considered likely or even possible (including great issues of war, peace and taxation). And, it should also be noticed, for every act of Congress declared by a court to be unconstitutional, there have been thousands of bills that Congress itself disposes of as unconstitutional.

It should be recognized as well that whenever the Congress and the Supreme Court differ, the Congress is just as apt as the Court to be correct. Thus, in the two greatest constitutional crises in the history of this country (one in the first century of the life of the Republic, the other in the second century), Congress was on sounder constitutional ground than was the Supreme Court. I refer, of course, to the crises which saw the Court do what it did first

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13. Consider, however, the terseness of the Supremacy Clause. Even so, it is more (with respect to judicial review of State laws, which was anticipated by the Judiciary Act of 1789) than is provided for judicial review of acts of Congress. On judicial review see Mr. Crosskey, supra note 7, at 195-97, 202-03, 299 n.76, 242 n.134.


15. I need not discuss on this occasion whether the Marbury Court was correct in second-guessing the First Congress about the constitutionality of the relevant part of the Judiciary Act of 1789 (That Congress did include members fresh from the Constitutional Convention.). On this and other matters, I find the work of William W. Crosskey most useful, even though I depart from him here and there. See W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1980); Sharp, supra note 1, at 3; Mr. Crosskey, supra note 7.
in *Dred Scott* and then in the early New Deal Cases. One crisis saw the Court denying Congress the power to exclude slavery from the Territories of the United States; the other saw the Court denying Congress the power to deal in what Congress and the President considered an effective manner with a national economic catastrophe. (I will return to both of these crises.)

Is judicial review more popular today than in the early Nineteenth Century, partly because people generally sense that neither Congressional integrity nor public opinion is adequate to assure legislative conformity to the Constitution? And so a more select body is looked to for the kind of judgment that might once have been generally perceived to be available in Congress? Besides, Congress itself may sense its limitations and thus may be amenable to, if not even dependent upon, judicial review.

Even so, it should be noticed that respect for the Constitution means, among other things, that the people's ultimate authority should be respected. That is, it is the people who have ordained, and who continue to ordain, this particular constitution—and that which they have ordained should be respected. In principle, are not the people now as competent to know, to assess, and even to change (or at least to continually reaffirm) the Constitution as were the people of the 1776-1791 period? If so, should not the people now be able to assess what the government is doing and whether it is conforming to the Constitution? Is this ability in the people no more than what the original deference to the people assumed that the people would always be able to do?

Is there a special problem, however, about any government action that, rather than impinging upon the rights or interests of the people at large, mistreats a minority? Is this especially so when the liberties of individuals are threatened? Are *these* instances in which judicial review is needed? Still, it should be remembered

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17. But is Congress encouraged not to think about such matters? Thus, President Franklin D. Roosevelt once urged Congress to enact a law his administration was proposing with this suggestion, "Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests. [But] the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality." G. GUNTHER, CONSTITUTIONAL LAW 24 (11th ed. 1985).
that the cause of freedom and decency might have been better served during the so-called McCarthy Period if the Supreme Court had not passed at all upon civil liberties questions, since it usually had the effect of ratifying and hence reinforcing what Congress and Executive agencies were doing. This kind of judicial acquiescence is to be expected in such passion-ridden circumstances, making judicial review an illusory safeguard.

Critical to what I have said thus far is the fact that it is the people's constitution. Otherwise, the Constitution has no political authority—unless one is to say that its intrinsic merits give it authority, no matter how it happened to be established. But if its intrinsic merits are decisive, that makes it even more important (whether or not judicial review is relied upon) that the Constitution itself be read and used as authoritative, not the opinions that courts and scholars may happen to have about a "living" or "growing" Constitution. If it is "growing," what does it grow to? That is, what is the real constitution, or super-constitution, by which we are to be guided? 18

One problem that it is believed judicial review avoids is that which comes from permitting a legislature to have the last word. But someone is going to have to have the last word, and risks are going to be run, no matter what arrangements are made. In any event, it is salutary to keep in mind the observation by Thomas Jefferson, endorsed by Abraham Lincoln in the course of his debates with Stephen A. Douglas, 19 "Judges are as honest as other men, and not more so." If there is not in the community a general respect for the Constitution, a respect dependent upon considerable understanding, it may not matter who has the last word in constitutional interpretation and application.

iii.

Whatever the status of judicial review, there is no doubt that courts do have considerable authority under the Constitution when they interpret acts of Congress. Thus, courts can protect and exercise the judicial power of the United States. 20 Thus, also, courts can interpret acts of Congress in accordance with what they under-

18. See, e.g., THE CONSTITUTIONALIST, supra note 4, at 584; see also infra text Part V, § iv.
19. See III A. LINCOLN, supra note 9, at 232.
20. Perhaps Marbury v. Madison can be seen as primarily an effort on the part of the Supreme Court to keep its own jurisdiction within constitutional bounds. Whether the Court was correct in its reading of the Judicial Article on that occasion is another question. Mr. Crosskey is particularly instructive here.
stand the Constitution to mean, whenever there is any uncertainty in reading a statute. That is, any uncertainty in a statute can be so resolved as to leave the statute consistent with the constitutional understanding that a court has, leaving it to Congress to insist thereafter, if it dare do so, upon action that openly diverges from what the courts suggest the Constitution prescribes.

Furthermore, the courts can themselves insist that they will apply only laws, not (for example) Executive decrees which take the place of laws. This kind of judicial integrity may be seen in the 1952 Steel Seizure Case.\textsuperscript{21} Constitutional scholars generally prefer Justice Jackson's concurring opinion (with its considerable deference to Executive prerogatives)\textsuperscript{22} to the forthright opinion for the Court by Justice Black—but, it seems to me, the more "radical" opinion (the one by Justice Black) is there the better one.\textsuperscript{23} "This is a job for the Nation's lawmakers, not for its military authorities,"\textsuperscript{24} Justice Black observed in response to the President's invocation of his supposed powers as Commander-in-Chief. Congress had had an opportunity to provide for precisely such Executive seizure of a strike-threatened defense-related industry, and had refused to do so, Justice Black noticed. Furthermore, he argued, it simply will not do to rely upon Executive orders which look very much like statutes. Of course, the President or the courts may believe that the Country will be ruined if this or that measure is not taken by the government—if, that is, a certain thing is not done which the Congress does have the power to do but which it has deliberately decided not to do.

The same can be said about the impoundment controversy, except in those obvious instances when circumstances have changed markedly since Congress last had an opportunity to deal with the matter. Thus, for example, the President probably should hold off spending money on a dam which is no longer needed since an

\textsuperscript{21} Youngstown Sheet \& Tube Co. v. Sawyer, 343 U.S. 579 (1952). One may also wonder whether \textit{ex post facto} enactments and bills of attainder should be treated as laws. See Mr. Crosskey, supra note 7, at 241 n.120; see also Id. at 242 n.134.

\textsuperscript{22} See, e.g., G. GUNTHER, supra note 17, at 345-46; see also Mr. Crosskey, supra note 7, at 240 n.126.

\textsuperscript{23} Is the Black opinion more "radical" because it is an instance of Justice Black's general insistence that the Constitution be read with care and followed scrupulously? Id. at 225 n.49. See \textit{MEMORIAL ADDRESSES AND OTHER TRIBUTES IN THE CONGRESS OF THE UNITED STATES ON THE LIFE AND CONTRIBUTIONS OF HUGO LAFAYETTE BLACK}, H.R. Doc. No. 92-336, 92d Cong., 1st Sess. 16, 17-18, 19, 24, 46-47, 53, 60, 100 (1972) [hereinafter cited as \textit{MEMORIAL ADDRESSES}]. Justice Black described himself as a "literalist." Id. at 83.

\textsuperscript{24} Youngstown Sheet \& Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).
earthquake (subsequent to the adjournment of Congress) has changed the course of a river. But if Congress (upon reconvening) is made aware of the change in the river's course and yet retains the dam appropriation, it is not the function or within the power of the President to withhold the expenditure.\textsuperscript{25}

The Constitution, that is, does not guarantee us from foolishness. Here, too, we can say, the last word properly belongs to the Legislature, however foolish the courts or the Executive may consider Congress to be. This, after all, is what the rule of law means, however risky it may often seem and sometimes be.

\textit{iv.}

It is instructive to recognize that it is the legislature which is ultimately superior among the three branches of government under the Constitution. Not only is the Legislative Article the first and longest article in the Constitution, but the Congress (subject, of course, to continuing public supervision) can restrict and even remove (or otherwise control) members of the Judicial and the Executive branches, whereas Congress itself is relatively immune (if it should want to be) from Executive or Judicial action.

Thus, it is up to the legislature to set policy. And if the Congress does not choose to exercise its power, it is not a Presidential or Judicial prerogative to exercise that power "as it should be done." The presumptuousness of the courts in such matters may be seen in the multitude of "undue burden on interstate commerce" cases in which the courts (without any legislative mandate) undertake to regulate the degree of acceptable interference by States with the supposed freedom of interstate commerce. To say this is not to deny that the Supreme Court can properly review State acts for their constitutionality. It is to deny, however, that the Constitution dictates what the Supreme Court has in fact done here.\textsuperscript{26}

There is no question but that Congress, if it chose, could indicate what State commercial regulation on so-called interstate commerce is impermissible; and it could do so much more systematically than can the Court with its somewhat haphazard case-by-case determinations about mudguards here and milk-quality standards there.\textsuperscript{27} If Congress does not choose to come up with a comprehensive

\textsuperscript{25} See, e.g., G. Gunther, supra note 17, at 361-62; see also Mr. Crosskey, supra note 7, at 241 n.128, 254 n.193.

\textsuperscript{26} See Mr. Crosskey, supra note 7, at 224 n.46.

plan, what warrant has the Court to conjure up a mythical national policy in favor of "free trade values?" 28

There are various indications in the Constitution that the "burden on interstate commerce" approach is not warranted by the Constitution. Generally speaking, there does not seem to be in the Constitution any exclusive grant of power to Congress except when this is explicitly provided for or when the very nature of a power makes it obvious that it has to be exclusive. 29 If Congress should want to forbid discriminatory action with respect to regulation of commerce (or, for that matter, with respect to taxation) on the part of States, then all it has to do is to enact statutes much like (but, it is to be hoped, more systematic than) some of the Supreme Court's opinions. 30

Should it not be recognized that the "chief occasion of the commerce clause" was not (as the Court says) to remove barriers to "interstate commerce," 31 but rather to give Congress power to remove such barriers when it wished, in the way it wished, and for so long as it wished? Does not the "burden on interstate commerce" approach by the Court itself depend upon a "theory" which limits Congress to regulation of "interstate commerce," not upon a "theory" which recognizes that Congress may regulate all "Commerce ... among the States" (which can mean, in Chief Justice Marshall's language, any commerce "which concerns more States than one")? 32 If the available Congressional power over the economic life of the country should be seen as virtually complete, then any State regulation of commerce could be considered a "burden" on


29. If there were a general presumption in favor of exclusive grants, even with respect to "interstate" commerce, it would be hard to explain various limitations placed in the Constitution upon the States. One can see both in the Articles of Confederation and in the Constitution how the Founding Fathers provided for exclusive grants of power to Congress when they wished to do so. See Mr. Crosskey, supra note 7, at 224 n.46, 228 n.69.

30. It will be noticed that Congress has not acted to nullify what the Supreme Court has done. Does that mean that Congress tacitly approves? Or is it that Congress simply does not recognize that it alone has the power to regulate State "burdens" and that the Supreme Court does not? We notice that Chief Justice Marshall refused, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), to rely upon a "burden" argument in order to restrain a State's challenge to Congressional power. Id. at 209.


32. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824). "It is not intended to say that these words ['among the several States'] comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." Id. See Wickard v. Filburn, 317 U.S. 111 (1942); infra note 36.
the commerce that Congress could regulate. This would mean, under the "burden" approach, the extinction of virtually all State power to regulate any commerce, which certainly was not evident (in intention or in practice) from the beginning of the Republic under the Constitution.

It would go beyond the scope of this discussion to explore the dubious experiments by the courts in defining the Congressional commerce power. It suffices to notice that up to the middle 1930's, the "commerce power" rulings by the Supreme Court were in their effect like the Dred Scott extension-of-slavery ruling in the 1850's. There were (if the Court was to be believed) vast areas of activity, vital to American life, which could not be legitimately regulated by any government in the United States, National or State. It is highly unlikely that the Framers of the Constitution intended any such result. And so President Franklin D. Roosevelt, who was himself sometimes careless about the Constitution, could well ask after the 1935 Schechter ruling, "Does this decision mean that the United States Government has no control over any national economic problem?"

The Roosevelt complaint about judicial restrictions upon the Commerce Power could have been voiced on various occasions in earlier generations as well, such as when the United States (because of restrictions on the Congressional power to regulate commerce) had to have recourse to a treaty in order to secure for itself legislative power to prevent the destructive hunting of migratory birds in this country. And so Justice Holmes could say, in Missouri v. Holland, "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power." But does such a roundabout approach really make sense? Would any prudent framers of a sensible national government have required Congress to proceed thus? Should not the "need" to go the contrived treaty route have stimulated judges and constitutional scholars to wonder whether they were really thinking about a rational constitutional system?

33. It was held by Dred Scott that Congress could not keep slavery out of the Territories lest it deprive slaveholders of their property rights in violation of the Due Process Clause of the Fifth Amendment. Nor could any Territorial government do so, it would seem, since its power was derivative from Congress. Nor could any State, since it obviously had no jurisdiction there. On the Commerce Power and slavery see Mr. Crosskey, supra note 7, at 182-83, 205-06, 246 n.155.

34. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); G. Gunther, supra note 17, at 125.

Such developments as I have already sketched should lead us to wonder whether courts should not stick to what they can do best. That is, courts should (1) interpret Congressional statutes as they apply them to particular instances (keeping in mind the Constitution as they do so) and (2) develop the common law of the United States, about which I will have much more to say. Instead, we have (as I have indicated) constitutional law courses in which heroic efforts are needed to make sense of judicial rulings that really do not fit together and that have no clear basis in the Constitution. (This may be seen in the multitude of cases devoted to the explication of "Commerce... among the States.")

If one does know what the Constitution says, and how simple its provisions are, one is better able to see the prevailing line of cases in a variety of fields (however confusing they may be): one can see them as they truly are and make the best use of them. If one knows what the Constitution does say, and why, then one can better appreciate why there should be the trouble there is with the cases we happen to have. One can see, for example, how things get out of joint and what the consequences of that may be. Thus, the truly "practical" may depend upon a sound comprehension of what is easily dismissed as "ideal."

