

interpretation

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interpretation

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Discussion

Notes toward an “Apologia pro vita sua”

GEORGE ANASTAPLO

The University of Chicago, Rosary College, and Loyola University

What is called by this highfalutin name [of the correspondence theory of truth] is just the commonsense view of truth. It is common sense surely. What I have in mind about, say, Mr. Anastaplo is true only if it corresponds to what Mr. Anastaplo is, does, and so on.

—Leo Strauss, *Seminar on Aristotle's Ethics* (1963), II, 26

PROLOGUE

We have been taught by Professor Strauss that it is reasonable in some circumstances to assume that the commission of “such blunders as would shame an intelligent high school boy” is intentional, that they point to a purpose (or a meaning) beyond (or beneath) that which the offending author seems to offer. And we have been taught by the Socrates of Plato’s *Apology* that such blunders are sometimes clues to a riddle, to a testing, if not even a kind of playfulness, especially if their source is a comic poet.

Blunders abound in Glen E. Thurow’s critique of my *Constitutionalist* in the May 1980 issue of this journal. To be sure, many kind things *are* said (and not without some plausibility) about the book, but they are balanced by so many unkind things (some of them of an outlandish character) that the reader who does not know my book must find it difficult to decide what is to be taken seriously. I trust that the passages quoted by Professor Thurow from the book suffice to put on notice attentive readers of his critique who do not happen to see this reply, arousing in them at least the suspicion that anyone who said the things quoted from the book simply could not have taken the dubious positions attributed to him by Mr. Thurow. Certainly, it is remarkable how the tone of the Thurow critique changes after its opening paragraph which includes these observations:

The Constitutionalist has been well received since its publication in 1971. It has been widely recognized as presenting the best existing defense of the opinion that the First Amendment of the U.S. Constitution protects freedom of speech from any limitation by law of Congress. . . . Yet this view is presented with such care to approach free speech as a problem rather than a dogma that it has led to questioning and reflection rather than partisan defensiveness. . . . Few books have received as

many thoughtful reviews as this one—a credit not only to the reviewers but to the book.

It is obvious that Mr. Thurow, of the University of Dallas Politics Department (where I have conducted annual seminars since 1967), has devoted considerable time and effort to his review, for which I am grateful. How, then, are his blunders to be understood? Perhaps the most generous interpretation is to conclude that Mr. Thurow jests, that he is (if only to put us all to the test) being somewhat comic, even as he repeatedly inveighs against my playfulness. Perhaps, indeed, he is thereby counselling us about the care needed in reading not only the greatest books but even reviews written by intelligent men about ordinary books.

Perhaps, also, he can be understood to have wanted to spur me to assess the race I have run thus far, to consider where I have been and where I am going as well as how I am regarded and why. For this opportunity, too, I should be grateful. It is a particularly propitious time for such an appraisal, since I do seem to be moving from a post in a college political science department to one in a university law school. Furthermore, I know of no readers I esteem more highly than I do those who read *Interpretation* regularly—and so the forum for this exercise in autobiography is also propitious.

I

That the *Constitutionalist* is, in many respects, an ordinary book should not be denied. This is not to say that it is not extraordinary in certain respects. Thus, the paper on which it is printed is remarkably good for these times; so is the binding, as may be seen in how nicely the book lies flat when opened. Thus, also, it is a rather big book, with an extraordinary proportion of its pages devoted to notes. (I have been informed by the Recording for the Blind service that of the fifty-seven hours required in their cassettes for the *Constitutionalist*, thirteen hours are devoted to the text of the book, eight hours to the appendices, and thirty-six hours to the notes.)

It should be said as well on the book's behalf that it may turn out to be one of the few contemporary attempts at constitutional interpretation to survive our time. That is, the Constitution itself is looked at, I believe with a certain rigor; the book is not dependent on the vagaries of United States Supreme Court interpretations, however much it may take account of them.

I will not attempt to summarize what Mr. Thurow wrote about the *Constitutionalist* upon inaugurating the "Discussion" section in *Interpretation*. That should become evident, insofar as it is relevant here, in what I now choose to respond to. (All my page references in parentheses are to Mr. Thurow's critique of the *Constitutionalist*.) Nor do I attempt to catalogue all the questionable things Mr. Thurow says, but only enough to confirm the perceptive

reader in the suspicion that there must be many things in the Thurow review that need not be taken at face value. On the other hand, those who are not challenged by my response should be sympathetic toward Mr. Thurow's complaints—and so each will get what he deserves.

The argument *in the text* of the *Constitutionalist* itself has been summed up by me at the outset of that book in these terms:

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.

Absolute as the constitutional prohibition may be with respect to Congress, it does not touch directly the great State power to affect freedom of speech and of the press. In fact, I shall argue, one condition for effective negation of Congressional power over this subject (which negation is important for the political freedom of the American people) is that the States should retain some power to regulate political expression. It seems to me, however, that the General Government has the duty to police or restrain the power of the States in this respect, a duty dictated by such commands in the Constitution of 1787 as that which provides that the “United States shall guarantee to every State in this Union a Republican Form of Government . . .”

Another way of putting all this is to say that the majority opinions of the Supreme Court both in *Scales v. United States* and in *Cohen v. California* are rather childish: they display little understanding of what the First Amendment is all about. But, considering their author, it is not surprising.

II

Readers of *Interpretation* are entitled to one straightforward review of my book by a scholar they can rely upon. I reproduce here, therefore, the first

review of the *Constitutionalist* (which appeared in a Dallas newspaper in 1971). It is by Laurence Berns, of St. John's College, whom I first came to know as a college classmate at the University of Chicago in 1947. Mr. Berns should be familiar to readers of this journal since he has published three articles in *Interpretation*. His newspaper review, presented here in its unedited form, is provided with his permission:

This fascinating eight-hundred-and-forty-page book is really three books, and more.

First is the text, a detailed legal, historical and, above all, dialectical analysis of the First Amendment with special attention to the reasoning of the Founding Fathers. Their reasoning is shown to be more subtle than many recent critics have been able to appreciate. George Anastaplo concludes that the prohibition on the Congress, and hence on the "general government," against abridging freedom of speech (political speech, not, for example, obscenity) was rightfully intended to be absolute. The privileges and immunities of legislators in their respective legislatures are by analogy extended to the people as a whole in their capacities as self-governing citizens.

But is there no remedy against the abuse of this freedom? Must not, or should not, legislatures by rules of relevance and decorum abridge that kind of speech which would defeat the possibility of arriving at any reasonable legislation? Anastaplo faces the problem, but in a way different from what is suggested by the last question. He invokes a kind of patriotic piety in arguing that Americans have always been at their best when extending, and at their worst when restricting, the limits of toleration for that abuse. But the states, he argues, by the Constitution are, and should be, left free, in those rare circumstances calling for it, to abridge political speech. In fact, the prohibition on the Congress is likely to "lose some of its effect if directed in its fullness against the states as well." "[P]ressure upon Congress to 'do something' becomes very great if trouble spots in particular states cannot be taken care of in those states." This discussion is developed in conjunction with a general argument for the importance of the relative autonomy of state governments ("states' rights") and with a critique and analysis of the Fourteenth Amendment and the "clear and present danger" test. However, in addition to the limits imposed by traditional standards of due process, the Congress is empowered, according to Anastaplo, to supervise and restrain the states in the exercise of their power. And in the most extreme emergencies, in "Cases of Rebellion or Invasion," the President, subject to later correction, can abridge freedom of speech by suspending the writ of *habeas corpus*.

Beyond the legal analysis, the First Amendment is seen as a democratic right for protection against, and for popular influence on or control of, government and as an aristocratic right which "provides protection for minority opinion, even against the popular will." Protection of the thoughtful dissenter serves primarily to advance the interest of the community. "A people with popular government [like the government of the United States], where there are no recognized spokesmen of merit [as there are in Great Britain], needs to rely upon an aristocratic right."