Still, some would say, such questions as whether there is judicial review of acts of Congress are "settled." What should be considered the status of Marbury v. Madison? This leads us to notice still another questionable notion fancied by courts and scholars—the notion that various constitutional issues have indeed been settled. An indication of this respect for what is "settled" may be seen in an observation by Justice Brandeis in his concurring opinion in Whitney v. California: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."

Compare Justice Rehnquist in Wengler v. Druggists Mutual Ins-
surance Co.38 He insisted there, as he had theretofore, that “constitutional issues should be more readily reexamined under the doctrine of stare decisis than other issues.”39 Compare, also, the observation by William O. Douglas (in a law review article): “A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.”40

The very notion that a constitutional issue is to be considered settled even though competent judges (such as Justice Brandeis in Whitney) find “arguments to the contrary” still persuasive is itself questionable. Should any constitutional issues be considered settled in such circumstances, especially when their present “resolution” is so unsettling? The classic instance here may indeed be the Dred Scott decision. Lincoln’s response to it, including his reflections upon how decisions of courts should be regarded, is instructive. Also instructive is a consideration of the very issue to which Justice Brandeis referred in the quotation just taken from him, and to this we now turn.

I repeat: “[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”41 We see here still another anomalous notion accepted and promulgated by the courts, the notion that the traditional due process guarantee is not limited to matters of procedure. Do we not have, in the curious expression “substantive due process,” an instance of what Thomas Hobbes called “insignificant sounds?”42 These are to be found, Hobbes had said, “when men make a name of two Names, whose significations are contradictory and inconsistent; as this name, an incorporeal body, or, which is all one, an incorporeal substance, and a great number more. For whensoever any affirmation is false, the two names of which it is composed, put together and made one, signifie nothing at all. For example, if it be a false affirmation to say a quadrangle is round, the word round quadrangle signifies nothing, but is a meere
Of course, that "meere sound" which is the phrase "substantive due process," has not been without effect, especially since it has seen (among other things) various (sometimes transitory) notions about liberty and property brought to bear against State legislation. (Again, I notice in passing, what I have said about the questionable character of judicial review of acts of Congress does not apply to the review by the General Government of State actions under the Constitution.) Whether and how elements of the Bill of Rights are brought to bear against the States, by virtue of the Fourteenth Amendment, is a perennial question. Certainly, it is difficult to see how such "incorporation" is effected through the Due Process Clause. The Privileges and Immunities Clause seems a more plausible means of bringing this about. Even so, it is also difficult to see that the Framers of the Fourteenth Amendment anticipated that what they were doing immediately put in jeopardy such things as the abortion laws, the obscenity laws, or the libel laws then on the books of the several States.

In any event, a due process guarantee should not keep governments from governing. Rather, it obliges government to be fairly predictable and reasonably precise in the way it administers laws which bear upon persons, especially through judicial proceedings.

Still another dubious reading of (or, rather, failure to read) the Constitution may be seen in what may be called "reverse incorporation," that operation by which the Equal Protection Clause of the Fourteenth Amendment is applied against the United States government as well as against State governments. Courts speak again and again in recent years of "the equal protection component of the Due Process Clause of the Fifth Amendment." A critical early statement to this effect may be seen in Bolling v. Sharpe, decided the same day (in 1954) as Brown v. 

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43. Id. (emphases in original).
44. See Mr. Crosskey, supra note 7, at 233 n.93. I have the impression that Justice Black also sensed that the Due Process Clause of the Fourteenth Amendment might not suffice and that more use should be made of the much-neglected Privileges and Immunities Clause of the Fourteenth Amendment. See, e.g., his concurring opinion in Duncan v. Louisiana, 391 U.S. 145, 166-67 (1968).
45. Racially discriminatory State laws, on the other hand, could have been seen by them as certainly put in jeopardy by the Fourteenth Amendment even if few immediate actions by Congress or the Courts were anticipated.
47. 347 U.S. 497 (1954).
Board of Education. Brown ruled out segregation in State schools; Bolling did the same for the schools in the District of Columbia, with Chief Justice Warren observing that it would be unthinkable if a less stringent rule were applied to the United States than was now being applied to the States.

But the fact of the matter is, of course, that there is no Equal Protection Clause applicable to the government of the United States. May there not be good reasons why this is so? That is, may there not be extraordinary occasions when some government in this country should be permitted to discriminate on the basis of race? And as between the government of the United States and the governments of the States, may there not be a sound basis for allowing only the United States some power to discriminate with respect to race?

A misuse of the Equal Protection Clause can interfere with Federal affirmative action programs, programs which can be seen to have been authorized by the Fourteenth Amendment. Consider, for example, Fullilove v. Klutznick. There would have been a majority invalidating that Federal program, which sets aside ten percent of certain construction contracts for minority businessmen, if two more justices had accepted the Equal Protection arguments of the three dissenters. But is there not good sense to Justice Marshall's observation on that occasion, "[Doors that have been shut to Negroes] cannot be fully opened without the acceptance of race-conscious remedies?"

All this is aside from the question of what is truly a denial of equal protection of the laws. Much can be said for the proposition that when the majority of a community knowingly and deliberately deprives itself of privileges for the benefit of an otherwise deprived minority, that is hardly an equal protection problem, whatever the Bakke case may seem to say. Critical here is the political power

Also curious have been the efforts to apply the Contracts Clause against the Government of the United States. See, e.g., National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe R.R., 105 S. Ct. 1441 (1985); see also infra note 168.
50. Cf. The Federalist No. 10 (Publius). Consider, also, the unhappy experiences of States with racial minorities. On the other hand, the States may be better trusted with power to police freedom-of-speech abuses. See The Constitutionalist, supra note 4, at ch. 7. See also supra note 67.
51. 448 U.S. 448 (1980).
52. Id. at 522 (1980).
53. See Board of Regents v. Bakke, 438 U.S. 265 (1978). See also Ely, The Constitu-
that majorities do have to protect themselves from unequal (that is, unjust) laws. However this may be, the loose talk about the Equal Protection component of the Due Process Clause of the Fifth Amendment reminds us of how careless and unperceptive interpretations of the Constitution by eminent judges and scholars can be.

vii.

It should be evident from what I have said how faulty constitutional interpretations have had a cumulative effect, leading to one distortion after another. A few more illustrations should be helpful here.

A distorted notion both of the constitutional right to representation and of a constitutional right to a fair trial leads judges to say, in effect, that a defendant has a constitutional right not only to testify but also to lie. And this has come to mean, in turn, that a lawyer can be forced, in the name of the supposed constitutional

tionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723, 727 (1974). This is not to deny that such "remedies" may be misguided or ineffectual in some circumstances.

54. Should the same be said about women, who also have the political power to protect themselves from discriminatory laws? Consider, however, a letter of mine which was published in several Illinois newspapers in May 1980:

Precisely what effect an Equal Rights Amendment would have remains difficult to say, especially since there are more and more uses of existing constitutional and statutory provisions to achieve what the amendment would.

Even so, there is a good deal to be said for ratifying this harmless amendment now. For one thing, we will have otherwise a continuing controversy, perhaps even into the 21st Century—and I do believe we all have something better to do with our energy and attention.

That is, it does not seem to be appreciated that agitation for such an amendment will not cease if the present proposal should fail to be ratified by its 1982 deadline. Efforts with a new proposal will be renewed thereafter.

All this is to suggest that I do not believe it likely that, in our circumstances, women will be denied the explicit constitutional recognition which so many of them (including most of the politically active among them) are demanding as their right.


I have had occasion to commend an equal rights amendment as a "largely symbolic grace note for our Constitution." See THE ARTIST AS THINKER, supra note 6, at 478-79. See also H. JAFFA, AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING 50 (1984).

55. A not unrelated instance of distorted Constitutional interpretation was the use made by Congress primarily of the Commerce Clause rather than of the Fourteenth Amendment to provide the constitutional basis for the Public Accommodations Act of 1964. See G. GUNTHER, supra note 17, at 157-64. One consequence of this "practical" approach has been to deprive citizens of salutary instruction in a straightforward Congressional insistence upon racial justice. On the other hand, it does seem to be generally recognized that the public policy of the country is clearly against "private" as well as public racial discrimination.
rights of his client, to acquiesce in (and, in effect, to ratify) client perjury.\(^\text{56}\) One result of this confusion is to undermine the traditional duty of the lawyer not to put up with known perjury on the part even of his client.

Also, a distorted notion of the constitutional right to freedom of speech and of the press, which has been virtually turned into a right to "freedom of expression," leads judges to insist that such things as commercial speech enjoy the august protection of the First Amendment. But since everyone knows that commercial speech (such as advertising) must be regulated to some extent, one consequence of this expansion of the meaning of "freedom of speech" is to get people accustomed to the practice of denying virtually absolute protection to whatever speech is protected by the absolutist-sounding First Amendment. And yet, it should not take much of an argument to establish that political discourse by the sovereign citizen body should be left completely free of government regulation in ordinary circumstances.\(^\text{57}\)

Thus, as well, a distorted notion of what the constitutionally relevant unit is under the Fourteenth Amendment leads to misapprehensions of how the Equal Protection Clause might be applied. The only "sovereign" political units within the country which are recognized by the Constitution are the States. Counties, townships, cities and wards do not "count," since such divisions are themselves creatures of some State. If the consequence of such creation is to conceal from view the differential treatment by the State (or, collectively, by its subdivisions) of various groups of its citizens (especially groups substantially divided along racial lines), the courts of the United States should be able to disregard intrastate lines as they see and deal with what the State itself is in effect doing.

Intrastate lines are, for constitutional purposes, matters of chance. It is what the State as a whole is doing which must be examined if we are to make sure that various groups of citizens are being treated equitably. One might wonder, for example, whether State power can properly be used (even if in the form of local property taxes) to permit one group of citizens (especially a favored racial group) to have far better financed public facilities than other

\(^{56}\) See, e.g., Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).

\(^{57}\) See infra Parts III and IV. See also Anastaplo, Censorship, ENCYCLOPAEDIA BRITANNICA 634 (15th ed. 1985) [hereinafter cited as Censorship]; Anastaplo, Book Review, 3 WINDSOR Y.B. OF ACCESS TO JUSTICE 436 (1983) [hereinafter cited as Book Review]; supra note 1; infra note 112.
groups of citizens in the same State, even when the groups happen to be separated by county or school district lines.\textsuperscript{58}

\textit{viii.}

To insist upon the States as the decisive constitutional unit—and to recognize both that all States, whether old or new, have the same status under the Constitution and that a respect for "States' Rights" can be politically salutary among us—is not to foreclose the argument that too much has been made of the States themselves in certain constitutional interpretations. This may be seen in one of the most remarkable misreadings of the Constitution in this century, that seen in the line of cases since \textit{Erie Railroad v. Tompkins},\textsuperscript{59} where it was held (through Justice Brandeis) that in diversity-of-citizenship cases the courts of the United States are obliged to apply (for common-law adjudications) not their own determination of what the common law should be but rather whatever the common law happens to be said to be in the supposedly controlling State on the question at issue.\textsuperscript{60}

Thus, under \textit{Erie}, it is said to be the duty of the courts of the United States to find out what the common law is in the controlling State. And this is said to be required by the Constitution itself, not by any act of Congress laying down directives for these courts in such matters (as Congress could perhaps do). This approach, as I have anticipated, reflects the opinion that the common law is the product of some sovereign. A certain so-called legal realism is evident here.\textsuperscript{61}

Before I say more about the character of the common law itself, however, something should be said for our immediate purposes about the insistence upon the subordination of Federal judges to their State counterparts in these matters, those Federal judges who

\textsuperscript{58} Cf. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). I believe that the issues raised by \textit{Rodriguez} need to be reargued. Is it not generally believed today that a State government could not directly allocate tax revenues so as to give some groups of citizens far more than is given other groups of citizens (especially if the groups are separated along racial lines)? May a State government do this indirectly, by what it authorizes local school boards to do in raising and allocating taxes? Are not political and other subdivisions within a State largely irrelevant in any application of the Constitution of the United States? \textit{See} Milliken v. Bradley, 418 U.S. 717 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

\textsuperscript{59} 304 U.S. 64 (1938).

\textsuperscript{60} This repudiated the approach which had been authoritatively recognized by Justice Story in \textit{Swift v. Tyson}, 41 U.S. (16 Pet.) 1 (1842). \textit{See Mr. Crosskey, supra} note 7, at 185-86, 203, 243 n.138, 244 n.142.

\textsuperscript{61} \textit{See supra note} 7 and accompanying text; \textit{see also} \textit{Human Being and Citizen}, \textit{supra} note 5, at 46-60; \textit{Mr. Crosskey, supra} note 7, at 203.
are (by all indications) the most carefully selected and usually the best qualified of any judges in this country. It has been said since the 1938 Erie case that Federal judges must defer, even in the most elementary judicial, indeed lawyerly, functions to what happens to have been said and done by State courts not only in deciding what common law is to be used but also in interpreting the relevant statutes of a State.

Consider what happened in Bishop v. Wood, a 1976 case in which the Supreme Court of the United States had to decide whether a policeman in a North Carolina town, who had been summarily dismissed, had been deprived of due process, and this in turn depended in part upon precisely what property interest this policeman had had in his job. The Supreme Court decided (not without reason) that a certain city ordinance had to be looked to in order to determine whether this policeman had "a property interest in employment." There then followed in the opinion of the Court one of the most astonishing observations in recent Supreme Court pronouncements:

On its face the [city] ordinance on which petitioner relies may fairly be read as conferring such a guarantee [as this policeman has invoked]. However, such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures. We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner "held his position at the will and pleasure of the city." This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit, albeit by an equally divided court. In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.

63. This case may have touched, for a change, upon a genuine due process question under the Fourteenth Amendment.
64. Bishop, 426 U.S. at 345.
The Supreme Court then adds, 66

The District Court's reading of the ordinance is tenable; it derives some support from a [certain] decision of the North Carolina Supreme Court . . . ; and it was accepted by the Court of Appeals for the Fourth District. These reasons are sufficient to foreclose our independent examination of the state-law issue.

I find all this beautiful, in a perverse sort of way. And since it comes from the pen of an intelligent judge, it shows us how unfortunate the influence of Erie can be.