The second "book" is the appendices, especially the appendix of close to one hundred pages on the record of the author's own remarkable bar admission case.

The third "book" is the notes. As the author explores the question of what

kind of character in the people free institutions and self-government presuppose, the reader is led into depth after depth—that is, the reader who is able to accept the author's invitation to explore. The range of topics dealt with penetratingly and carefully in those notes must be seen to be believed: this part of the book is like a little university, a second University of Chicago (the author's alma mater). Scarcely any important political event of the last forty years, it seems, has been neglected in Anastaplo's notes; but far more important is the wealth of discriminating references, comment and often detailed analysis of the anthropological, sociological, psychological and above all poetic and philosophic writings that the author has found useful for his explorations into the nature of American institutions, into the meaning of the American way of life, the nature of man, the nature of nature. Serious students of American institutions, of political life, and of what transcends and is the ground of political life have here a guide to where to go as they face the dilemma posed by the realization that the good citizen and the good man are not simply identical. Students of the law will be pleasantly surprised to learn how fascinating their field of study can be.

The author seems, judging roughly from the frequency of references, to have learned most from Shakespeare, from his fellow Illinoisan Abraham Lincoln, and from Plato. This book is a major attempt to discover and articulate the harmony, or at least the compatibility, that exists between principles of the American polity and the principles of classical ("Greek") philosophy.

Mr. Berns (who was then at Cambridge University) prepared also the following paragraphs to be inserted into a version of this review submitted to an English journal:

Lord Bryce wrote of the British polity that "though the constitution has become democratic, the habits of the nation are still aristocratic." Although many Britons seem to doubt whether that is still true, and many more seem to deplore the extent to which it is still true, it *is* still impressively true, I believe, to American eyes. At any rate, Anastaplo argues, it is precisely because it is not true, or as true, for the United States, that in the United States freedom of speech (and its inevitable attendant abuses) has been buttressed by rigid constitutional protections against the general government. To put it bluntly, where aristocratic habits prevail legal and governmental control over speech is apt to be more salutary, less oppressive and less needed; where they are absent (and there is something of a manly spirit of independence in the population) it is more prudent not to entrust the general government with such powers.

Anastaplo is a keen student of British affairs and institutions and the book contains a good number of interesting arguments and observations like these based on similarities and differences between British and American conditions and procedures.

Mr. Berns provides, I suggest, a sufficient review for those readers without much time to devote to appraisals of the *Constitutionalist*. Other reviews are cited in the opening notes of my "American Constitutionalism and the Virtue of Prudence" and in the first note to my *Human Being and Citizen*.

III

We must now turn to Mr. Thurow's criticisms. Foremost among them is what he has to say about the notes of the *Constitutionalist*. Those notes were ignored in my own summary of the argument of the book. Mr. Berns, in his review, spoke of them with considerable respect. But Mr. Thurow is upset by them: he condemns the "disturbing form of the book," likening it to "some gross physical deformity" (p. 188). The "unnatural proportions" of the book recall "a dwarf with a small body and a big head," a "little dwarf [with] his outsized head" (pp. 188–189). He opens and closes his review with indignant protests against my notes.

How seriously *are* such criticisms to be taken? (We can disregard, if only for the moment, the dubious anatomy evidently relied upon as well as the tendency to convert the "customary" or conventional into the natural.) Mr. Thurow refers to the notes, some two dozen times, as "footnotes" (and only a half dozen times as "notes"). Had they indeed been footnotes, they would have been difficult to work around or deal with (although law reviews and court opinions, it might be noticed in passing, routinely have recourse to much longer notes than political scientists may be accustomed to). But my notes are at the back of the book—and properly so. Furthermore, I repeatedly advise readers of my things not to read the notes until they have read through the text. I will not trouble to give that advice on this occasion. (As for Mr. Thurow's anatomy: if my notes should indeed be "*foomotes*," could it not be said that my book rests on "a solid foundation" if not even on "an ample understanding"? Certainly, its *head* should not be called "big" unless one wishes thereby to speak politely of my "arrogance.")

Not only does Mr. Thurow insist upon mislabeling my notes, he also miscounts them. What *is* one to make of a blunder that more than triples the number of notes—from 787 to 2,787 (p. 188)? Would he have felt differently about the notes if he had recognized how few there truly were? (He does have the correct number of pages devoted to them [p. 189]. Or is it that he did know better but merely wanted to make a joke? But, in order for the joke to work, with or without the help of Isaac Bickerstaff, did he not presuppose the reader's familiarity with the notes (including my observation, at the center of the *Constitutionalist's* notes, "What's a millennium among friends?")? Was his joke good enough to risk misleading those readers who do not know the book? Let us hope so.

Mr. Thurow suggests that the abundance of notes may be due to the subject of the book: "[W]hy does the subject of free speech require such footnotes? Does Anastaplo mean to demonstrate to us the fruits of free speech by revealing all he has been free to hear and print? Or does he mean to satirize free speech by showing its excesses?" (p. 189) But this, alas, is too pat an analysis: for there are publications of mine known to Mr. Thurow, published both before

and after the *Constitutionalist* but *not* on freedom of speech, which have a similar abundance of notes. This means that some other explanation must be found, if explanation is needed, for the unconventional use I do make of notes.

Mr. Thurow also suggests that the *Constitutionalist* is “inconceivable” without its notes (p. 201). Yet he can advocate not having them: that is, *he* can conceive of the book without them. And he recognizes that most reviewers do not deal at length with the notes—as if they did not exist, for those reviewers’ immediate purposes, which again suggests that *they* conceived of the book without them. Besides, the text did once stand alone—that is, without the massive notes—in its University of Chicago dissertation form, on the basis of which my publisher accepted the *Constitutionalist*. And parts of the book have been reprinted without notes (such as the chapter on States’ rights, in the American Government reader published by the Kendall/Hunt Press). It is obvious, then, that the text can stand alone and can be read through—I believe with profit—without the notes.

That the notes do exist for the *Constitutionalist* is providential, so to speak. The opportunity presented itself, during the half dozen years between the acceptance of the original manuscript and its final publication, for development of the notes in their amplitude. To have put the material now found in the notes into the text itself would have made the argument of the book quite cumbersome. In that condition, I doubt that the book would have found its way, as it has, into a number of bibliographies on freedom of speech and the First Amendment. The question Mr. Thurow never considers is whether the materials in the notes are worth having at all, assuming that they could be had only in the form in which they are now available.

Mr. Thurow does concede that “not only will everyone who looks find something fascinating and instructive among these notes, but throughout there is a high and serious tone and the author makes clear that he has carefully nurtured his little dwarf so that his outsized head would not be filled with a jumble of disconnected memories, but [with] a highly organized collection of serious reflections on important theoretical issues” (p. 189). Why not, in this imperfect world, settle for that? No, he must speak of the notes (and hence of the book as a whole) in rather disparaging terms. He finds it “irritating to read footnotes with a text because of their tendency to interrupt a train of argument” (p. 201). Well, then, don’t read them with the text, I suggest—and enjoy them. But he will not enjoy himself: “One is tempted to say that footnotes are thought divorced from the natural movements of speech. They may shock, inform, instruct, amuse, enlighten, but they do not sufficiently participate in the structured movement of speech necessary to move a human body and soul from uneducated to educated. Anastaplo’s footnotes, like his book as a whole, lack a proper body” (p. 202). It is with this remonstrance—this temptation to which he succumbs—that Mr. Thurow ends his review.

Precisely what the last sentence means, or how a human body can be either educated or uneducated, I do not know. Even so, I doubt that anything in my notes shocks anyone. But if the notes do “inform, instruct, amuse, enlighten”—then, I again presume to ask, why not settle for that? After all, how many contemporary books offer the “fascinating and instructive” things discovered here by my critic?

Mr. Thurow reports that reviewers have ignored the notes, “avert[ing] their eyes from the disturbing form of this book” (p. 188). Here we have what lawyers call a question of fact: how *have* reviewers regarded the notes? Anything but silent embarrassment may be seen in most of them. A few are critical of them, of course, preferring to see in the text some of the material found in the notes. But several reviewers of the *Constitutionalist* express an informed appreciation of my notes. Thus, the late Malcolm P. Sharp, Professor of Law Emeritus of the University of Chicago, could conclude an article (“Crosskey, Anastaplo and Meiklejohn on the United States Constitution”) in this way:

Mr. Meiklejohn’s, Mr. Anastaplo’s and Mr. Crosskey’s constitutional opinions not only stand the tests of practical utility; When slight adjustments are made among them, their Constitution has the immediate intuitive appeal characteristic of music or poetry.

In the Notes which are in effect the third volume in Mr. Anastaplo’s *Constitutionalist*, the author engages in brilliant and delightful comments and explorations, which can be read with the main text or with the aid of the Index, but which are best read at leisure on their own account.

Here, for example, fairly early in the Notes, the Constitution is compared with the famous cup of tea which brought to life in Proust’s mind the beloved and beautiful Combray with its people, its fields and its buildings. And at the very end of the Notes, Mr. Anastaplo reverts to his early love for and skill in mathematics, with a passage which—as I understand it—has received (for its mathematics) confirmation by qualified specialists. It is in part beyond the comprehension of a layman. But it is also in part intelligible to any student of philosophy who is aware of the part played by Pythagorean thinking in the history of both Greek and modern philosophy. Here the extraordinary mathematical relations among the elements are taken as signs of a deep if inscrutable reason in the nature of things, including the nature of law.

What about those reviewers who did ignore the notes? Perhaps representative of them is the reviewer who has authorized me to quote the following passage from a letter to me:

I regret that my review of *The Constitutionalist* in the *American Political Science Review* could not have addressed your arguments with greater depth and fullness. Unfortunately, the journal placed a stringent word limitation on my review, which made it impossible for me to do more than to sketch the outline of your argument in the basic text of the book and to indicate the difficulties I found in it. While I found it impossible to accept your position on the First Amendment, I should

have liked to have been able to express my admiration of the erudition reflected particularly in the endlessly fascinating digression of the notes.

This is hardly the attitude of one “turn[ing] from some gross physical deformity” (p. 188).

The fact is that a number of readers have reported themselves delighted by the notes. One thoughtful college teacher informed me that they had replaced Gibbon (temporarily, I trust) as his bedside reading. More than one reviewer has urged lawyers and other students of constitutional law to browse among the notes, after having grasped the systematic argument I have made in the text. A reviewer in *Modern Age* of the volume which includes, among other things, my “American Constitutionalism and the Virtue of Prudence” and Mr. Thurow’s instructive article on the Gettysburg Address, observes of notes very much like those in the *Constitutionalist*:

In his first of many long footnotes, Anastaplo suggests that “the notes provided here may not be necessary for a first reading of [his] article. In fact, most readers probably should leave the notes completely alone.” This is bad advice. With the possible exception of his own essay, no part of the book is better written or more interesting than Mr. Anastaplo’s notes.

Do not my notes in the *Constitutionalist* and elsewhere offer, however episodically, guides to the education that lawyers and judges, and their teachers, very much need? Do not they, at the least, remind narrow-minded “practical” men that “there is a world elsewhere”?

IV

Mr. Thurow’s crowning jest may be his suggestion that I presume to teach “that all men should try to be philosophic” (p. 199). He surely means for his readers to see this as a jest, since he immediately cites them (evidently for support) to a passage (at the beginning of the *Constitutionalist*) which indicates just the opposite:

This inquiry is, as its subtitle [*Notes on the First Amendment*] suggests, an exploratory effort. The *Constitutionalist*—as may perhaps be true of anyone who takes political things seriously—is occasionally obliged to beg the question, to proceed as if there were more certainty and precision than there can be about such matters. If he knows what he is doing, he can serve his fellow citizens by fashioning a salutary lawyer’s brief which tells “a likely story.”

(An advocacy of the “salutary” may be seen throughout my book, including in the concluding words of its text.) Mr. Thurow’s distortion, with respect to the place for me of philosophy in the life of a community, must have a purpose (just as does the distortion, in note 13 of his review, which has me saying something other than what I have about Lincoln’s Gettysburg Address).

Of course, philosophy is to be drawn on, in the effort to provide lawyers—or the teachers of lawyers—a grander view of things. One is reminded of such things in the notes to the *Constitutionalist*. Mr. Thurow, in advocating that more of the materials hidden among the notes should have been put into the text (on the surface of the book, so to speak), would have had me be more philosophical for everyone! Surely he jests.

Surely Mr. Thurow jests as well when he seems to suggest that I do not concern myself sufficiently with the moral character of the American people, and that I believe that an absolute freedom of speech will solve all our problems (p. 190). Indeed, I may be remembered, if I am remembered at all among political scientists, as the first among them to publish a systematic argument for the abolition of broadcast television in this country—an abolition of television for the good of the character of the American people and for the health of political discourse among us. I presumed to call this argument for total abolition “A Practical Man’s Guide.”

V

Then we are asked by Mr. Thurow to believe that choice is to be preferred (at least with respect to political matters) to deliberation (pp. 192f., 196, 199). This means, among other things, that the Founding Fathers are to be the last Americans to *have* deliberated. Freedom of speech is distinguished by him from “reliance upon the capacity of men to deliberately choose good government” (pp. 195–196). But is not good government that which our “freedom of speech [and] of the press,” properly understood, also aims at—but a choice of good government (including the establishment of justice) continuously, not just once?

Mr. Thurow talks (e.g., p. 196) as if I praise deliberation only for its own sake. But he can do this only by remaining silent about various limits I suggest upon freedom of speech, not the least of which are the emergency restrictions provided in the Constitution upon liberty generally. (Comic poets, too, depend on selective silence in order to secure their effects.)

One effect of Mr. Thurow’s silence is to make my position seem unpolitical and irresponsible. Thus, he can speak of me as “denigrating political life” and as “underestimat[ing] both the difficulty and the dignity” of that “moderation which subordinates one’s own claims to those of the Constitution” (pp. 199, 200). But a number of people who know my work do consider it devoted to an effort to bring prudence to bear on the study of legal and constitutional, as well as political, matters. Indicative both of the place of prudence in that work and of sensible men’s response to it are my “Occasions of Freedom of Speech” and the generous acknowledgments of my influence in the excellent University of Dallas Press translation of Machiavelli’s *Prince*, and in a most useful Northern Illinois University Press commentary on Aristotle’s *Rhetoric*.

Of course, the simplest response to Mr. Thurow's emphasis upon choice, in preference to deliberation, is to say (as is shown in various Platonic dialogues) that unless one understands the alternatives before one, one cannot truly choose—and such understanding depends, to some extent, on serious deliberation. Are not *we*, as American citizens, more apt to choose well if freedom of speech is at work among us?

Will, if not willfulness, seems the key to Mr. Thurow's preference here. In this, perhaps, he is very much a modern.

VI

Related to the emphasis on choice in Mr. Thurow's critique is his hearty appetite for combat (p. 199).

Why is combativeness made so much of by this mild-mannered scholar? What opinion about the world is implied by this appetite? To what extent is combativeness seen as essential to patriotism?

I must say that I find combativeness tiresome. I have seen far too much of it for my taste at academic gatherings: it is all too often assumed that one is not "serious" unless one is on the attack in dealing with the work of one's colleagues. Not that I have failed to be combative when I have had to be. But I have sometimes found myself tiresome also in assuming such postures, even when I felt obliged to do so. Certainly, I do not want to encourage anyone to believe that patriotism depends only on fighting, on attacking and defending. A little understanding, as well as gentleness and magnanimity, now and then, might not hurt. Certainly, firmness does not require one to be callous, meanspirited or vindictive, however salutary it can be to display one's teeth and claws occasionally to keep presumptuous wolves at bay.