What do we have the Supreme Court of the United States relying upon here? In the final analysis, the Court relies upon the biography of a particular district court judge: that is how the Supreme Court is able to decide how this ordinance is to be read. What is this but reliance upon chance? Why could not the Supreme Court have interpreted the ordinance itself (as, I believe, Chief Justice Marshall would surely have done), making use of any available district court opinion and of whatever arguments and materials the parties might have chosen to supply? Thus, one can see here, in the unwillingness of the Supreme Court to read for itself what this previously uninterpreted ordinance says, a particularly striking instance of the kind of deference to the vagaries of State courts that Erie calls for. 67

A related question here, which I can mention only in passing, is whether the Constitution does not presuppose (independent of State determinations) various notions of what such things as "laws," "citizens," and "property" are. And does not the Constitution also depend upon a settled notion of what the common law is? It is this latter question that we must touch upon in preparing to conclude this survey of dubious readings of the Constitution of the United States. Although Bishop v. Wood does show us Erie v. Tompkins carried to what may be called its "logical" conclusion, where this development probably began was with certain modern opinions about the nature of the common law, if not about the nature of law itself. It is to this that we now turn.

ix.

What law should be used in common-law determinations by

66. Bishop, 426 U.S. at 347.
67. Cf. Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805). See Mr. Crosskey, supra note 7, at 203 for the case that can be made for States' rights. See THE CONSTITUTIONALIST, supra note 4, at ch. 7; Collins, Reliance on State Constitutions, 54 Miss. L.J. 371 (1984); Collins, Bills & Declarations of Rights Digest, AM. BENCH 2483 (1985); see also supra note 50.
courts of the United States in diversity cases? One's answer to this question depends in part, as I have indicated, upon what one understands the common law to be. If it is, in principle, general (at least among the English-speaking peoples), then judges (in diversity cases) should use the best law available (if not in the case immediately before them, because of the obvious expectations of the parties, then at least prospectively). That is, if the common law attempts to do justice, then it should take into account expectations the parties may have had (because of local law), even as it points toward a new reading of the controlling law for the future, a reading which generally makes sense to sensible people familiar with law. And when the Supreme Court thus rules, State judges (in non-diversity matters) will be inclined to follow—and why not, since they usually prefer to follow the best rule available, which the Supreme Court of the United States should be presumed to set forth?

Of course, to say that the common law looks to the best possible rule on an issue means that we have to face up to the likelihood that different judges will see different rules as superior. This means that one of the candidates for "the best rule" should also have the benefit of authority, and hence should be (other things being equal) what the United States Supreme Court itself says on the subject. Has not the common law always proceeded thus, blending deference to authority with discovery of the simply just rule? The conscientious judge will consider the best reasoning available, wherever he may find it. And if a sense of natural justice is drawn upon by the judge, he will likely act in accordance with what people in a decent community do believe to be right.

Certainly, something has gone wrong when the Supreme Court has to choose, in a diversity case dependent upon the common law, between dubious rules in the States involved. Notice that each dubious State rule is itself presented by its formulators as correct. That is, each State attempts to justify the standards by which it purports to operate. Why, therefore, should not each State be willing to allow the Supreme Court of the United States also to go for the best rule it can find? The duty of the Supreme Court is to establish justice; and over time, I have suggested, the Swift v. Tyson approach should lead and refine the common-law adjudications in all of the courts in the United States.68

Thus, it should be remembered, the proper common-law judge

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68. This, some will say, had not in fact happened under Swift v. Tyson? But is not this because of a change of opinion, in a positivistic direction, as to what the common
does not consider himself making or establishing the law; it is not a matter of his will. Rather, it bears repeating again and again, he looks for the law, in order to find it. This may sound old-fashioned and unrealistic. But may it not reflect a deeper realism? Certainly, it is an approach that can lead to fewer inconsistencies than there are when, as now, will governs (especially since all wills, as wills, are similarly arbitrary and are equal in other ways as well).

What, then, is the better authority on any given issue? Two elements (to which I have referred) are to be taken into account (and one can hope that they usually coincide, or at least overlap considerably): the sounder the reasoning, the better the authority; and the higher the court, the better the authority. Thus, in short, a unitary common law is implied both by the Constitution (with its reference, in the Judiciary Article, “to all Cases, in Law and Equity, arising under this Constitution”) and by the very nature of the common law itself.

With these observations we return to my opening comments about the role of thinking for the student of law, comments which can be applied to common-law determinations as well as to constitutional interpretation. On the other hand, there is something thoughtless about an approach to the common law which not only assumes, but even makes a virtue of, divergent common-law rules. Consider, by way of contrast in attitudes, that Nineteenth Century approach which had American courts looking even to English common-law cases for guidance.69

If the dominant opinion about the nature of the common law had not changed—and changed from an opinion which tacitly, and sometimes explicitly, recognized the authority of natural right—then Erie v. Tompkins probably would have been impossible. (I mention in passing that the older understanding of the common-law duties of the Supreme Court of the United States fits in nicely with an approach that is dubious about a general Supreme Court power of judicial review of acts of Congress. That is, the older emphasis was put upon courts as judicial bodies doing judicial things, not upon courts acting as assessors for constitutionality (which is hard to distinguish from the exercise of political judgment)).

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The *Erie* approach says, in effect, that it is not truly possible to think about these matters. The refusal (or failure) to think—to recognize in law the sovereign role of reasoning, as distinguished from rationalizing—may be seen in what happened to the general opinion about the common law leading up to *Erie* and thereafter because of *Erie*.

A misunderstanding of what the common law is—of how standards come to be known—is perhaps related as well to another mischievous opinion of our century, the opinion that morality cannot (and, even if could, should not) be legislated. If it had been understood what the common law did (and somehow continues to do, despite faulty “theories”), the intimate connection between law and morality would be more readily apparent among us today. In addition, we might have avoided, or at least moderated, the profound distrust of prudence and moral judgment now found among us, especially among the young.

A proper reading of the Constitution, I have suggested on this occasion, leaves the student of constitutional law better equipped, than mere reliance upon current cases and interpretations leaves him, to anticipate constitutional developments over the next half-century. This is partly because the Constitution is sensibly crafted and courts will have to adjust to it (and return to it) if the country is to be effectively self-governing. The cases we read in our “constitutional law” courses do provide us indications of issues one might want to consider in thinking about the Constitution itself (whether or not these are issues that courts themselves should be concerned with in the way they are).

The accepted judicial and scholarly interpretations of the Con-

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70. Civil law judges may be more sensible in these matters. Would not an American civil-law jurisdiction (as in Louisiana) find its determinations shaped by common-law developments under *Swift v. Tyson*? Would not this be consistent with the deference civil law judges pay to reasoning itself in preference to precedents? And, in due time, should not the Louisiana civil law be assimilated into the general common law? C.f. Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 532-536 (1928) (Holmes, J., dissenting). See supra note 7.

71. See *Mr. Croskey*, supra note 7, at 185-88. Something solid and steady is provided by a properly-read Constitution, thereby permitting one to make some sense of the multitudinous and constantly changing opinions of judges and scholars about “constitutional law.” See *Mr. Croskey*, supra note 7, at 187, 191.

I have referred to a year-long constitutional law course of which this discussion can be said to be a distillation. See infra text accompanying note 11. For convenience, I have drawn considerably in my notes upon the Gunther constitutional law casebook, which is probably the most popular such text today in law schools. Of course, other casebooks have their merits as well. See, e.g., *W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law* 1-75, 789-90 (5th ed. 1980).
stitution often require resort to peculiar or strained means in order to achieve legitimate governmental ends. Is not that an indication that something has gone wrong in the general view of the Constitution (assuming, still, that it was written by sensible, informed men for the government of a great and obviously growing country for decades, if not centuries, to come)?

Need I add that some such approach as I have here suggested to both the Constitution and the common law—an approach which recognizes the role of thinking and of reliance upon a sense of natural justice—is essential if the lives of the men and women of the law are to be meaningful? Otherwise, one's life as a lawyer is unduly shaped by the demands of the clients one happens to have. Otherwise, also, that life is devoted all too often merely to the pursuit of money and power and prestige.

Only if the law is obviously rooted in reason, and is obviously dedicated to an objective and discoverable justice, can one lead a life of reassuring significance even as one secures sufficient worldly rewards. Such reassurance comes in large part from the informed confidence that one is truly contributing as a practitioner of law to justice and the common good, in company with thoughtful lawyers, legislators and judges, past, present and future.

II. ON THE USE AND ABUSE OF OLD BOOKS

For, dear Crito, you must know that to use words wrongly is not only a fault in itself; it also corrupts the soul.

—Socrates

You have been misled.

Your program describes me as a lawyer. I cannot imagine anything more inaccurate. Indeed, I know of no one who is less a lawyer than I am: the highest courts in this State and in the Land will support my claim to this distinction.
One other biographical note might be of interest to this convocation of Great Books leaders: I, too, have been through your leadership training program. That must have been a dozen years ago, even before I became so emphatically a nonlawyer. I recall vividly my first practice leadership session, which was devoted almost entirely to the opening sentence of Aristotle’s *Ethics*:

Every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim.

I felt there was no point going any further until this statement was worked through. The training director thought otherwise. And so I joined the ranks of the nonleaders.

I know that your broadmindedness is such that you will not hold these failures against me. In fact, there may even be something attractive about a thoroughgoing failure.

**ii.**

Indeed, I can confess to still another failure, and this perhaps the worst of all.

I have even failed to live by one of the rules that I discovered several years ago, which is that if one wants to understand the Twentieth Century, one should be most reluctant to read anything written since 1900. Now this is not a hard-and-fast rule: a few good books are bound to be written from time to time—but the rule allows for them, since it merely acknowledges a kind of presumption against new books. My rule recognizes that the exceptional book will come to one’s attention eventually, if only through a reliable friend who had heard about it or who had perhaps found himself caught in a railroad station late at night with nothing else to read. 75

This was the status of the Lippmann book. I had heard some good things about it; I even had copies of other books of his (also unread) on my shelves. Perhaps it was only a matter of time before I would get around to reading Mr. Lippmann. Your program chairman persuaded me to say something about *The Public Philosophy*. 76 I decided, on my own initiative, to do even more than was

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75. This is how I myself discovered, in Cologne, the instructive Henry Cecil novels about English lawyers and judges. See Anastaplo, *Due Process of Law—An Introduction*, 42 U. DET. L. REV. 195, 211 (1964).

asked of me: even though no reliable friend had advised me to do so, I would read the book as well as talk about it.

That may have been my mistake, for I have had still another hope disappointed. It is not really a very good book. I should like to confine myself at this time primarily to a somewhat detailed analysis of one passage in the book, a passage which utilizes material which I have been told all of you have been exposed to, the Platonic dialogues dealing with the last days of Socrates. I believe this illustrates much of what is wrong with this kind of book.

Permit me to preface my discussion with an acknowledgment of Mr. Lippmann's merits. He is one of those in the community—your Program is another such influence—he is one of those who have helped make the greatest books respectable. When successful and respectable men speak well of the classics, and act as if they take them seriously, that does prepare the way for the proper instruction, by others, of their readers and of their readers' children. But such service can become a disservice if a more or less popular discussion is taken to represent the serious philosophical enterprise.

iii.

I turn to the passage I have mentioned, Section 6 of Chapter IX. Mr. Lippmann begins:77 "In the dialogues recounting the death of Socrates, Plato has painted the classic portrait of the civilized citizen. On the afternoon of his execution, Socrates is arguing with his friends." Strictly speaking, one might note, only one of the dialogues Mr. Lippmann is evidently thinking of recounts the death of Socrates—the Phaedo; the others, The Apology and the Crito, are accounts of his trial and of his refusal thereafter to fall in with a plan of escape. But this is the kind of slip we are all guilty of from time to time, worth mentioning perhaps only because it is the harbinger of a series of errors I must correct.

One must question also—and to this we must return at length—whether this is "the classic portrait of the civilized citizen." Is it Socrates as citizen who is the concern of Plato here? Mr. Lippmann thinks it is. He continues: "The jailers have left the door of the prison open, and Socrates is explaining why he refuses to escape."78 The long quotation that Mr. Lippmann reproduces at this point is from the Phaedo: the purpose of what Socrates says here

77. Id., ch. IX, § 6, at 106.
78. Id.
in the *Phaedo*\(^{79}\) is not primarily to explain the refusal to escape—that is done in the *Crito*, when the opportunity to escape was offered to Socrates\(^{80}\)—but rather to draw a distinction between “these muscles and bones” (which, he says, had wanted to flee) and “the better and nobler part,” which rules his body. The nature of the soul, or the relation of body and soul, is the subject here.

Nor had the jailers left the door of the prison open. Rather, Crito had informed Socrates, some time before the assembly reported in the *Phaedo*, that he (Crito) and others were prepared to use their wealth to secure Socrates’s escape.\(^{81}\) Why Socrates refused to escape is barely, if at all, explained by the account in the *Phaedo* of the relation of body and soul.

Mr. Lippmann goes on to say that Socrates is “the person who governs that organism [of his muscles and his bones, his reflexes, affections and instincts].”\(^{82}\) When he adds “reflexes, affections and instincts,” he may blur distinctions, attributing to Plato modern terminology and concepts. Distinctions of a different kind may be blurred when Mr. Lippmann simply assumes that the relation suggested by Socrates between “soul” and “muscles and bone” corresponds to a similar relation indicated by Thomas Aquinas between “a royal and politic rule” and the “irascible and concupiscible powers.”\(^{83}\) Obviously there are similarities, but the distinctions between a Socrates and a Thomas may be important to preserve and understand. But there runs through Mr. Lippmann’s book a somewhat facile division of the world, both political and intellectual, into two principal camps, the “good guys” and the “bad guys.”

\(^{iv}.\)

Socrates had refused to escape. He is “the adopted and initiated citizen of Athens”\(^{84}\)—it is not clear, however, what “adopted” can


\(^{80}.\) Crito is the only visitor on the occasion described in the *Crito*, it seems. One would not expect an extended consideration of escape plans amidst the large company present in the *Phaedo*. The passage quoted by Mr. Lippmann (from *Phaedo* 98-99) contains no more than a prudently guarded allusion to the illegal offer that had been made to Socrates on another occasion. On the reading of Platonic dialogues, see the discussions of the *Apology*, of the *Meno*, and of the *Crito*, in *HUMAN BEING AND CITIZEN*, supra note 5, at 8-29, 82-84, 206-07.

\(^{81}.\) See PLATO, *CRITO* 44-46.

\(^{82}.\) See W. LIPPMANN, supra note 76, ch. IX, § 6, at 106.

\(^{83}.\) Id. For Thomas, as for Socrates, are not both a “royal and politic rule” (or wisdom) and the “irascible and concupiscible powers” (or spiritedness and the appetitive) dependent more upon the soul than upon the body?