I gather that such sentiments as these, as well as my publications generally and my easily-exaggerated career of resistance to tyranny at home and abroad, have helped prompt a committee based in Chicago to nominate me repeatedly for a Nobel Peace Prize. This committee is evidently made up primarily of former students of mine in the University of Chicago adult education program. (Fewer than one hundred complete nominations are submitted each year from all over the world.) I was peremptorily informed several years ago by my nominators both of their intention annually to go through the elaborate Nobel Peace Prize procedures and of their determination not to be dissuaded by anything I might say or do. My favorite law-school teacher was the first spokesman for this committee of generous Chaerephons.

I myself suspect that the most useful public service I could provide at this time would be as a member of the Supreme Court. I know of no one else with the useful "liberal" credentials I do happen to have who could be depended upon to develop the arguments necessary for various critical "conservative" restorations. Especially needed on the Court today is an articulate

but relaxed confidence in the capacity and duty of the community to discern and to act upon differences between good and bad, such confidence as was once reflected in the common law. Need I add that it is safe to predict that my appointment to the Court is not destined to be? (I am reminded of what I told the character and fitness committee back in 1951, that the Illinois bar needed me far more than I needed the Illinois bar. I am also reminded, of course, of the outlandish proposal that the useful critic of the community should be maintained at public expense in the Prytaneum.)

Be all this as it may (and may not be!), fearfulness, as well as ambition, may lie at the root of a contentious approach. Not that there are not genuine risks facing us. But fearfulness (or too great a sensitivity with respect to mortality) all too often either paralyzes us or arouses in us a desire for a strong leader (and a disinclination to deliberate). (Awareness of my own mortality was vividly brought home to me in our B-29 one night over Kwajalein many years ago, where I [as navigator] and our pilot took turns trying to get our air crew killed. It proved a liberating experience, and not only because I have sometimes felt that the almost four decades of life since then have been something of a “bonus.”)

The combination, as in Mr. Thurow’s argument, of (1) an emphasis on choice (with a depreciation of deliberation) and (2) a glorification of combativeness (or assertiveness, if not even aggressiveness) points to existentialism as the modern way out.

VII

But it is not an avowed existentialism that Mr. Thurow relies upon but rather (since he *is* a *political* scientist, however much of a modern he may be) upon Presidential power. (Here I temporarily step outside his review.) Does not Mr. Thurow’s expertise in the Presidency follow naturally for anyone who makes much of the combination of choice and combativeness? May not this perhaps unrepublican emphasis reveal a covert existentialism?

The President, it would seem, is preeminently a man of action: he defends us; he executes the laws; he *does* things. All a legislature ever seems to do is talk: it may be too deliberative for Mr. Thurow’s taste; it evidently cannot be taken seriously.

Publius and the *Federalist* seem to him to be in need of defense from me (pp. 191–200). He is not altogether wrong here, although I do rely upon the *Federalist* a good deal. (I should note, however, that the explicit reference to the *Federalist* in the opening paragraph of the *Constitutionalist* was out of deference to my publisher’s insistence, as was the extensive use of my bar admission case in an appendix. If I had had my way, there would have been little or nothing about that case in the *Constitutionalist*, just as it has never been discussed in any class I have been responsible for since I began teaching

more than a quarter-century ago. Mr. Thurow makes more of the case in his review than I am inclined to do in this setting. But since it *has* been dealt with by him, I do comment upon it here and there in this response. But the reader must go elsewhere for my systematic considerations of that case. A useful place to begin is in my June 18, 1979 *National Law Journal* article. Also useful are the following remarks, recently made to me by perhaps the leading constitutional law scholar in this country today, who wrote, “As you probably know, I am something of a fan of Justice Harlan, especially his First Amendment work in the late 1960s. But I have always considered his treatment of your claims as one of the low points in his career, especially in its roughshod, cavalier handling of your arguments, and I have so stated in most of my classes over the years, whenever the bar admission issue arose.”)

The *Federalist* is important, for Mr. Thurow, partly because Publius does not really deliberate (p. 192): everything Publius says is designed to elicit a certain response—ratification of the Constitution by the community. Does not Mr. Thurow, in glorifying Publius as he does, inadvertently point up the limitations of reliance upon the *Federalist* by anyone who is trying to understand what the Constitution itself does provide?

However proper may have been whatever Madison, Hamilton and Jay did in the *Federalist*, was it not immediately and primarily something said for the occasion? Thus, for example, if the Constitutional Convention had happened, in its closing days, to adopt a bill of rights—which, I dare say, it would have done if it had anticipated the considerable use that would be made by critics during the ratification campaign of its absence—can it be doubted that Publius would have explained and justified its presence just as cogently as he (and his apologists in imitation of him) accounted for its absence?

VIII

Mr. Thurow’s instincts are consistent, however mistaken they may be: he makes much of the Presidency, even as he disparages freedom of speech. For the legislature *is* the locus of freedom of speech. This is why I can refer back to the parliamentary prototype for freedom of speech (p. 193). (A nice confirmation of this may be found in the Tennessee Constitution of 1796: the people “shall in all cases, except treason, felony or a breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from them.” Does not this echo the privilege of legislators, such as that provided in the Constitution of the United States for members of Congress, who are protected “from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same”?)

Of course, the legislature also acts, in that it enacts laws. But deliberation is obviously critical to its activities. But deliberation about what? The good and how it is to be achieved in the circumstances facing the legislature.

Certainly, there is limited merit in vigorously executing laws (without regard to their worth) which *someone* has happened to make.

Something more should be said about the people in their sovereign, or legislative, capacity. It is that people who, preferably after due and adequate deliberation, must lay down the form (or overall law of the land) which the government as a whole (State and Federal) must implement. In this sense, that is, the people is the supreme legislature, with its various governments as its executive.

IX

Mr. Thurow's instinct is certainly correct in noticing the importance for me of the relation between freedom of speech and the right of revolution. Perhaps I get the combativeness out of my system here (or, at least, whatever is left after my bar admission litigation). Consider the question I put in Athens in 1969, on a nationally broadcast press conference, to the Colonel who had plotted the overthrow of the Greek government two years before:

We have been told many times that the April 21st revolution was made by Army officers who sincerely believed that they had to intervene when they did in order to rescue Greece from its deteriorating situation. My question addresses itself to the central problem of the legitimacy of the present regime and of its continuation in power.

What do you, as Prime Minister and as Minister of Defense, advise those intelligent and sincere Army officers who should now honestly believe that your regime has been disastrous for Greece and who agree with Mr. Karamanlis [who was then in Paris] that immediate intervention by the Army is again necessary in order to rescue Greece from its dangerously deteriorating situation?

Conscientious army officers who studied the published transcript of this press conference, I have been told, found my question even more interesting and worthy of study because of the evasive manner in which the Prime Minister responded to it. Be that as it may, I was never permitted by the Colonels to return to Greece after that visit. (Even so, I can be considered fortunate, since a couple of my fellow foreign correspondents in Athens that summer were not sure I would leave Greece alive. They kindly took precautions on my behalf.)

It is appropriate that the section dealing with the relation between the right of revolution and freedom of speech should be central to Mr. Thurow's critique of the *Constitutionalist*. To be reminded of the right of revolution, properly understood, is to invoke the role of nature and hence of natural right in our political life. It at least reminds us who (or, rather, what) is ultimately sovereign, and of the standards to be looked to. But I have never discussed the right of revolution without noticing prudential limitations upon its exercise—limitations which also remind us of nature and its prescriptions. Consider, for

example, the essay on Thoreau and Socrates in my *Human Being and Citizen* volume.