\(^{84}.\) Id. at 106-07.
mean when a natural-born citizen is referred to. We are further told by Mr. Lippmann that the friends of Socrates "would perhaps have said that it was only 'human' that he should want to run away when he had the chance. But Socrates chose to affirm the opposite, to insist that he was most fully human because he was willing and able to govern his desires." 85

But the question remains. Why did not Socrates escape? Because, we are told, he was most fully human by staying—and this humanity, Mr. Lippmann believes, requires Socrates to obey the law. This, and the purpose of his use of this passage from Plato, are summed up by Mr. Lippmann in these words: 86

Needless to say the lesson of this great story is not servility and conformism, and it does not carry any implication that the people of Athens who condemned Socrates were right in their judgment. As Crito says, when he has closed his eyes, "Of all the men of his time whom I have known, he was the wisest and justest and best." 87 The point of the story is that Socrates would not save himself because an Athenian citizen could not cheat the law, least of all for his own personal advantage. If Athens was to be governed, it must be by citizens who by their second natures preferred the laws to the satisfaction of their own impulses, even to their own will to live. Unless the citizens would govern themselves with such authority, the Athenian city would be ungovernable. If they followed their first natures, Athens would be trampled down in the stampede.

And, Mr. Lippmann goes on to say, "The necessities and the pur-

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85. Id. at 107. It is prudent to be cautious here, lest "governing" of desires be transformed into a crippling "suppressing" of desires. Thus, it is well to keep in mind, even as a distinction between the high and the low is insisted upon, that the life of philosophy may depend upon an erotic element. Is not this one reason why Antony is preferable to Octavius in Shakespeare's Antony and Cleopatra? Consider the implications of Cleopatra's recollection to Antony, "Eternity was in our lips and eyes, bliss in our brows' bent." W. SHAKESPEARE, ANTONY AND CLEOPATRA, I, ii, 35-36. Consider, also, the implications of Enobarbus' response to the suggestion that Antony "must leave [Cleopatra] utterly":

Never; he will not:
Age cannot wither her, nor custom stale
Her infinite variety: other women cloy
The appetites they feed, but she makes hungry
Where most she satisfies. For vilest things
Become themselves in her, that the holy priests
Bless her when she is riggish.

Id. at II, ii, 234-40. See infra text accompanying note 98; see also THE ARTIST AS THINKER, supra note 6, at 55. On the relation of the low to the high, see Mr. Crosskey, supra note 7, at 227 n.58.

86. W. LIPPMANN, supra note 76, ch. IX, § 6, at 107.

87. Id. (citing PLATO, PHAEDO 118).
poses of Athenian life are not something outside of Socrates, something alien, extraneous, imposed and only reluctantly conformed with. They are the ends of his own true character, established in that part of his being which he calls himself.”

Much of what is said here is superficial. But superficiality of analysis is inevitable when one considers the lack of care that has evidently characterized this reading of a Platonic text. I have referred to a few points already. The most striking error, however, is in the long passage I have just quoted. The concluding sentiment in the *Phaedo*—the testimony that “of all the men of his time whom I have known [Socrates] was the wisest and justest and best”—this testimony is attributed by Mr. Lippmann to Crito, when any attentive reader of the dialogue should know it was uttered by Phaedo. It is a melancholy reflection upon the state of American education—indeed, Mr. Lippmann’s instinct is correct as to the state of that education—that such an obvious error of this magnitude should have eluded the attention of the eminent men whose assistance the author acknowledges—and should have continued to elude them and their colleagues through the half-dozen printings that the book has enjoyed in the past decade. If such an error can be perpetuated, however it might have been conceived, others that depend on interpretation are to be anticipated. The key is the lack of care in reading.

Crito assisted Socrates in his final bath; he closed his mouth and his eyes after death. Such services were to be expected of one who happened to be an old friend and fellow-citizen. It is understandable that an Athenian gentleman such as he should have been moved (for good and bad reasons) to want to employ his wealth to help his friend escape. But his assessment of Socrates might not have meant as much as Phaedo’s: we are able to assess the capacity for judgment of both Crito and Phaedo; we may even be able to determine what Socrates and Plato think of each man. Indeed, we see Socrates stroking Phaedo’s hair as he engages in his final conversation with his friends; and we notice that Plato has “entrusted” to Phaedo the narration of a moderately long dialogue. Furthermore, we note, Phaedo is not an Athenian; he relates his story to other non-Athenians in a foreign city (Phlius), a Peloponnesian

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88. W. LIPPMANN, supra note 76, ch. IX, § 6, at 107.
89. See PLATO, PHAEDO 118. I merely note here that the translation may be another problem. For instructive translations of Plato’s *Euthyphro, Apology* and *Crito* and of Aristophanes’ *Clouds*, see FOUR TEXTS ON SOCRATES (T. West & G. West trans. 1984).
90. See PLATO, APOLOGY 33; see also PLATO, PHAEDO 118.
91. See PLATO, CRITO 44, 45-46.
city that seems to have always been an ally of Sparta, not of Athens. Thus, his praise of an Athenian in these circumstances is even more telling than that of a Crito would have been.92 Such are the considerations that have to be taken into account in assessing and understanding what is said in any dialogue.93

All this bears upon the problem of why Socrates does not escape.94 The superficial impression—and the one that is suggested to Crito, a man who seems unduly concerned about public opinion as well as somewhat too inclined to use his wealth to subvert the law95—the superficial impression is that Socrates means to stand for law-abidingness at all costs. Perhaps this is the impression with which the casual, that is, the usual, reader as well is intended to leave the dialogue: the city and the citizen must be assured that philosophy constitutes no threat to its security.96 Perhaps, indeed, this assurance must continue to be made.97

But Plato is not so extreme as to suggest that the laws must be obeyed at all costs, that citizens must always prefer the laws “to the satisfaction of their own impulses, even to their own will to live.”98 Or, if one insists on defining citizenship in such extreme terms, it is not Plato’s contention that one should be simply the citizen, or even that citizenship represents the highest pursuit or the best state of man. Mr. Lippmann’s emphasis, on the other hand, is reflected in the title of his book: philosophy is somehow to be made public. But philosophy is, of all pursuits, one of the most private.99

92. “An orator obliged to praise Athenians among Peloponnesians, or Peloponnesians among Athenians, must be a good rhetorician in order to succeed and gain credit. But there is no difficulty in a man’s winning applause when he is contending for fame among the persons whom he is praising.” PLATO, MENEXENUS 235D.
93. Phaedo’s age should be considered as well. On the dramatic elements in a Platonic dialogue, see J. KLEIN, A COMMENTARY ON PLATO’S MENO (1965); HUMAN BEING AND CITIZEN, supra note 5, at 82-89. See also L. STRAUSS, STUDIES IN PLATONIC POLITICAL PHILOSOPHY (1983) [hereinafter cited as PLATONIC POLITICAL PHILOSOPHY]; L. STRAUSS, ON TYRANNY (1968) [hereinafter cited as ON TYRANNY].
94. It bears also on the related question, which I only touch upon in this article, of why Socrates permitted himself (to the extent he did) to be tried, convicted or sentenced to death. It suffices to note that Socrates seems to have succeeded in making his death, as well as his life, both useful and noble. See PLATONIC POLITICAL PHILOSOPHY, supra note 93, at 38-66; HUMAN BEING AND CITIZEN, supra note 5, at 206-07. See infra note 96.
95. See PLATO, CRITO 43, 45.
96. See PLUTARCH, NICIAS (reference to Socrates and Plato) XXXIII, 3-4.
97. See Handbill Replying to Charges of Infidelity (July 31, 1846), in III A. LINCOLN, supra note 9, at 382. See also Virtue of Prudence, supra note 4, at 123-24; infra Part VII.
98. W. LIPPMANN, supra note 76, ch. IX, § 6, at 107. See supra note 85.
99. See THE ARTIST AS THINKER, supra note 6 at 370; Anastaplo, Notes Toward an
We suspect that Socrates’s position at the time of his trial and execution would have been different had he been a young man with his work yet to be done instead of a man of seventy whose powers he reports to be on the verge of beginning to fail. 100 If one reads the Crito carefully, one notices that the arguments that silence—if they do not persuade—Crito are not really Socrates’s arguments, but those of the laws which Socrates seems to adopt for the occasion. 101 A number of other details, even in the dialogues I have mentioned, reinforce what I have suggested. 102

Much of Mr. Lippmann’s argument in the latter part of his book rests upon the virtual identification of the purposes of the human being with those of the city. 103 But even our basic public document, The Declaration of Independence, stands as a reminder that unquestioning law-abidingness is a sometimes dubious attitude. 104 Plato’s dialogues testify against that simple identification of the human being with the citizen, an identification which opens the door to that totalitarianism which Mr. Lippmann deplores throughout his book. 105

The carelessness exhibited by Mr. Lippmann in the handling of Platonic texts is merely a particularly striking illustration of his approach. Many more instances could be developed. Those of you familiar with Aristotle’s Politics and the Nicomachaean Ethics, for example, can work out several difficulties in Mr. Lippmann’s exposition of Alexander’s improvement of Aristotle’s political teach-

100. PLATO, APOLOGY 38. That Socrates’ powers have not yet begun to fail is evident from his last conversations as reported in the Phaedo.
101. See PLATO, CRITO 50-54.
102. Consider, for example, the preference expressed in the Crito (47-48) for the opinions of one man over those of many men. The “laws” appear as many in Socrates’ account. They are so loud that they drown out in Socrates’ ears any other argument. PLATO, CRITO 54. Cf. PLATO, CRITO 46. Had Socrates not wanted the argument needed to move Crito to come from “the many,” he could have invoked a single Justice figure rather than the multiple Laws.
103. Consider how Plato’s Euthyphro questions one manifestation of zealous law-abidingness.
104. See Declaration of Independence, supra note 4, at 398-403.
105. Is not Mr. Lippmann’s approach that of the Enlightenment, however much he himself may criticize the Enlightenment from time to time? On Enlightenment influences in the United States, see Anastaplo, Prophets and Heretics, MODERN AGE 315 (Summer 1979). On Enlightenment influences worldwide, see infra Part VII.
ing\textsuperscript{106} as well as in his discussion of Aristotle's rules of human
conduct.\textsuperscript{107}

It is no wonder that, in the final analysis, Mr. Lippmann seems
to see the classics as fundamentally outmoded, something to be
corrected and built upon.\textsuperscript{108} Indeed, he seems to stand for a hopeful idea of intellectual progress. Thus, he can quote with approval
the statement of Bernard of Chartres that we can see further than
the ancients because we are dwarfs seated on the shoulders of giants.\textsuperscript{109} But even this does not make a proper assessment: we must think of giants and dwarfs not only with respect to size but also
with respect to capacities. That is to say, the dwarf cannot hope to
see further than the giant upon whose shoulders he sits unless he
should happen to have the vision of that giant.

Mr. Lippmann's judgments about the relevance and significance
of the classics cannot stand.

vi.

Mr. Lippmann's imprecision in this book is to be found as well
in his treatment of contemporary political problems. He opens his
discussion of freedom of speech with these observations:\textsuperscript{110}

Only within a community which adheres to the public philos-
ophy is there sure and sufficient ground for the freedom to think
and to ask questions, to speak and to publish. Nobody can justify
in principle, much less in practice, a claim that there exists an
unrestricted right of anyone to utter anything he likes at any time
he chooses. There can, for example, be no right, as Mr. Justice Holmes said, to cry "Fire" in a crowded theatre. Nor is there a
right to tell a customer that the glass beads are diamonds, or a
voter that the opposition candidate for President is a Soviet
agent.

Much of the discussion that follows in the book is characterized by
the imprecision found here.

The three examples Mr. Lippmann uses are unfortunate ones for
any useful introduction to the problem of freedom of speech, its
advantages and its limitations. First, Mr. Justice Holmes denied

\textsuperscript{106} See W. LIPPMANN, supra note 76, ch. VIII, § 4, at 81-83. Cf. Id., ch. IX, § 5, at
104-05.

\textsuperscript{107} Id. at 111-13. See Anastaplo, Aristotle on Law and Morality, appended to the

\textsuperscript{108} See W. LIPPMANN, supra note 76, ch. VIII, § 3, at 80-81; ch. IX, § 4, at 102-03;
ch. IX, § 5, at 105; ch. X, § 3, at 113-15. Cf. HUMAN BEING AND CITIZEN, supra note
5, at 49-53, 55-56; infra notes 115, 119.

\textsuperscript{109} W. LIPPMANN, supra note 76, ch. IX, § 5, at 105.

\textsuperscript{110} Id., ch. IX, § 3, at 96.
the right falsely to cry "Fire" in a crowded theatre—Mr. Lippmann, like others before him, overlooked the qualification.\textsuperscript{111} Second, no one I know of tries to apply freedom of speech criteria and immunities to commercial transactions—the case of the glass beads and diamonds is simply irrelevant.\textsuperscript{112} Third, as to his denial of the right of a candidate to tell a voter that the opposition candidate for President is a Soviet agent: certainly, he may have that right if the opposition candidate is or appears to be such an agent; and perhaps he should also be left free to accuse that opponent of advocating projects that seem, in effect, much more in the interest of other countries than of his own.\textsuperscript{113}

The cavalier introduction to the problem seen here is reflected in the subsequent discussion of freedom of speech. One finds Mr. Lippmann lending the authority of his name and the weight of his apparently sober examination of public issues to the cause of those who advocate the most sweeping suppression of radical political dissent.\textsuperscript{114} Despite appearances, there is no serious examination of the problems to which he addresses himself.

\begin{footnotes}
\begin{itemize}
\item[\textsuperscript{111}] Cf. A. MEIKLEJOHN, POLITICAL FREEDOM 39 (1960). Even with this qualification, Justice Holmes's example raises no free speech problem. On Justice Holmes and the First Amendment, see \textsc{The Constitutionalist}, \textit{supra} note 4, at 824.
\item[\textsuperscript{112}] Mr. Lippmann, alas, was ahead of his time. See infra notes 124-27 and accompanying text. Recent developments are indicated in a letter, of December 11, 1984, which I submitted for publication to the \textit{Washington Post}:

In your article, "Battle Brews Over Broadcast Beer, Wine Ads" (Dec. 9), a prominent First Amendment lawyer is quoted as saying that proponents of bans on broadcast liquor advertising would likely have a difficult time of it before the U.S. Supreme Court because of the free-speech protection now available to commercial messages.

The recent limited extension by the Supreme Court of First Amendment guarantees to such market-place activity as advertising is generally recognized by constitutional scholars to be poorly grounded and hence tentative. Therefore, it should not come as a surprise during the next decade to see the Court move away from such a trivialization, if not even subversion, of that vital First Amendment guarantee which is intended primarily to ensure that a self-governing people will be able freely to discuss the public business. It is to be hoped that, when the Court does return, as it must, to a sounder view of the First Amendment, it is not seen as moving us into an age of repression.