Freedom of speech, then, is a kind of domesticated version of the right of revolution (pp. 191, 193). It looks to the ends by which deliberation is guided and toward which action is to be directed. A useful comment on the right of revolution may be found in my Orgain Lecture at the University of Texas Law School (in April 1981). In the course of that lecture, “The Trials of Witches and the Tribulations of Witch-hunters,” I put the question of “how a decent, intelligent and educated man could and should have responded in the fifteenth, sixteenth or seventeenth century to witch hunts,” recognizing that “there must have been desperate men (especially among the clergy) who knew there was little they could do, once a witch hunt began in their locality.” My response, which recognized also that it was very dangerous to be identified publicly with anyone accused of witchcraft, included these observations:

No doubt, behind-the-scene efforts were made on behalf of some, with influence and wealth being brought to bear on receptive witnesses and judges, if they could be gotten to in time. But probably the best course of action was to head off a witch hunt before it could start in one’s locality. Sensible people would have had to unite at the earliest symptom of the disease, to catch it early. Of course, with some diseases, it may be sensible to let them burn themselves out—but that was a risky course to pursue when a witch hunt threatened *at that time*. (One does need prudence, to distinguish one kind of affliction, or one set of circumstances, from another.)

Perhaps, also, in such circumstances, decent men should have been prepared to use extralegal means. Perhaps, indeed, some communities fared well precisely because discreet leaders knew what measures to take, whom to get rid of and how—and in such a way that there would be (to this day) no record of it having been done. The measures that are appropriate in such circumstances would surely occur to truly sensible men, especially to men not unduly constrained by conventional spiritual considerations. A piecemeal invocation, so to speak, of the “right of revolution” may be called for in such desperate times.

I am reminded by these observations of a comment by Mr. Strauss, in the opening session of his 1963 seminar on Xenophon:

Someone told me once a long time ago—unfortunately he didn’t have the practical wisdom to make a note of it—that he had read in a renaissance writer that Xenophon was the watch-dog of the Socratic circle, meaning that he defended the position, the tradition one could almost say, against its enemies.

(I draw here, as in the epigraph, upon the transcripts prepared of Mr. Strauss’s courses at the University of Chicago.) 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.

Reservations by Mr. Strauss about right of revolution talk, as expressed

in the fourteenth session of his 1960 seminar on the Problem of Socrates, should also be noticed here:

The argument [in the *Crito*] of the Laws—with a capital L—suffers from generality. The problem of obedience to the laws cannot be simply decided. On the other hand, and that is why Plato wrote the dialogue as he did, as a crude rule of thumb it is sound teaching. People should really be law-abiding, by all means. There are cases where it is not possible to be law-abiding, but don't teach people that [which] is true [only] in extreme cases, because that has a bad effect. That makes them extremists themselves and that's not good for any society. But there are extreme cases. I think any one of you can find examples—I hope fictitious examples—where he would not obey the law. Mr. Anastaplo—I don't know if some of you know him—has not been admitted to the bar here because he stated this principle. He stated it, I think very soberly; it is, of course, an undeniable principle. But it is also a principle which—how should I say it?—which one shouldn't teach in the first grade of elementary school, because it is also a disconcerting point.

X

Of course, there are risks to any extensive exercise of freedom of speech, and remedies should be available when things threaten to go wrong. Mr. Thurow disparages as unrealistic my reliance upon the States to deal with the abuses of free speech (pp. 196–198).

But for much more than a century after the ratification of the Constitution, the States were relied upon for many things, not just for policing the abuses of freedom of speech. (It is evident that Publius, too, relies on the States.) Certainly, my argument on behalf of the States should be taken more seriously than Mr. Thurow seems inclined to do. The States did see the Revolution through to success; and they were, at least in part, responsible for the Constitution itself. They remain competent to deal with most serious abuses of freedom of speech to this day—the abuses (which do tend to be local in character) that we may want the law to deal with. Then, of course, if the States should prove inadequate in their duty in a particular situation, there are the emergency provisions in the Constitution for genuine national crises.

Mr. Thurow notices that I have questioned the dangers thus far in the twentieth century which have evoked federal limitations on freedom of speech. He seems to concede that I may have been correct to play down, as I have for several decades now, these supposed dangers. But he adds, “This estimate is a very happy one, if not overly reassuring in the light of recent events” (p. 198). What does Mr. Thurow suggest, that Russian aggression and tyranny in Afghanistan mean that we should restrict freedom of speech in *this* country?

The tendency to lump together legitimate foreign-policy (or national-defense) concerns with problems created by domestic dissent points up the advisability of keeping whatever control we may want over harmful talk in the hands of

the States, rather than in the hands of those charged with (and moved by) overpowering international concerns (p. 200). Let us hope that the final payment on the folly of *Dennis v. United States* was our ill-conceived involvement in the Indochinese War, not a nuclear war stumbled into by fearful gamblers or by thoughtless “defenders.”

Very few of the problems we do face are going to be made easier to deal with sensibly if we suppress full (including, unfortunately, irresponsible) discussion of them. Still, to say (as I do) that much, if not most or all, of the suppression of political dissent in our time has been silly, if not even harmful to American interests at home and abroad, is not to deny that the conscientious public servant must take account of what the public (which is rarely, if ever, “philosophic”) can be led (or misled) to believe necessary for its security. But, then, I regarded the response to the Watergate “threat” as silly also in *its* excessiveness, as may be seen in the essay on impeachment in my *Human Being and Citizen*.

XI

The question about the status of the States in our constitutional system may be related to that of the tension between liberty and equality. The States tend to stand for differences (even if only in the form of prejudices). They can also be said to stand for liberty. A national government, on the other hand, moves more toward equality, toward sameness, toward leveling and subduing large numbers.

Mr. Thurow, although he is quite familiar with the book, provides no *Federalist* citations to support his suppositions about Publius’s reliance on equality arguments (p. 200). Indeed, does not the *Federalist* take for granted some of my reservations about a reliance on equality, however Lincoln was obliged (in *his* circumstances) to read the intentions of the Founding Fathers (p. 203)? (What contemporary conservatives mean by the “equality” they endorse is, for me, far from clear. Far clearer is what they mean by the “liberty” they condemn: revolutionaries with guns and “the designing few,” to say nothing of “ambitious intellectuals,” come to view [pp. 195, 196, 201].)

In any event, we should be reminded of what both liberty and equality finally aim at: each is directed by an opinion about the highest good. Whether equality or liberty should be stressed, I have argued on various occasions, may depend on circumstances—which means, among other things, that something beyond both liberty and equality must be kept in view as sovereign.

We should also be reminded, especially in these most egalitarian times, of Tocqueville’s observation that “there is only one effective remedy against the evils which equality may cause, and that is political liberty.” We should be reminded as well both of Chief Justice Marshall’s display of deference in *McCulloch v. Maryland* to “the great principles of liberty” and of Publius’s

warning, a generation earlier, "Liberty may be endangered by the abuses of liberty, as well as by the abuses of power, and the former rather than the latter is apparently most to be apprehended by the United States."

Is it merely my temperament which inclines me to the opinion that liberty, more than equality, is something which may be desired for its own sake as well as for the good things it makes possible? Does not liberty point to excellence?

And excellence includes an awareness of and dedication to one's duties. Thus, I observed on December 15, 1975, in the course of acknowledging the presentation to me by the Illinois Division of the American Civil Liberties Union of its Second Annual Harry Kalven Freedom of Expression Award (the first award had been given to Professor Sharp):

The salutary questions I have for you are these: What is the moral character, both of citizens and of the community at large, which is presupposed by that most important right of a self-governing people, freedom of speech? That is, what is presupposed in the responsible use of that freedom of speech for which the A.C.L.U. has so gallantly labored for decades? What may properly be done, by private parties *and by the community itself*, to foster and preserve whatever moral character should be thought by reasonable men to be required for common decency and for thoughtful citizenship?

It is one thing to teach, as does the First Amendment in keeping Congress in check, that it is eminently prudent in our circumstances to allow contending arguments full scope so long as political discourse is being conducted among us. It is quite another thing to assume (as all too many intellectuals assume today) that we as a people are not entitled to do (consistent with due process of law)—to do what we can, both as human beings and as citizens, to save each other and hence the community from corrupting influences and to promote the virtue and the well-being of our fellow men. That mistakes will be made in the course of such public-spirited endeavours is inevitable—but that is in itself no ground for shirking the duty we naturally have to make reasonable and repeated efforts on behalf of a civilized community.

XII

I do not recall saying anywhere in the *Constitutionalist* that "the First Amendment is the centerpiece of the Constitution" (p. 191). I do say, in the passage cited here by Mr. Thurow, that freedom of speech and of the press is "both literally and spiritually central" *to the First Amendment*, and that that amendment is "a declaration of our political faith as a united, self-governing people." Truly central, however, are those goals in the service of which the First Amendment, and indeed the Constitution as a whole, are to be used and for the sake of which even our cherished constitutional liberties may be temporarily set aside—the twin (not altogether compatible) goals of the common good and the fully developed human being.

Of course, liberty, including freedom of speech, can go too far. My extended discussion in the text of the *Constitutionalist* of John Quincy Adams and the abolitionist-petitions controversy should suffice to suggest the abuses we do have to contend with wherever freedom of speech is permitted.

But, I repeat, the most dangerous abuses we face cannot be legislated against effectively. (This is where education comes in, to which I will return, shortly.) Instead, we get such things as the *Schenck* case and the crippling delusions of the facile “clear and present danger” formula which has appealed so much to intellectuals, liberals and conservatives alike.

Besides, equality too can be abused. It does have its purpose—not the promotion of adequate discussion with a view to sensible choices, but as a handy test with respect to the justice of the community. But is not a passion for equality (unless properly discussed) apt to be used today to deny standards, hierarchical relations and hence nature, even as it legitimates envy, jealousy and a lack of generosity?

That liberty and the right of revolution need also to be discussed properly should be obvious from everything I have published on this subject. Thus, I could conclude my “Human Nature and the First Amendment” article in the *University of Pittsburgh Law Review* with these cautions:

Prudential judgments are called for in the exercise of the considerable freedom that we depend upon and enjoy. But to rely upon prudence is to rely, by and large, upon a general opinion about the fitness of things which a self-confident community must encourage and sustain. Self-confidence and the moral tone of a community can be undermined, however, when, as is true today, there is a good deal of corrupting stuff around. (Indeed, that moral tone is already considerably affected, for the worse, when it becomes fashionable to argue either that there is no such thing as corruption or that the community has no legitimate concern with it.)

All this aside, the good sense of the community can be inundated when, as is also true today, there is a great deal of (non-corrupting but time-consuming) rubbish around—especially when we are deluded into believing (contrary to what nature teaches) that we can, with far less effort than our betters were obliged to exert in earlier times, understand what is going on and what needs to be done.

A lot *is* to be said for thinking for ourselves—and this the First Amendment, properly understood, helps us do. But thinking for ourselves is virtually impossible if we don't *think*—if, that is, we do not do what needs to be done to discipline ourselves to think. This means, among other things, that self-restraint is essential if we are to have effective self-government.

[W]hat Western intellectuals are doing, or are permitting a relatively few to do, to the sensibilities of the community is likely to provoke a natural rebellion by people whose instincts tell them that there must be more to life than the aggressive hedonism, if not even spiritual anarchy, into which we are falling. Unless we once again stand for civilization, and the discipline and prudence associated with a civilized way of life, we in the West can expect (human nature being what it is) to be subjected to barbaric, even tyrannical, efforts to purge ourselves of those elements which blatantly deny the deep-rooted moral claims of the community.

Our cavalier attitudes—which our corruptors even presume to call principles—about the governing opinions of the community mean that the passions of our people and the character of our leaders will become such that we can anticipate political and social repression (through the use both of a harsh criminal law and of an intolerant public opinion) which will be much more painful and sustained than anything Americans have ever known.

XIII

Playfulness, it can be said, helps keep one from making too much of any partisan position. It can also help one understand how things are, in their puzzling complexity and ambiguity. One is moved thereby to wonder what the whole is like—or, at least, what one's ability to know the whole is like.

Certainly, one should enjoy (as well as protect) oneself through playfulness. Furthermore, playfulness (which *is* the manifestation of a certain liberty) can promote discipline in reading (or in writing), thereby deepening one's thought. (It should be noted in passing, however, that Mr. Thurow does not have the horse-race puzzle quite right [pp. 190–191]. He overinterprets this, as he does other things in my book, partly because of his general misconception of my position. One knows one understands that “Roman ‘constitutional’” puzzle when one “figures out” why it and its solution appear in the notes where they are found. Despite what Mr. Thurow says, however, the riders' horsemanship or cleverness is not decisive.)

One can see in the *Constitutionalist* things found (that is, also hidden from view) in fuller development in far greater writers. Thus, my book is in some ways an experiment, for it demonstrates to the perceptive that a certain kind of writing is possible even in our day. (An author *does* have to be ever vigilant with publishers and editors who want to “straighten things out” for him: various numberings of chapters, sections and notes, if not of paragraphs and even words, can provide test patterns by which one may check to see whether a text is likely to have been published in its integrity. The Rabbinic tradition, especially with respect to transmission of the Bible, is instructive here.) In any event, there *are* some rather nice things yet to be discovered in the *Constitutionalist* and, if I may say so (and if I do not, who will?), in my other writings as well—things which some readers should someday enjoy bringing to view.

But then, as I have indicated, a certain playfulness must be posited for Mr. Thurow himself. For how else are his shortcomings to be accounted for? Thus, to give still another (albeit minor) example: Mr. Thurow, in note 11 (after conceding an argument I had made about the freedom of speech implied under the original Constitution), reports that I do not account for why the Bill of Rights “was not placed at the beginning of the Constitution or integrated with its text.” We are then referred by him “to an excellent discussion [by Herbert J. Storing] of this question as understood by the authors of the [First Amendment].” It so happens, however, that the Storing article (“The Consti-

tution and the Bill of Rights”) does not really provide the explanation sought as to the placement of the Bill of Rights. In fact, Mr. Storing’s characteristically useful discussion of the episode concludes rather lamely, “Sherman had his way [as to where the amendments would be placed], for reasons that do not fully emerge from the report of the debate.” I believe I have indicated as much in the *Constitutionalist* and elsewhere.

Yet there *is* something fitting in this equivocal invocation of Herbert Storing against me, inasmuch as various of Mr. Storing’s ambitious disciples have always disapproved of my career—of my bar admission case, of my mode of constitutional interpretation and political analysis, of my casualness with respect to ever so many things they take ever so seriously (including Cold War fantasies). Mr. Thurow seems to be in that convention-minded tradition, a tradition which ages young men prematurely. (Is this what comes from wanting to be “one of the boys”?) I, on the other hand, can be plausibly dismissed as someone who “never grew up”—and yet here I am, going on sixty!

Still, it might not be amiss to record here the observation by one sensitive scholar of considerable talent: he recalls that the one exception to the dog-eat-dog attitude—the intense competition—among graduate students in political science at the University of Chicago during his time there was among those students who were members of the informal seminars in political philosophy that I presided over. We did make little in those gatherings of professional ambition and much of the leisurely reading together of good books. (Need I add that these seminars were “unofficial”? Neither the political science department nor the law school of the university has ever displayed the slightest interest in my services. But that is a story for another occasion: it begins with my refusal to buckle under in 1950 to the demand that I give up my resistance to the impositions of the bar admission authorities—the demand made by the then dean of the law school who went on to become president of the university and thereafter Attorney General of the United States. And so I have been confined ever since, so far as the University of Chicago has been concerned, to teaching in an adult education program. Fortunately for my intellectual development, no part of the university has had during the past quarter-century so sound a dedication to old-fashioned liberal education as its adult education division. And fortunately for my professional development, the president of Rosary College during this period was much more tolerant of apparently unorthodox political opinions than “that man” at the University of Chicago who had come to take such an insatiable interest in my career. A somewhat combative but yet salutary summing up of the Attorney General, at least for the time being, may be found in my *National Law Journal* article.)