Clearly protected by the First Amendment is vigorous discussion of any government measures now used, or proposed to be used, in dealing with the serious alcohol-abuse problems that almost everyone seems to agree we confront. In the long run, of course, no constitutional guarantee which is not confined to its proper object is likely to remain useful.

\textcolor{black}{See supra text accompanying note 57.}
\item[\textsuperscript{113}] Calumny is but one of the risks we must be prepared to accept if we are to have genuine freedom of speech. \textit{See Mr. Crosskey, supra} note 7, at 213-14.
\item[\textsuperscript{114}] W. LIPPMANN, \textit{supra} note 76, ch. IX, § 4, at 102.
\end{itemize}
\end{footnotes}
It is my impression that Mr. Lippmann uses the classics primarily to buttress his practical judgments, judgments formed independently of the classics, rather than going to these books for instruction and guidance. Fortunately, he, as a gentleman of culture and experience, happens, by and large, to be on the right side. His usefulness for us comes in large part from his efforts to legitimate a general interest in the great books.

The wide response he has elicited reflects, I suggest, the desire in men for something better than the usual simply partisan studies. Mr. Lippmann speaks of the significance of the central theme in a community, the theme of "the great deeds and the high purposes of the great predecessors." He appeals to, and attempts to nourish, the yearning for nobility that some men have happened to retain even in times of mediocrity and conformity. For this service, also, we are in his debt.

But true nobility should not be seen exclusively in terms of civic virtue. Philosophy, even to be useful, must be more than useful: the citizen and the philosopher cannot be simply blended together. It is not philosophy or public philosophy, but natural law and political philosophy that Mr. Lippmann should speak of. But that is another story for another occasion.

The great books are no doubt edifying, even for the casual reader. But they can truly teach us only if we are equipped and moved to devote to them the care, imagination and precision that they require.

115. See What is a Classic?, in The Artist as Thinker, supra note 6, at 284-300; see also Anastaplo, The Teacher as Learner: On Discussion, Claremont Rev. of Books 32 (Summer 1983).
116. See Aristotle, Nicomachean Ethics 1095a25.
117. W. Lippmann, supra note 76, ch. IX, § 5, at 105.
118. See supra note 99. "It would seem that the notion of the beneficence of nature or of the primacy of the Good must be restored by being rethought through a return to the fundamental experiences from which it is derived. For while 'philosophy must beware of wishing to be edifying,' it is of necessity edifying." L. Strauss, Thoughts on Machiavelli 299 (1958).
119. Mr. Lippmann seems to set aside the term, "natural law," because of the "great semantic confusion" caused by that term. W. Lippmann, supra note 76, ch. VIII, § 3, at 79. But one result of this is to misuse other terms and to confuse distinctions that are worthy of preservation. See, e.g., Aristotle, Politics, III, iv. See supra note 108. An even better term than "natural law" may well be another venerable term, "natural right." See Human Being and Citizen, supra note 5, at 249 n.4.
III. MORE IS LESS: ON THE PURPOSES OF THE FIRST AMENDMENT\textsuperscript{121}

Education conduces to the happiness and improvement of man, and is particularly necessary to the support and purity of Republican Governments.

—An Act Establishing Jefferson College\textsuperscript{122}

It is good, after a very long absence, to be back in Louisiana, a State of many fond memories for me. I won my wings at Selman Field, up at Monroe, Louisiana, some forty years ago. In the course of my training, I flew over Alexandria many times, but this is the first time I have been here on the ground. I trust that what I say to this Press Club today is similarly down to earth.

In constitutional matters, just as in artistic productions and in fine cooking, \textit{more is less}. That is, one \textit{can} go too far with a worthwhile development; one can add more than is needed, thereby spoiling the overall effect one wishes to achieve.

This may be seen in what has happened the past quarter-century with respect to First Amendment interpretations. As you recall, this amendment commands, among other things, that freedom of speech and of the press should not be abridged. Before the Second World War, it would have been easy to accept the proposition that the "freedom of speech [and] of the press" found in the First Amendment referred primarily, if not exclusively, to political discussion. (This is aside from the protection provided all publishers by the "no previous restraints" aspect of the "freedom of the press" guarantee.\textsuperscript{123})

There were arguments, of course, as to \textit{how far} political discussions could be allowed to go—but that political discussion was what the First Amendment was primarily "about" did not provoke much of an argument. And, it would be said, this political-discus-

\footnotesize{\textsuperscript{121}} This talk was given to the Central Louisiana Press Club, Alexandria, Louisiana, March 14, 1983. The text of the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. See infra text accompanying note 143 for a summary of my interpretation of the Speech and Press Clause of the First Amendment. On the Religion Clauses of the First Amendment see infra note 143.

\footnotesize{\textsuperscript{122}} Jefferson College, Washington, Mississippi, May 13, 1802.

\footnotesize{\textsuperscript{123}} See Anastaplo, \textit{The Pentagon Papers and the Rule of "No Prior Restraints,"} 64 U. CHI. MAG. 16 (March/April 1972) (reprinted in 118 CONG. REC. 24990 (July 24, 1972). On previous restraints, see \textbf{THE CONSTITUTIONALIST}, supra note 4, at 818. See also Anastaplo, \textit{Freedom of Speech and the Silence of the Law}, 64 TEX. L. REV. (forthcoming) (1985); supra note 57; infra text accompanying note 144.
sion emphasis is critical to a constitutional system which depends upon the right and ability of Americans to govern themselves.

In recent decades, however, the protection of the First Amendment has been extended (with the enthusiastic approval of the mass media) far beyond political discussion: it is now said to cover almost all artistic or artistic-seeming expression; it covers much that would once have been vulnerable as libel or slander; and it covers commercial talk, especially advertising.\textsuperscript{124}

Of course, it has always been true that if restrictions on advertising or personal criticism or art could be shown to be motivated by partisan considerations, such restrictions would be vulnerable under the First Amendment as roundabout ways of curtailing or controlling political discussion. (It has also always been true that the freedom of political discussion permits the people to examine and criticize all government regulations, including regulations of art and of commerce.)\textsuperscript{125}

The First Amendment immunity now made available to art and to commercial talk goes far beyond a proper concern for uninhibited political discourse; rather, art and commercial talk are now protected for their own sake. This probably has something to do with the widespread tendency today to extol "freedom of expression" rather than "freedom of speech." (I suspect that the passions aroused by the Second World War and the unprecedented dislocations resulting from that war have helped shake us loose from our constitutional moorings.)\textsuperscript{126} Does not the phrase "freedom of expression" look pretty much to individual self-gratification and personal fulfillment, whereas the traditional "freedom of speech" language looks much more to public concerns, an established community, and the common good?

But, someone might observe, this only means that more is more, not (as I have suggested) that more is less. True, there is more that is now said to be covered by the First Amendment. But the degree of protection now available through the First Amendment may be, or may become, less than what is needed.

I remind you that the First Amendment guarantee is put in ab-

\textsuperscript{124} See supra note 112 and accompanying text.
\textsuperscript{125} See Human Being and Citizen, supra note 5, at 134-35.
\textsuperscript{126} See Anastaplo, Law, Lawyers, and Property: The Open Society and its Limitations, in Order, Freedom, and the Polity: Critical Essays on the Open Society 48 (G. Carey ed. 1986) [hereinafter cited as Open Society]. (An unedited version of this article, with extensive notes, may be found in 20 Willamette L.J. 615 (1984). At page 631, line 20, "reluctance" should be "inclination"; at page 641, line 7, "common" should be "common good."). On "freedom of expression," see infra note 155.
solute terms: no qualification on the right of the people to freedom of speech is recognized. But, as we all know, various of the activities which are now extended First Amendment protection have to be regulated. Advertising, for example, can be routinely regulated with a view to promoting truthfulness, punishing fraud, and preventing harmful consequences for consumers.

Which way will we move in the future? Will political discussion come to be curtailed as, say, advertising can obviously be? The First Amendment does not distinguish among the things it does protect: if its absolute-sounding language can permit advertising to be regulated, why should it not permit political discussion to be regulated as well? This is one risk of our carelessness about the principles which should guide us, especially if people around us begin to strike out blindly at the licentiousness flaunted before them.

Or will the movement in constitutional interpretation be in the other direction? That is, since the First Amendment is absolute in terms, the regulation we still permit of advertising and of art may eventually be done away with. And would not this mean, in turn, that there would be both short-term damage to be endured by consumers and long-term disabilities visited upon the community?

For, it can be said, the community which cannot control at all what advertisers and artists do is a community which cannot intelligently shape successive generations of citizens. This means, in effect, that the ability of our people to govern itself would be considerably abridged, so much so that there can be no reasonable assurance that those who inherit from us the Constitution and its First Amendment will truly know what to do with the vast powers and privileges recognized therein for the American people.127

What, then, does common sense call for now?

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IV. THE FIRST AMENDMENT AND THE IDES OF MARCH\textsuperscript{128}

Brutus: Stoop, Romans, stoop,
And let us bathe our hands in Caesar's blood
Up to the elbows and besmear our swords.
Then walk we forth, even to the market place,
And waving our red weapons o'er our heads,
Let's all cry “Peace, freedom, and liberty!”

Cassius: Stoop then and wash. How many ages hence
Shall this our lofty scene be acted over
In states unborn and accents yet unknown!

Brutus: How many times shall Caesar bleed in sport,
That now on Pompey's basis lies along
No worthier than the dust!

Cassius: So oft as that shall be,
So often shall the knot of us be called
The men that gave their country liberty.

—Shakespeare, \textit{Julius Caesar}\textsuperscript{129}

Today is the Ides of March, a date made famous by Shakespeare's \textit{Julius Caesar}, that play in which there is examined an unsuccessful attempt by conspirators to save, or perhaps it was to restore, the Roman Republic. That a conspiracy "had" to be resorted to on that occasion suggests defects either in the Roman Constitution or in what it had imprudently been allowed to become.

The Constitution of the United States, it is prudent to assume, recognizes that everyone who has a duty under our constitutional scheme also has the power necessary for an adequate performance of that duty.

Thus, the great duty of Congress and the President to "provide for the common defense" can reasonably be expected to be accompanied by a considerable power to prepare for and to wage war.

\textsuperscript{128} This talk was given at Louisiana State University, Alexandria, Louisiana, March 15, 1983. Both this talk and the Central Louisiana Press Club talk on the day before (found in Part III of this article) were arranged by Professor Stephen Vanderslice of Louisiana State University. The Louisiana State University Law Center talk on the following day (found in Part I of this article) was arranged by Professor Paul R. Baier of the Law Center.

\textsuperscript{129} W. SHAKESPEARE, JULIUS CAESAR, III, i, 105-19. See THE ARTIST AS THINKER, supra note 6, at 22-23; see also W. SHAKESPEARE, THE RAPE OF LUCRECE 1830-48.
Consider what was said by the freedom-loving Justice Black, in December 1944, about the wartime exclusion, by the Government of the United States, of all people of Japanese ancestry from the West Coast.\textsuperscript{130}

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Particularly to be noticed here is the observation that "the power to protect must be commensurate with the threatened danger." That any power—and especially the awesome defense power—may be misused should go without saying. And that it may very well have been misused in dealing with Japanese-Americans during the Second World War has long been obvious to many Americans. Also long obvious has been the need for the people of the United States to do something substantial to recognize and properly to make up for any misuse of the defense power with respect to Japanese-Americans. A power so to recognize and to correct surely belongs to the American people under the Constitution. (Is not such a power implied by the defense power itself, as part of it?\textsuperscript{131})

Be all this as it may, we should again notice the observation in the Black opinion that "the power to protect must be commensurate with the threatened danger." Similarly, it can be said, the Constitution recognizes (implicitly, even before the First Amendment, and explicitly, through the First Amendment) that the power of the people of the United States must be as broad as the duty of that people acting in its capacity as the ultimate sovereign of this country.\textsuperscript{132}

We, the people, do make the vital political decisions here, both by the choice of officers of government and through the influence of public opinion. The power we require, therefore, is not only that of the ballot but also that which comes in the form of the right to discuss fully and freely the public business of the country.

No doubt, the American people can, and sometimes do, misuse their power. There is no constitutional or institutional safeguard

\textsuperscript{130} Korematsu v. United States, 323 U.S. 214, 220 (1944).

\textsuperscript{131} A bolder, or better, use of the defense power is more likely if it is recognized that corrections can be made later. See infra Conclusion, § 1.

\textsuperscript{132} See, e.g., THE CONSTITUTIONALIST, supra note 4, at ch. 5.
against foolishness or against the consequences of a bad character (either personal or communal). But it is even more foolish, and dangerous, to argue against the existence or use of a power because of the possibility of its abuse. If all of us had to be limited only to the exercise of powers that could never be abused, then there literally would be nothing that could ever be done.\footnote{133. Thus, for example, we could never eat—and hence we would starve to death. Consider, for example, the implications of W. SHAKESPEARE, CORIOLANUS, I, i, 75.}

And so, we the American people should insist—and the Constitution provides considerable authority for the insistence—that our power to discuss public affairs must be commensurate with our right and duty to decide what is to be done and who among us is to do it for us. \textit{This} power of discussion exercised by the American people, I have suggested, can be considered, for practical purposes, to be absolute, at least so long as it is possible for constitutional government to work.

The Constitution of the United States, it is also prudent to assume, should be so read as to permit each part of it to be consistent with all other parts. When two constitutional provisions do seem to be in conflict, that is an indication (a symptom, so to speak) that one or the other provision has been misunderstood.

This may be seen, for example, in the supposed conflict (of which much is made today) between freedom of the press and the guarantees in the Constitution of a fair trial. The effort to assure a fair trial may at times require restrictions upon immediate press coverage of judicial proceedings. But even in these rare instances, we the people are left free to examine what judges are doing and the reasons they give to justify themselves. We are also left free to expose what has been done, to have it corrected if it should have been improper, and (if need be) to legislate against repetitions.

Another example with respect to the problem of the internal consistency of the Constitution takes us back to my opening remarks about the treatment of Japanese-Americans during the Second World War. Some suppose a conflict between the First Amendment and the provisions in the Constitution for the common defense. But, it should be remembered, those who exercise the common defense power (usually the military, on a day-to-day basis) are subordinate to civilian control in the Government—with the people of the United States reserving to themselves the ultimate civilian control. And this means, among other things, that the American people can decide what the defense needs of the country are, what the war and peace policies of the country should be, and
who should execute those policies from time to time. This means that the people must be free to discuss these matters fully and repeatedly, even to reconsider and to revise what has already been decided or done.\(^{134}\)

Of course, it will be said, "the enemy" is listening while we discuss such things. But it hardly makes sense to cripple ourselves in so vital an activity, in order to thwart any supposed enemy. Besides, it can be hoped, others can learn how to think about their affairs from watching us fully discuss our own, including our mistakes and failings. (Also instructive for us should be to notice what others do notice about us.) It can even be hoped that the good sense, and the justice and the humanity, of what is being said among us, as we discuss fully our affairs, will commend themselves eventually to other peoples and their leaders as they "listen in."