XIV

I have several times referred to the need to respect the limits confronting us (to say nothing of the even more severe limits confronting the Russians).

Education helps one become aware of limits—the limits of most people and of all institutions—even as it points to the unlimited, whether the divine or the ideas or the cosmos. Education should also help one to know oneself better, and hence one's own limits and one's possibilities, as well as what is truly worth choosing.

Political philosophy is available in some form to a few, philosophy to even fewer. For the community it is useful that a few be shaped by political philosophy (not necessarily by philosophy itself, the influence of which on political life should probably remain indirect if it is not to be destructive).

There has always been a gap, of course, between the level of discourse in the public forums of countries and that in their inner councils. But in our regime, there has usually been a correspondence between these two levels: the higher the one, the higher the other; one reflects, is perhaps even keyed to, the other. Thus, what is said in the public forums is apt to affect what is thought in the inner councils, especially since some of the best people among us have access only to public forums. Thus, also, what is said in the public forums can give one a reliable indication of what is thought in the inner councils—and this provides the community an opportunity to assess, question and correct the opinions that are likely to be acted upon by those in authority. If there should be too great a gap between the public forums and the inner councils, our people cannot grasp or countenance what is being done in their name—and demagoguery is more likely to be effective.

It should not be assumed that discourse in the inner councils today is necessarily more thoughtful than that in the public forums: it may merely be more self-interested or more expediency-minded and hence more calculating. Principles may be more evident in the speeches of some in the public forums, if only because the many generally tend to be respectful of the established morality of the community. Furthermore, since some modern thinkers have lifted the restraints of traditional morality from the tough and ambitious few, it may be necessary in modern times to widen both the freedom of speech and the education made available to the many if the "liberated" few are to be properly watched and controlled. A comment in my "Pentagon Papers" article anticipates this point:

It is the success of Machiavellianism (with its persuasion of bright men that they *should not* be concerned about conventional morality) which helps legitimate the modern constitutional elevation of freedom of speech and of the press in public life. For it is freedom of speech—which never had to have in ancient (that is, pre-Machiavellian) times the status it enjoys today—which can help the public become as informed as it is capable of becoming. It is freedom of speech (with all its risks and banalities) which makes it possible for the deepest moral sense of the community, however crudely it may be expressed at times, to make itself felt in the conduct of foreign affairs. It is also freedom of speech which permits and even obliges citizens in private life to speak on public affairs, those private citizens who

are as informed and intelligent (and sometimes even as experienced) as the men who happen to be in high office. Thus, it is freedom of speech and public opinion which help make it possible for us to live humane lives in an age in which even the most respectable among the sophisticated and ambitious have been so taken by Machiavelli as to permit themselves to do terrible things with "a good conscience."

For the decent community—at least for the educated citizenry—liberal education (as distinguished from political philosophy) is possible and desirable. My notes (in the *Constitutionalist* and elsewhere) provide guidance to *that*, not to philosophy simply. My "educational program" (for which instruction in how to begin to read good books is vital) may be seen in what I have published and in what I hope yet to publish:

The *Constitutionalist* studies American principles and institutions and moves, especially in its notes, to the underpinnings of our way of life and of our ability to understand (or at least to deal sensibly with) that way of life. *Human Being and Citizen* addresses itself to enduring questions as reflected in various issues of the day. So does "Human Nature and the First Amendment" (which is, in effect, a small book, as is true of several more of my long articles). My forthcoming *Artist as Thinker* considers, among other things, the question of natural right as reflected in the work of various English-language artists.

My publications on Quebec separatism, on Israel and on modern Greek affairs, culminating perhaps in my article on modern Greece in the current edition of the *Encyclopedia Britannica*, constitute a separate volume of work. So do the briefs and articles I have prepared since 1950 with respect to my Illinois bar admission controversy. (My *American Political Science Review* critic ended the letter from which I have already quoted, "I believe Justice Black's opinion in your case was the finest and most eloquent of his career." This assessment, which I have heard from many others, suggests that there may indeed be something about that case worth thinking about. Thus, Willmoore Kendall generously identified me in the *Review* as "the author of perhaps the only 'apology' of our time that demands a place in any anthology of American oratory." [He, in association with Leo Paul S. de Alvarez, was the founder, at the University of Dallas, of what must be one of the finest political science departments in this country today.]

My publication plans (D.V.) include a collection of commentaries on constitutional documents; a collection of analyses of famous trials; a series of addresses on political questions of our time, with special emphasis on problems of war and peace; another collection of discussions of the kind found in *Artist as Thinker*, but not limited to English-language artists; the most careful translation into English yet made of Plato's *Meno* (working from the draft left by John Gormly; a contract for this edition has been signed); a collection of examinations of classical and biblical texts (returning thereby to the roots of our way of life); and a series of inquiries into the divine (based upon a recognition of that question which is fundamental to much of philosophy as well

as to theology—the question *quid sit deus*). Much of the work for most of these projected volumes has already been done, as should be evident to anyone consulting the entries under my name in the useful bibliography in political philosophy prepared by J. Harvey Lomax. Whether all of these volumes are actually collected and published in my lifetime, however, should not matter much to me.

In much of what one does, unfortunately, one is today pretty much working alone. There is, for a variety of reasons, relatively little contact among authors in this country. I have long thought it useful (partly as a precaution against sophistry), as I explain in my “American Constitutionalism and the Virtue of Prudence,” to make extensive references to my own work as well as to the work of others. (The influence upon my work of Hugo L. Black, Laurence Berns, William W. Crosskey, Harry Kalven, Jr., Alexander Meiklejohn, Harry V. Jaffa, Malcolm P. Sharp, Richard M. Weaver and Leo Strauss should be evident to anyone familiar with that work.) I have not written the things I have, with the care I have, only to have them “lost” in diverse journals—and for this reason, too, I cite myself freely, however immodest it may seem.

I do conceive of my widely scattered publications, including such things as my introductory lectures on Confucian and on Hindu thought, as all parts of one corpus with a consistent argument from a general point of view. Thus, I believe Mr. Thurow is mistaken to consider me to work from “an exception to government” (that is, the First Amendment) (p. 199). It is apparent, even in the *Constitutionalist*, that I work (at least with respect to American political and constitutional matters) from the Declaration of Independence (p. 193).

Thomas G. West had this to say about my “educational program” as manifested in my *Human Being and Citizen*:

Human Being and Citizen should prove helpful to those who wish to understand politics in its broadest context. Anastaplo speaks in the precise, vigorous language characteristic of the great tradition of political discourse. He examines contemporary events in the light of the abiding arguments of political philosophy, simultaneously addressing himself to those arguments in the light of current political questions. His writing is free from jargon, and he discusses points of view opposed to his own with sympathy and clarity. In our time we have nearly abandoned the idea of a liberal education that enables a man to speak and act sensibly when facing the whole range of questions with which human beings must concern themselves; Anastaplo’s book helps us to recall that the universal interests of thoughtful men such as Aristotle, Cicero, Hegel, and Churchill remain our only access to the completeness we seek in our lives. . . .

. . . The peculiar excellence of *Human Being and Citizen* is that the questions it raises can be considered within the terms of Anastaplo’s own arguments. Even where politics seems too depreciated by philosophy’s authority, the thoughtfulness and balance of the presentation shine through. This is a fine example of the kind of writing needed to bring back a conception of education in letters and citizenship

that has nearly dissolved under the corrosive effects of academic skepticism and the decline of serious political discourse. It is unlikely that Anastaplo's book will become a "best seller." His standards of human and political virtue are probably too high to satisfy the debased tastes of an age of mass communication. The book, however, may be a godsend for anyone whose mind and soul are capable of genuine growth.