Perhaps, indeed, others can learn from us as we, along with many others, have learned from the desperate and perhaps imprudent conspirators who nobly sacrificed themselves some two thousand years ago today on behalf of the republic that they loved.

V. PORNOGRAPHY AND THE SCOPE OF THE FIRST AMENDMENT\(^{135}\)

It was a precept of great antiquity as well as of high authority that we should not be righteous overmuch. [I believe] we ought to be equally on our guard against being wise overmuch.

—Gouverneur Morris\(^{136}\)

\[i.\]

It is a peculiar feature of American life in these closing decades

\(^{134}\) Indeed, the American people have to remain free to discuss whether any war which has been embarked upon by the United States should be continued and, if so, how. Emergency wartime measures, however justified in particular circumstances, cannot be permitted to keep the people from assessing and passing judgment upon those public servants (including military personnel) who resort to emergency measures on behalf of the people and their country. After all, it is the people, and only the people, who authorize public servants to act—and to continue acting. See Anastaplo, *The Occasions of Freedom of Speech*, 5 Pol. Sci. Rev. 303, 398-401 (1975).

\(^{135}\) This talk was given on the occasion of a program, "Pornography: Its Social and Legal Implications," presented by The Women's Law Center, The School of Law, Loyola University of Chicago, March 28, 1985. This talk, another talk (by Professor Franklyn S. Haiman of Northwestern University), and the general discussion which followed have been published in 8 Loy. U. Chi. Women's L. Rep. 1 (Summer 1985), from which this talk has been reprinted with permission. See infra note 145.

\(^{136}\) J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, July 26, 1787.
of the Twentieth Century that so many reputable constitutional au-
thorities, both on the bench and off, should believe that the First
Amendment is intended to protect the publication and sale of por-
nography as such. We need not attempt to determine today which
came first, this peculiar constitutional opinion or the flourishing
pornography industry among us; we need only notice that these
two (theory and practice, so to speak) go hand in hand, each evi-
dently supporting the other.

And yet, there can be little doubt but that the Framers of the
First Amendment did not intend it to protect such things as por-
nography. This is not to suggest, of course, that the First Amend-
ment (or the Constitution as a whole) takes any position on pornog-
raphy itself, except to leave it open to communities to con-
sider what is best to do about it. Thus, the First Amendment does
protect the right and the duty of the community to discuss public
issues fully, including such issues as what (if anything) should be
done about pornography. And, of course, the right of full discus-
sion here includes both the right to argue that the First Amend-
ment does indeed protect pornography and the right to show what
is clearly wrong with that argument.

ii.

When citizens investigate, as they are obliged and entitled to do,
the extent and effect of pornography today, what are they apt to
find? No doubt, they will find differences of opinion. But some
observations seem to be beyond serious questioning, such observa-
tions as the following: there is certainly much more, and much
more vivid, pornography around in this country today than there
ever has been; there is very little effective regulation of it in many
parts of the country; and there is little prospect that things will
change in the near future, except perhaps that there will be more
and more pornography and that it will become even more vivid
than it is. Although I am not an expert with respect to pornogra-
phy—since I am not much interested in it personally either as a
consumer of it or as a suppresser of it—I believe that there cannot
be much doubt about the observations which I have just said to be
beyond serious questioning.

What is seriously questioned, of course, is what the effect of so
much pornography is. A few consider it trivial and amusing, if not
even a positive good, contributing to a relaxation of crippling inhibi-
tions and of stifling repression; many tend to be indifferent, con-
sidering it more or less inconsequential and probably no one’s
business but the consumer's; many others, if pressed, would identify it as harmful, or at least as ugly and insulting (and otherwise offensive) to the community; and a few (perhaps more than just a few) consider it positively evil, contributing to depravity and a general degradation and to a cheapening of love and sexuality. Such differences of opinion are the stuff of public discourse—and, in the ordinary course of things, the community, with the aid of such experts as it chooses to rely upon, would decide, at least for the time being, what pornography does and what, if anything, should be done about it.

iii.

If the community should decide that any particular activity is questionable, it is likely to be tempted to suppress or at least to regulate it, rather than to rely upon “education” alone. And so the issue is naturally raised as to whether it is really feasible to do anything constructive about such a problem as pornography in the circumstances at hand. Some problems, it can be argued, are likely to solve themselves, and so are best left alone. Others may be too far out of control to be brought back in line, and so the community must simply bear with them (especially if technological developments should make effective control unlikely). In some circumstances, attempted regulation may even be considered “counterproductive,” either making things worse than they already are or spilling over into the control of other activities that the community wants left alone. Any sensible community, in considering what to do about a questionable activity, must determine not only whether the activity is indeed harmful but also whether it makes sense to try to do anything about it here and now. Thus, the response of the community may vary from place to place and from time to time, a response which (it is to be hoped) reflects the considered opinion of a community which has self-confidently engaged in serious discussion of the problem of pornography.

iv.

But, some will insist, the community is not entitled even to consider, with a view to legislation, either the effects of pornography or the feasibility of its control. That is, an invocation of the First Amendment will be interposed here, an invocation which does find considerable support in opinions of the courts in recent decades. But an attempt thus to use the First Amendment, however exalted the authorities relied upon, simply is not warranted by any genuine
respect for constitutional language. The Constitution does refer to various things which this or that government may not resort to, things such as a "Bill of Attainder" or "Letters of Marque and Reprisal." It is obvious in such instances that what, precisely, is being prohibited has to be studied carefully. It is less obvious now, but no less true, that what "freedom of speech [and] of the press" means similarly has to be studied carefully. And when one does study it, one finds no, or almost no, evidence to suggest that pornography was ever intended to be protected by the Framers of the First Amendment. Rather, the right and power of citizens to discuss the public business are primarily what that amendment was designed to protect.

Still, some will reply, we need not be bound by the original meaning of the Constitution; instead, it should be considered a living, growing document. Thus, the demand for liberty—the demand to be let alone—extends even to the Constitution itself: that is, we are at liberty to do whatever we please with the language of the Constitution; its terms can be made to mean whatever happens to suit people's fancy from time to time. This is, however, a sword that cuts more than one way: for one cannot expect others to respect constitutional restraints if one admits that one is not bound oneself by any enduring meanings. Thus, if "freedom of speech [and] of the press" is quite flexible language, having no fixed meaning, why not also "Congress shall make no law?" (I need not consider on this occasion what the Fourteenth Amendment does with and to the First Amendment.)

Be all this as it may, there may not be any new arguments here, certainly not the argument that a truly free people must be a people of sturdy character if it is to be able to use effectively and responsibly any considerable liberty. Perhaps the only new thing with respect to pornography today may result from the compulsion placed upon pornographers to devise more and more bizarre materials in order to service the jaded tastes of their customers, tastes which (by the way) probably depend somewhat, for their full titillation, upon the awareness that what is being served up remains forbidden fruit. It can be expected, in the years ahead, that monstrous things will have to be resorted to routinely by purveyors in order for their pornography customers to get the required "kick."

v.

Of course, to say that there is no First Amendment issue with respect to the regulation of pornography is not to deny that there
may be other constitutional restraints upon what is attempted to be done to the purveyor. There is, first of all, the “problem” of devising definitions which are adequate. Then there are other due process concerns as well as a general obligation to treat property rights with the proper respect. The right of privacy may also be invoked, but that can be invoked, at least as naturally, on behalf of the suppression of pornography as well. Some may even go so far as to suggest that the community is not entitled to attempt to shape moral character—but here, also, two centuries of principles and experience among Americans should suffice to counteract the dogmas of recent decades about the so-called autonomy of the individual.

vi.

A First Amendment argument of sorts can be made to the effect that if the community is permitted to suppress pornography, it can become accustomed to suppressing whatever else it does not like—and so unpopular political discourse is likely to be next. But this argument, too, cuts more than one way: if freedom of speech becomes identified with obvious licentiousness, how long is it likely to be respected by ordinary people? After all, the defender of the First Amendment, in dealing with people who are worried about unbridled criticism of government, can explain, with some plausibility, that such criticism must be risked if there is to be that full examination of public issues and government policies which is needed for genuine self-government. Many examples are available of unpopular criticism which turned out to be very much in the public interest. People can also be led to appreciate here that relatively few are likely to abuse the privilege of criticism, and that such abuses tend (for a variety of reasons) to be self-correcting.

But what kind of assurances and experiences can one use in deal-

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137. Consider, e.g., the concluding passage from the Final Report of the Governor's Commission on Individual Liberty and Personal Privacy (State of Illinois, 1976):

Finally, it is recommended by this Commission that there be established, at least once a decade, a temporary privacy commission composed for the most part of private citizens. Each such commission should survey enduring as well as emerging privacy problems in this State; suggest appropriate legislation; call public attention to coarsening "cultural" developments threatening those human sensibilities upon which an abiding respect for privacy rests; define privacy-related matters in need of extended study; and otherwise assess, correct and continue the work of its predecessor privacy commissions.

See also Obscenity and Common Sense, in Human Being and Citizen, supra note 5, at 117-19; infra note 145.
ing with people who are worried about unbridled pornography? What plausible explanations are available here as to the need for this as a contribution to the common good? What self-correcting elements are there to be pointed to, especially when a steady deterioration is very much in evidence over the past quarter-century? Even the instances of sustained misguided censorship in this country are few and far between. In a generally free community, it is the censor who must continually justify himself and who is subject to ridicule and to correction when he has been foolish, whereas the profit-making pornographer is not likely to be curbed by mere public opinion or by any free market in his product. In any event, it should be remembered, although pornography does not properly enjoy First Amendment protection (except perhaps with respect to "previous restraints"), full First Amendment protection is available for anyone who chooses to question whatever the censor may do, even if what the censor does should be quite popular. Similarly, the First Amendment does remain available for those who would condemn the pornography industry as a sleazy operation. The question remains, however, whether laws are also available (in addition to exhortations) to curb the excesses of pornographers and of censors alike.

vii.

The First Amendment, it is useful to remind ourselves, does take the community for granted: it is because it obviously helps the community govern itself—truly to govern itself—that the First Amendment has long been respected. Thus, it stands for the citizen, who is rooted in his community, not merely for the individual, who is somehow independent of if not alienated from the community. And yet both liberals and conservatives among us make much of a radical individuality: In their defense of commercial pornographers, liberals can be heard invoking "freedom of the press," as they voice an undue concern for self-expression. In their defense of deadly vigilantes, conservatives can be heard invoking "the right to bear arms," as they voice an undue concern for self-preservation.

In both cases, constitutional principles are distorted. In neither case is it possible to proceed without running risks, whatever we may try to do. Thus, the community must insist upon the prerogatives of statesmanship, as it deliberates on what to do about those who, out of greed or lust or fear, abuse the privileges of a free people. In such deliberations, of course, the First Amendment
may be cherished for what it truly is, a testimonial to a community's passion for constitutional government.

VI. THE REGULATION OF CABLE TELEVISION

He had moved [in the Constitutional Convention] for a power [in the General Government] to make sumptuary regulations. He had not yet lost sight of his object. After descanting on the extravagances of our manners, the excessive consumption of foreign superfluities, and the necessity of restricting it, as well with economical as republican views, he moved that a Committee be appointed to report articles of association for encouraging, by the advice, the influence and the example of the members of the Convention, economy, frugality and American manufactures.

---George Mason

An old-fashioned approach to our First Amendment problems is well for a legal audience to keep in mind as it considers the challenges of a new, and rapidly changing, technology. Most of my colleagues on our three panels this afternoon will no doubt have a good deal to say about cases decided by the courts in recent years, especially cases which attempt to apply the First Amendment to issues of the day. I, too, am prepared to say something during our discussions about such cases, especially as they bear upon the attempted public regulation of cable television. But I believe it would be more useful for me to talk at the outset mostly about what the First Amendment itself does and does not say, and how the First Amendment bears upon efforts by the community both to protect moral standards and to promote the common good. After all, moral standards are invoked by courts and others when they say that censorship is bad, and the common good is looked to when

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138. This talk was given on the occasion of a program, "The First Amendment and the Media," at the Chicago Bar Association, March 19, 1985. See infra notes 140, 145.

139. See J. Madison, supra note 136, at Sept. 13, 1787. The Mason sumptuary regulations proposal was markedly unsuccessful, as has been my longstanding proposal that broadcast television be abolished in the United States. See Self-Government and the Mass Media, supra note 127, at 192-232; see also Mr. Crosskey, supra note 7, at 239 n.119; W. Shakespeare, Richard II, I, iv, 42, II, i, 17.

140. The three panels were (1) "Cable Televising of Pornography: Is pornography a First Amendment activity?" (2) "Fair Trial—Free Press: Will an unfair press free an accused?" (3) "Is New York Times v. Sullivan Wrong? Who really wins?" The moderator for the three panels was George F. Archer, a Chicago attorney.
the First Amendment is made much of.\textsuperscript{141}

Of course, it is only prudent, as we look to moral standards for guidance, to guard ourselves against the perils of a blinding self-righteousness. Is there anyone among us who does not recall things he has personally done which he really should not have done—and things he should have done which he simply has not done? But thus to acknowledge our own private failings and limitations does not mean that we should not notice serious, indeed overwhelming, public shortcomings in others. I refer to the kind of shortcomings reflected in the fact that the American public annually supports, not merely tolerates, an eight-billion-dollar pornography industry. (This has been a rare "growth industry" in a time of economic recession, having tripled its output since 1970.) What is responsible for this remarkable development? The answer can be put in old-fashioned terms: responsible for this unprecedented pornographic assault are lust, greed, and corruption, including that most pernicious corruption which takes the form of the abdication by intellectuals of their duty to call a spade a spade and dirt dirt.

\textit{ii.}

The spade we are particularly concerned with here today is the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Whatever the courts may happen to say about this language from time to time, the First Amendment does remain something to be returned to. And if the First Amendment was well conceived in 1787, there should be difficulties if it is not made proper use of. That is, the enduring sober sense of a people, as well as natural sensibilities and social necessities, can be expected to provoke resistance whenever a sound community senses that its precious constitutional guarantees are being shamelessly exploited by those who really care for nothing but themselves.\textsuperscript{142}

Of course, some will say, the First Amendment, like the rest of the Constitution, is merely what the courts say it is. But that obviously cannot make much sense: to what do the courts themselves look in deciding what it is they are going to say? It is difficult to see how the First Amendment, or any other part of the Constitu-

\textsuperscript{141.} See supra Part I, \S 9; see also Human Being and Citizen, supra note 5, at 74-86.

\textsuperscript{142.} See Human Nature, supra note 1, at 745-54, 777-78.
tion, can be taken seriously if it should indeed come to be believed that it has no enduring meaning. A kind of self-indulgence, or at least a disguising of policy preferences as constitutional principles, tends to be promoted by our failure to be rigorous in reading the Constitution. And yet, I must say, it sometimes seems that there is very little published these days on the subject of the First Amendment, by either judges or scholars, which is serious, however learned and ingenious it may be.

I had occasion, more than a decade ago, to sum up in this fashion the Speech and Press Clause of the First Amendment:

The First Amendment to the Constitution prohibits Congress, in its law-making capacity, from cutting down in any way or for any reason freedom of speech and of the press. The extent of this freedom is to be measured not merely by the common law treatises and cases available on December 15, 1791—the date of the ratification of the First Amendment—but also by the general understanding and practice of the people of the United States, who insisted upon, had written for them, and ratified (through their State legislatures) the First Amendment. An important indication of the extent of this freedom is to be seen in the teachings of the Declaration of Independence and in the events leading up to the Revolution.

Although the prohibition in the First Amendment is absolute—we see here a restraint upon Congress that is unqualified, among restraints that are qualified—the absolute prohibition does not relate to all forms of expression but only to that which the terms, “freedom of speech, or of the press” were then taken to encompass, political speech, speech having to do with the duties and concerns of self-governing citizens. Thus, for example, this constitutional provision is not primarily or directly concerned with what we now call artistic expression or with the problems of obscenity. Rather, the First Amendment acknowledges that the sovereign citizen has the right freely to discuss the public business, a privilege theretofore claimed only for members of legislative bodies.143

This summary seemed to me then, and continues to seem to me today, to be supported, indeed dictated, by the preponderance of the evidence available as to the intentions of the Framers of the First Amendment. It is dictated as well by any careful analysis of how the First Amendment (both before and since the Fourteenth

Amendment) fits into our constitutional scheme of things. And it was this understanding of freedom of speech and of the press, with its primary if not exclusive concern for protecting citizens in their right and ability fully to discuss public issues, which the American people can be shown to have endorsed and to have more or less acted upon from the 1770's until the 1950's.

I have already referred to the fact that the regulation of artistic, or pseudo-artistic, expression is not a First Amendment problem. Nor is the regulation of commercial speech generally, including most advertising and almost all broadcasting, a First Amendment problem. This is not to deny that such a problem may be raised if any kind of expression is suppressed with a view to advancing one political position at the expense of another. Nor is it to deny that whatever is done with the property one may have in any kind of expression (including trash) has to be done in conformity with the various due process and other constitutional guarantees which do protect property rights.\textsuperscript{144} Even so, the only interesting constitutional (but not a First Amendment) problem here may be whether cable television is different enough from our virtually uninhibited movies and video cassettes to justify with respect to cable the more stringent regulation, still available, of regular broadcasting. But it is only prudent to add that until there is a return to common sense with respect to the First Amendment, the only reliable means a local community may have to keep televised indecency from being peddled to local subscribers is to keep cable television itself out altogether, something which communities still seem to be empowered to do. However, the laying of cable may soon become obsolete—and we may be left only with the superintending powers of Congress in this area.

Be all this as it may, it should go without saying that whatever is done by, or in the name of, any community to anyone or his property or his would-be property is subject to full discussion by concerned citizens. So much then for the First Amendment—and for calling a spade a spade, and not a bulldozer.

\textit{iii.}

Let us now turn to the somewhat unpleasant duty of calling dirt dirt. The particular dirt we are concerned with on this occasion is, as you all know, pornography. The very framing of the issue for this panel seems to concede both that there is such a thing as por-

\textsuperscript{144} See \textit{Human Being \& Citizen}, supra note 5, at 134. Due process protection is intimately related to the prior restraint problem. See supra note 123.
nography and that it is generally recognizable as such.145 No
doubt, there is considerable pornography that the courts have now
immunized as “merely” “soft-core” or “indecent.” But it can
probably be safely assumed for our purposes that there is indeed
much that can still be readily identified as out-and-out pornogra-
phy. Whether even that can be effectively regulated in the present
climate of opinion, and considering various technological innova-
tions, is debatable. But the feasibility or wisdom of any particular
regulation is not our primary concern on this occasion.

Perhaps the most significant aspect of the question put to this
panel today is that it should be a question at all. That is, some-
thing is critically changed when there can be a serious debate as to
whether obvious pornography can be deliberately broadcast, even
if only for “private” subscribers to cable television. The fact that
there can be such a debate as this testifies to what has happened
generally among us since the Second World War. There does not
seem much doubt that, unless fashionable opinions do change,
there will be more and more, and of course worse and worse, por-
nography and obscenity openly displayed for marketing among us
during the coming decade.

This kind of development, which runs deep, denies the legiti-
macy of the community as sovereign, except perhaps for the provi-
sion of elementary physical protection and convenient public
services. Thus, we are in effect told by our opinion leaders that no
one acting on behalf of the community is entitled to help shape his
fellow citizens into moral and responsible social creatures, except
perhaps by whatever can be done through threats of the punish-
ments to be visited upon obvious law-breakers. This means, among

145. The title of the panel was “Cable Televising of Pornography: Is pornography a
First Amendment activity?” Other members of the panel were Joel B. Bernbaum, Burton

I have had occasion to make the following comment, in the course of a public discus-
sion of pornography, about the problem of defining it for everyday purposes:

I think it’s unrealistic to pretend that we don’t know what pornography is or
that we could not adequately define it for the purpose of putting on notice the
pornographer or the distributor who otherwise would be selling it. In fact, just
the opposite is the case. When somebody comes into a pornography shop and
asks, “Have you got any really good pornography for me today?”, the shop-
keeper doesn’t reply, “Well, you know, who’s to say what is pornography? I
mean, it’s all a matter of opinion and you just can’t tell.” The customer would
say, “Look, I know what it is and you know what it is. Now, do you have it or
do I go next door?” Thus, the real problem is not in defining pornography, but
rather in determining what if anything can and should be done about it.

(Summer 1985). See supra note 135.
other things, that the community, as community, is not entitled to intervene so as to halt, or to reverse, any decline into a degradation that everyone is likely to be affected by, and by which youngsters may be particularly harmed.

Critical to the beginning of serious reform with respect to these matters would be the restoration of self-confidence in the community. It is an informed self-confidence which permits communities to recognize a disgraceful state of affairs for what it is—whether it be an arbitrary segregation of races or the prosecution of an unjust war or the suppression of political dissent or the substitution of deceitful lotteries for honest taxes or a callous neglect of poverty and misery. But a proper self-confidence with respect to pornography depends upon, among other things, that toughminded understanding of what the First Amendment does and does not say to which I have already referred.

It is salutary to remind ourselves that our extensive freedom of political discussion did develop independent of the licentiousness to which we have recently become accustomed. Thus, neither principle nor history dictates that we must put up with licentiousness in order to have political freedom and effective self-government. In fact, just the opposite may be the case. For either a desperate popular backlash against blatant licentiousness can eventually subvert our political freedom, or such licentiousness can lead to a general corruption, including an intense privatization of life and a repudiation of the distinction between the noble and the base—and this in turn can make civic-mindedness and self-sacrifice far less likely. Of course, there can be abuses in any exercise of political freedom as well. But there is not much profit in such abuses; neither greed nor lust is likely to magnify them, and so they do tend to be self-correcting, whereas licentiousness feeds on itself as more and more ugly stuff must be produced to satisfy the jaded tastes that develop—while genuine love and healthy sexual relations are likely to be cheapened in the process.

Once a community appreciates that it is indeed being exploited; once it becomes evident that there is nothing constitutionally immune, and much that is harmful as well as unseemly, in the pornography industry; once it is remembered that the First Amendment is designed for political discourse and not for private business—that is, once the public mind does return to traditional notions about such matters, then pornography will naturally return to the sleazy under-the-counter operation which we can well live with and which I, for one, would be content to leave alone.
Whether the public mind can be changed, and how, depends in large part upon what lawyers, judges and professors of law believe and say about the First Amendment and about related matters. It would certainly be a step in the right direction (but perhaps too much to expect soon) if it should once again be generally recognized that no self-respecting lawyer will have anything to do with the pornography business as such (however legal it may be said to be), except to help people liquidate such firms and to defend in court those who do happen to be charged with criminal offenses. It can do wonders for the training, morality and morale of a community thus to be reminded again and again of the old-fashioned opinion that sleazy businesses should be left to sleazy people.  

VII. UTOPIA OR TYRANNY: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Now the Lord had said unto Abram, Get thee out of thy country, and from thy kindred, and from thy father's house, unto a land that I will shew thee:

And I will make of thee a great nation, and I will bless thee, and make thy name great; and thou shalt be a blessing:

And I will bless them that bless thee, and curse him that curseth thee: and in thee shall all families of the earth be blessed.

—Moses

We have gathered together to celebrate, in an appropriate manner, the fifteenth anniversary of the adoption by the United Nations' General Assembly of the Universal Declaration of Human Rights.

It is a declaration which, as its name suggests, strives for universality, for a standard to which all mankind can turn for guidance. One finds, upon comparing it with the historic declarations with

146. That is, it seems to me a serious problem for a lawyer that he should be kept on retainer (or regularly employed) by such on-going businesses. Consider, also, those who provide continuing counsel and support to manufacturers of cigarettes and of certain kinds of guns. See Bean, Tobacco Industry's Court Victories Fail to Slow Product-Liability Suits, Wall St. J., Jan. 30, 1986, at 27, col. 4.

147. This talk was given to the Chicago Ethical Society, Dec. 8, 1963. See G. Anastaplo, supra note 72, at 790.

148. Genesis 12:1-3. It seems to have been customary for the Sunday morning service of the Society to open and close with appropriate quotations supplied by the speaker. This quotation from Genesis opened the service; it closed with the quotation found in note 167, infra.
which we are familiar—such as the Declaration of Independence and the American Bill of Rights—that the Universal Declaration is much rougher, more fumbling in its formulation. It does not compare either in grandeur of language or in precision of thought to the earlier documents, something that would be even more apparent if one traced it article by article back to its predecessors. But it nevertheless became for many peoples emerging from the ravages of the Second World War their finest statement of aspirations, political and social.

The first part of the Declaration addresses itself to what we know as civil and political rights and liberties—such as the right to speak freely and the right to choose one's rulers; the second part, to what we know as economic and social rights and objectives—such as the right to employment and the right to education. There is, however, no indication of how these rights are to be secured by law. There is provided no tribunal in which these rights can be invoked, no right of petition, no writ of habeas corpus. Rather, the Declaration is proclaimed

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The full implementation of the principles of the Declaration would be, as I will try to show, a worldwide democratic state grounded on the brotherhood of man: the human family would be brought together in a prosperous world republic. This is the "city" to which the Declaration aspires.149

ii.

Another city comes to mind, another utopian city of which the Socrates of Plato's Republic is the founder. It is a city, you will recall, in which each man does the work for which he is naturally suited, in which everything is ordered according to reason, in which justice is the primary objective.150 It is a city not of three billion people, but only of about one hundred thousand men and women.

149. See The Artist as Thinker, supra note 6, at 23-24, 294-95.
150. See The Constitutionalist, supra note 4, at 278-81.
Socrates calls this the best possible city. It, too, is one of the
great nations of the world. But critical to its perpetuation is what
Socrates calls some necessary, but noble falsehoods. Socrates is
reluctant to reveal them—but he is induced by his companions to
do so. Thus, he explains that first the rulers themselves or at least
the soldiers and then the rest of the city must be persuaded
that the rearing and education we gave them were like dreams;
they only thought they were undergoing all that was happening
to them, while, in truth, at that time they were under the earth
within, being fashioned and reared themselves, and their arms
and other tools, being crafted. When the job had been com-
pletely finished, then the earth, which is their mother, sent them
up. And now, as though the land they are in were a mother and
nurse, they must plan for and defend it, if anyone attacks, and
they must think of the other citizens as brothers and born of the
earth.¹⁵¹

At this point, Socrates’ interlocutor exclaims, “It wasn’t for noth-
ing that you were for so long ashamed to tell the lie.”¹⁵² It is recog-
nized by both of them that something highly questionable has just
been said by Socrates.

What does the falsehood come down to? If the city is to survive
subversion or invasion, if men are to be willing to die for it, its
citizens must regard it as peculiarly their own. They must respect
and revere it as men do their parents and their brothers. They
must, that is, regard it as their native land. *This* city must be re-
garded as naturally theirs, as the community for which citizens
should be prepared to sacrifice their lives.

But what, we might wonder, is there false in this opinion about
their city? Do not we speak of *our* native land and of *natural-born*
citizens? And do we not speak of immigrants who are *naturalized,*
who are made like those who are citizens by nature? But, on the
other hand, what does it mean that someone is a citizen by nature?
The law (a convention) dictates where the country begins and ends;
it even prescribes who is to be considered a natural-born citizen.
Not everyone born here is a natural-born citizen; in fact, what
“here” means depends on just where the frontier *is* drawn. There
is no such problem with respect to one’s natural parents.

Indeed, to insist upon this land as my land is to deny what is
more apparent (at least to sophisticated men)—it is to deny the
brotherhood of man. How can one regard as a stranger and even

¹⁵¹. *Plato,* *Republic* 414D-E (A. Bloom trans.).
¹⁵². *Id.* at 414E.
as an enemy the good man who happens to live elsewhere, who speaks a different tongue, who wears a different color or uniform? Are not borders and patriotism artificial? Would it not be more in accord with nature to proclaim a worldwide community, to be done with man-made frontiers? But this is precisely why a story is needed, to induce men to take seriously the community in which they happen to be. Does not the brotherhood of man have to be denied if the best city is to be possible?

The best city, Socrates believes, is one in which men can know one another, in which rulers can control intimately what goes on throughout, in which life is kept relatively simple. The best city is a small city. The swollen city, one that begins to run into millions, to say nothing of billions, faces special problems: in it men can know of each other only by reputation; chance plays a much greater role in what is believed and done; technology has to be more developed, and this in turn brings luxury and an extensive commerce with other cities. But the rest of the world is unlikely to be good—the best is rare—and so any outside influence is almost certain to be for the worst. The best community—the greatest nation, whether political or religious—is in an essential respect bound to be parochial, somehow set off in its creeds and rituals from all the other peoples of the world. The highest development of man requires careful cultivation under very special conditions by rulers who not only know but can control what they are doing.

Thus, only a people that is chosen, that somehow sees itself as separate from others—indeed, only a people that has some reservations about the brotherhood of man—is capable of greatness, of a greatness that is somehow a blessing even to the rest of mankind.

This, in any event, is what Socrates seems to say.

We must return to the community implied by the Universal Declaration of Human Rights, to see what supports our opening suggestion that it in effect constitutes a worldwide democratic state.

That the democratic way is presupposed is explicitly affirmed by Article 29:

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the

153. See, e.g., Plato, Laws 704A-C; Aristotle, Politics 1276a22-34.

154. See Plato, Republic 470A-D, 495C-D.
rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 21, in addition, provides that,
1. Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.

That the community to which allegiance ultimately is due is worldwide becomes evident upon examining several articles of the Declaration. Article 13 provides,
2. Everyone has the right to leave any country, including his own, and to return to his country.

Indeed, according to Article 14,
1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

A community which cannot control movement in and out begins to take second place in the hearts of its citizens. It cannot be regarded as one's natural state. This becomes more evident in the latter half of Article 14,
2. This right [of asylum] may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Thus, asylum is to be the right of a citizen committing a political crime against his country (presumably, although this does not seem to have been thought through, even if he attempts to undermine the democratic institutions of his country). But there is no right of asylum for any act, political or otherwise, against the United Nations community itself. The implication is clear that the worldwide community takes precedence over all smaller associations of men.

This is further suggested by the form in which our traditional freedom of speech is set forth in Article 19:
Everyone has the right to freedom of opinion and of expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.\(^{155}\)

Frontiers are to be irrelevant to the exchange of ideas. And, of

\(^{155}\) "Freedom of expression," the use of which I have many times deplored as a substitute for "freedom of speech and of the press," has become much more respectable than it was in when I prepared this talk in 1963. See Censorship, supra note 57; Book Review, supra note 57; Open Society, supra note 126. See supra Part III.
course, it is assumed that ideas cannot be destructive of the public good, no matter where they originate and to whom they are directed. The truth is seen as always useful. Nor is there any recognition of a need to restrain some opinions or to promote others. This means, in principle, no noble lies, no self-governing communities, indeed no cities (or countries) short of the world republic worthy of the last full measure of devotion.

iv.

We are thus driven, upon confronting this universal utopia, to examine conventional attachments to particular communities. What is sacrificed by the depreciation, and eventual consolidation, of these arbitrary, limited, even superstition-ridden communities? One must first wonder what distinction there would remain between "citizen" and "human being." The Universal Declaration sets forth "human rights," not the rights of citizens, or even as did in 1789 the French Declaration, the "rights of man and of the citizen." No doubt, much evil would be eliminated if ordinary patriotism could be eliminated or at least muted. But perhaps something essential to the highest development of man would be given up as well.

A universal declaration is one that must necessarily be set forth in the most general terms. Precision is in part the product of experience, and experience with the life of a particular people. Few, if any, of the civil and political rights in the Declaration are as precise, or as meaningful, as those found in the American Constitution. How could the terms of the Declaration be precise if they are to be acceptable to men of all conditions and in all circumstances? In addition, one critical inducement toward precision is missing, the realization that these rights must be implemented immediately against the contracting parties. Do not these rights remain, instead, substantially the speculative pronouncements not of men who run governments but of intellectuals who serve in them?

Is it not evident that these are the civil and political rights that appeal most to men educated in the liberal democratic tradition of the West? One can acknowledge that tradition to be the best in the world today without conceding that it is the best for all peoples. In fact, it may be for some peoples the worst of several possibilities. That is to say, there are peoples for whom liberal democratic government, and several of the civil liberties we treasure in the West,

156. See, e.g., Plato, Apology 20A-C.
would be a handicap, bringing chaos and misery rather than justice and virtue. We should take care in trying to create the world in our image.157

When we turn from these civil and political rights to the social and economic, we see more vividly the yearning for justice, if only in the form of material well-being, that moves many of the peoples on this earth. The rights to work, to rest and leisure, to an adequate standard of living and to an education are proclaimed. It is not hard to believe that for many people these are the dominant concerns, not the political and civil rights that are so much more important in Western constitutions. But here, too, the conditions and circumstances of life are decisive in determining whether these rights can be realized—especially when the rights and expectations of people have been stimulated, if not created, by exposure to countries in which prosperity and education are taken for granted. The measures needed to secure these economic and social rights may seem to require the sacrifice of civil and political rights. Utopia, if it is to come, will follow a necessary interlude of tyranny.

v.

If this were all that could be said about the proclamation of a worldwide democracy, we would be reluctant to celebrate the adoption in 1948 of the Universal Declaration of Human Rights. But there is another anniversary this week which illuminates the significance of the Declaration, and that is the attack on Pearl Harbor seven years earlier.

That shattering attack on just such a Sunday morning as this twenty-two years ago unleashed the passions of war among a people largely indifferent to the affairs of the world. And once such a war begins, it is difficult if not impossible to keep within bounds: from the callous persecution of minorities in Europe and the surprise bombardment of Pearl Harbor, in time of peace, to the casual destruction of Dresden and of Hiroshima, in time of war, is an almost inevitable "progress." It is folly to expect, once full-scale war begins, that full-scale weapons will not be used.158

The decisive commentary on the lessons of war may still be that

157. See The Artist as Thinker, supra note 6, at 75-86. For radically different ways of organizing "the world," see Confucian Thought, supra note 120, at 124; Anastaplo, An Introduction to Hindu Thought: The Bhagavad Gita, in The Great Ideas Today 258 (1985).

158. See The Constitutionalist, supra note 4, at 750-51; see also Anastaplo, Book Review, Book Week, Chi. Sun-Times, June 26, 1977, at 8 (on the use of nuclear weapons).
of one of Socrates' students—not Plato (who deliberately presented the city of the Republic as essentially in isolation) but Xenophon. He reports that after Sparta had successfully concluded a great war, the Spartans resolved to chastise all among their allies who had been hostile to them during that war and to put them in such condition that they could not be disloyal again. Thus, the Spartans ordered the Mantineans to tear down their wall, saying that they could not trust them in any other way not to take sides with their enemies. When the Mantineans refused, Sparta laid siege to the city.

But the Mantineans were well-stocked with provisions. The Spartan commander,

thinking that it would be a grievous thing if it should prove necessary to burden both his city and its allies for a long period with campaigns, dammed up the river which flowed through the city; and it was a very large one. Its outflow being thus checked, the water rose not only above the foundations of the houses but above those of the city wall. Then as the lower bricks became soaked and failed to support those above them, the wall began first to crack and then to give way. And the Mantineans for a time tried to prop it up with timbers, and sought contrivances to prevent the tower from falling; but when they were no longer able to resist the water, being seized with the fear that if any portion of the encircling wall fell they would become prisoners of war, they offered to agree to tear down their walls.

"After this," Xenophon continues, "the wall was torn down and Mantinea was divided into four separate villages, just as the people had dwelt in ancient times."

Nothing is said about any lessons having been either taught or learned respecting loyalty or justice in international relations. (The only "progress" one can expect is usually in the worldwide development of the means of destruction and defense, not in any universal establishment of moral or political virtue.) Xenophon concludes his account with the observation, "Thus ended the affair of the Mantineans, whereby men were made wiser in this point at least—not to let a river run through city walls."

159. Xenophon, Hellenica V, ii, 1-7.
160. Id., V, ii, 4-5.
161. Id. V, ii, 7.
162. Id. One can see, from passages such as these, why Xenophon and his Cyrus appealed to Machiavelli. "I myself have long believed that Socrates would not have been indicted, let alone convicted and executed, had the remarkably resourceful and vigorous Xenophon been in Athens in 399 B.C." Apologia Pro Vita Sua, supra note 99, at 333.
It is the prospect of an old-fashioned war in an age of nuclear arms that does call into question the traditional respect for the sovereignty of nations. The city—the country, with its obligations of citizenship—was (despite its necessary narrow-mindedness) the most productive ground for the cultivation of the best human beings and the best community. But, now, the existence of humanity itself is threatened—threatened by the very patriotism that has been necessary for man’s highest development—and men of good will are obliged to consider compromises, compromises that will insure the continued existence of mankind, even if in communities that encourage only the third- and fourth-rate to develop.

The Greek city, the city of Socrates, was confronted with this problem as well: the city of small size and of great virtue was (unless isolated) threatened by every city that had nothing to commend it but the brute power that comes from size or from technology. Today, city-ness itself, not merely the best city, is threatened by the fully-armed city. And so men grope toward a community that surrenders the option to fight, somehow sensing that we will have one world or none. But with this surrender of the option to fight may be given up as well the option to be different in an essential respect, to be better, that is, than the common run of cities.

The option to be different means, in practice, the opportunity to do evil as well as good. That very isolation—that self-centeredness and even narrow-mindedness or stiff-neckedness which was a condition for the development of the greatest of communities—led as well to conflict, or at least deadly suspicion, between cities. But it is well to recognize, as we protect ourselves from certain risks, the opportunities we are also giving up.

The Declaration of Human Rights is not a substitute for a foreign policy, even though in principle it questions the legitimacy of separateness and, hence, of any foreign policy. But the Declaration does provide, for the people noble enough to acknowledge its aspirations but astute enough to recognize its limitations, a basis for moving mankind away from the edge of the abyss at which it finds itself and toward a world order which permits human beings to

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164. This, too, is a kind of tyranny. The city of Plato’s Republic, on the other hand, is not a tyranny, however tyrannical various of its institutions may be when found in other circumstances. See On Tyranny, supra note 93, at 143, 198.
survive with some dignity. We are obliged to examine, as never before, the possibility of a worldwide rule of law. The Korean "police action," if not the Second World War itself, may some day have to be regarded as the first crude attempt to establish that rule of law. This, in any event, it may become salutary for the rulers, or at least the soldiers and then the people, of the world to believe.

vii.

It is well to remind ourselves, and especially within a fortnight of another shattering event,\(^{165}\) that our best foreign policy—best not only for ourselves but also for the world at large—rests upon good government at home. Indeed, that is our most enduring security against enemies both foreign and domestic. To permit lawlessness to pervade any section of the country is to encourage men of great violence and little judgment to lash out at the world.

Good government requires a firm response, in word and in deed, by citizen and official alike, to outbreaks of violence in the community. Our freedom depends on an honest even though sometimes painful dedication to the rule of law by all who influence public opinion. The assassination of the President and the murder before our eyes of his alleged assassin should remind us of truths that we have helped to teach the world.\(^{166}\)

In the very nature of things, that which holds out for a chosen people the greatest hope is often the source of the greatest dread. This has always been true of the freedom that men and nations treasure.

Despair and confidence contend for the heart of mankind.\(^{167}\)

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166. See, e.g., Abraham Lincoln's speech, "Perpetuation of our Political Institutions," in III A. LINCOLN, supra note 9, at 108. See also Berns, The Goetz Case: Some Philosophical Considerations, in GADFLY, 10-11 (St. John's College, Annapolis, Md.) (Jan. 1986) (reprinting a talk given at the Rochester Institute of Technology, Jan. 9, 1986).

167. The quotation with which the Chicago Ethical Society service closed on this occasion, see supra note 148, was taken by me from Genesis 22:2-4:

And the Lord said to Abraham, Take now thy son, thine only son Isaac, whom thou lovest, and get thee into the land of Moriah; and offer him there for a burnt offering upon one of the mountains which I will tell thee of.

And Abraham rose up early in the morning, and saddled his ass, and took two of his young men with him, and Isaac his son, and cut the wood for the burnt offering, and rose up, and went unto the place of which God had told him.

Then on the third day Abraham lifted up his eyes, and saw the place afar off.
CONCLUSION

i.

We began, in Part I of this article, with suggestions about how to read the Constitution of the United States. We then turned, in Part II, to reflections upon simply how to read, moving in that part (as does the entire article) from a consideration of perennial questions about government (and the allegiances of citizens) to a consideration of contemporary problems of freedom of speech.

We then moved, in Part III through Part VI, to discussions of various applications today of the First Amendment. (No doubt, much more needs to be said about the various subjects touched upon in those parts.) Thereafter we returned, in Part VII, to a discussion of problems of government, but on a worldwide basis (which included consideration there, too, of the place of freedom of speech). The merits and demands, as well as the perils, of sovereignty in the modern world were examined.

To emphasize, as I have done again and again in this article, good government and the rule of law under the Constitution is to encourage, as well as to legitimate, a confident and beneficent use of government. The First Amendment, of which so much is properly made among us, not only imposes a salutary restraint upon government but also equips (perhaps even obliges) a self-governing people to do the good of which it is indeed capable.

It is not unfashionable today to suggest, as has recently been done by a legal scholar of some reputation, that “perhaps the clearest and most important purpose of the Constitution was to place a set of limitations upon government power, both at the state and at the federal level.”168 Of course, limitations are clear enough in the Constitution. But even more important to what is exhibited by the Constitution is the fact that public servants (pursuant to the guidance to be provided by the Constitution and by Congress) are empowered to act vigorously on behalf of the common good.

To emphasize limitations upon governmental power, as many do, is to make far too much of the form and not enough of the substance (and the obvious intention) of the constitutional dispensation. It may even mean that one is “libertarian” at the expense of a sound and enduring liberty.

The prerogatives of the American people, acting through their State and National governments, include the right and ability to shape the character and the morals of the people who are to use, and to have used for them, the considerable powers of government. Without such an ability to shape character and morals—which shaping must extend to what is to be considered “private property” and how it may be used—it becomes a matter of chance whether the American people are able to make proper use of the vast powers which, it is evident, they do exercise both locally and nationally.

The people indicate in various ways, directly and indirectly, what they expect of one another. This is done both through public opinion and through customs and laws. The common law (grounded as it is upon a sense of natural justice) routinely shapes character and morals. So do many of our statutes (including those devoted to the criminal law). And so does a properly-read Constitution. Only if the people are what they should be—and only if they know what they are and are confident that they should be what they are—only thus can there be preserved a vital constitutionalism.169

169. On the relation of the criminal law to a community’s sense of right and wrong, see Human Nature, supra note 1, at 715-29. See also Human Being and Citizen, supra note 5, at 46-60.

Of course, our literature should remain a powerful teacher of morality. See Alvis, Moral Criticism, Claremont Rev. of Books 1 (Oct. 1983); see also supra note 85.