These observations may be found toward the beginning and at the end of a review by Mr. West (who is also in the University of Dallas Politics Department). It seems to be characteristic of the *younger* members of that gifted department to make a good deal of the political as against the philosophical, of war as against peace, and of equality as against liberty. Mr. West, in his generous critique of *Human Being and Citizen*, has several thoughtful things to say about the differences between us—and in such a way as to make me suspect that he may not be altogether wrong.

I hope to be able to use in future publications, whenever appropriate, that form which I can perhaps justly claim to have "perfected," the dialectical note. That exercise in apparent free association is, in certain critical respects, imitative of the most satisfying (however immoderate) conversation among friends. (The influence here of Diogenes Laertius, the Talmud, Pierre Bayle, Jean-Jacques Rousseau and, I hope, Plato should be evident.) Thus, one of Mr. Thurow's Harvard teachers could observe, of my *Human Being and Citizen*, that I had "developed the art of the footnote with the fervor and elaboration of a Gothic architect." Thus, also, the editors of the *Memphis State University Law Review*, upon publishing my long memorandum on the Religion Clauses of the First Amendment, took (at my request) the step, perhaps unprecedented for a law journal, of placing the notes after the text; they explain that my notes are "used more for elaboration than for documentation." However all this may be, time *is* on the side of those who take offense at my notes, since such notes do require, for their proper fashioning, considerable energy, a disciplined imagination and a good memory, all of which (whatever *my* original supply) can be expected to diminish with age.

In any event, my notes are to my work as digressions are to *Tristram Shandy*: take them out, Laurence Sterne's narrator suggests, and one removes the sunlight from the book. Or, to recall Walter Shandy's observation, "Learned men, brother Toby, don't write dialogues upon long noses for nothing." It should be recollected as well that it is indicated in Plato's *Phaedrus* and elsewhere that one's writings (and especially the notes one has "the practical wisdom" to make?) can serve to remind some, perhaps even oneself in one's old age, of things worth thinking about. Furthermore, cannot political life be usefully guided by the right kind of writing (which includes constitutional documents and commentaries upon them)? This hope is consistent with the recognition that the most important things should not, perhaps cannot, be written, certainly not for the general public.

XV

Mr. Thurow concludes his section, "The *Federalist* and the *Constitutionalist*," with this comment: "Anastaplo understands the fundamental character of the United States to be revealed in its dedication to deliberation; Publius, in its choice of the Constitution" (p. 193). But, to repeat, is not that character truly revealed neither in dedication to deliberation nor in choice of any particular constitution but rather in the set of standards and in the attendant institutions which permit a discussion of and an informed choice among contending alternatives at various times? (Mr. Thurow evidently overlooked, in the article he drew upon in his note 11, Mr. Storing's endorsement of "the value of a serious and thoughtful deliberative process" in the First Congress.)

One consequence of my emphasis, in our circumstances, upon genuine deliberation is that I am considered suspect by diverse partisans. Thus, young conservatives (of whom Mr. Thurow is merely the latest) dread the risks that my reading of the First Amendment exposes a defenseless country to: they can even warn us that "one need only consider who revolutionaries are likely to be in our circumstances" (p. 195). (We may wonder what one will do as one grows older if one is unduly fearful in one's youth.)

On the other hand, an old liberal such as Thomas I. Emerson (of the Yale Law School) effectively discouraged the University of Chicago Press from publishing the *Constitutionalist* in 1964. (The Press, I have been told, had had some strong recommendations that the book be accepted.) *He* seemed particularly concerned that my reading of the First Amendment would open the way to repression, particularly by the States. (Thus, his concerns were just the opposite of Mr. Thurow's!) His criticisms of my manuscript include the following:

The author seems to think that the problems of free speech and the First Amendment are confined to situations where the government undertakes direct prohibition of speech. He confines the discussion to attempts by the government "to regulate speech and the press," referring mainly to censorship or sedition laws. There is no consideration of the problem of indirect infringements, which are far more numerous and pervasive than the direct prohibitions. It is surprising, for instance, that the author never discusses how the First Amendment might apply to his own case.

The parts which deal with the contributions of State's rights to free speech and the restraint of States in that area seem to me particularly weak. The propositions that suppression of speech in distant states does not affect more balanced communities, that the States are less likely to interfere with free speech because they are not concerned with international affairs, that States have limited resources for repression of speech, that the States have the power to regulate speech because they have responsibility for education, that the States are less impersonal, etc., are mere speculations (wrong in my opinion) not supported by any serious data.

Professor Emerson concluded his assessment in this fashion:

I seem to have worked myself up to a frenzy over this. And I still find it hard to separate opinion from workmanship. My general feeling is, however, that the levels of thinking, treatment of materials, and craftsmanship here are below the standards of an important university press.

It is rather engaging to see Mr. Emerson so worked up, considering how pedestrian his writing on the First Amendment usually is (with his forced marches through the cases).

Even so, a refreshing contrast to the sort of thing found in the Emerson assessment of the *Constitutionalist* is provided by C. Herman Pritchett who included in his published review of the book these comments:

This huge book is primarily a treatise on the first amendment, with notes. As such it is probably the most original, extended, learned, dogmatic, tightly-structured, eloquent, unorthodox, and altogether heroic essay in constitutional explanation, interpretation, and plain and fancy assertion since the two volume blockbuster of William W. Crosskey, who incidentally was one of Anastaplo's professors at the University of Chicago Law School.

Professor Pritchett even goes on to suggest that the publisher (which was also, to use the Emerson phrase, "an important university press") "deserves some kind of Pulitzer Prize" for having, "in this period of astronomical printing costs," "indulged the author in a considerable spate of autobiographical appendices" and (he later indicates) in "an incredible mass of 390 fine-print pages of notes, some 300,000 words, on which the author is reported to have spent four years." (Mr. Pritchett adds at this point, "In these notes the positions taken in the text are supported, elaborated on, or illustrated by a staggering array of sources ancient to modern, sacred to profane, serious to popular, and by the author's own observations that he did not have room for in the text.")

Still, it should be recorded on Mr. Emerson's behalf that he did make the following concession in supplying me recently, at my request, a copy of his 1964 assessment (which I had not seen before):

I know that you will read the enclosed only as a strong statement of intellectual differences. As a matter of fact, I probably would not state my position so vigorously today. For example, your argument for limitation of the First Amendment to "political" speech has far more support today than I would have thought back in 1964.

(It should also be recorded that if Mr. Emerson had not discouraged the University of Chicago Press from publishing the *Constitutionalist* when he did, its appendices and its massive notes would not exist—and so his veto proved a blessing, just as was perhaps my exclusion from the practice of law.)

I believe it reasonable for me to recognize that I am neither conventional nor doctrinaire—and this means, among other things, that my readers do have to think for themselves, however much of a "frenzy" they occasionally work themselves up to upon confronting that painful prospect.

XVI

To say that one is considered suspect by diverse partisans is not to say, however, that one cannot ever win their respect. It would be useful here, as indicative of how I approach the issues of our day, to draw upon the response I made on the occasion (October 12, 1979) when I was presented a special award (“for commitment to ideals in both word and deed”) by the Chicago Council of Lawyers, a liberal bar association.

I had been introduced on that occasion by a lawyer who quoted certain remarks with which Mr. Pritchett began his 1972 review of the *Constitutionalist*:

On April 24, 1961, the Supreme Court of the United States, by a vote of five to four, affirmed the action of the Illinois Supreme Court which, by a vote of four to three, had upheld the decision of the Committee on Character and Fitness of the Illinois bar which, by a vote of eleven to six, had decided that George Anastaplo was unfit for admission to the Illinois bar. This was not Anastaplo’s only such experience with power structures. In 1960 he was expelled from Soviet Russia for protesting harassment of another American, and in 1970 from the Greece of the Colonels. As W. C. Fields might have said, any man who is kicked out of Russia, Greece and the Illinois bar can’t be all bad.

My response opened with these words:

Since I was excluded from the Illinois bar originally in 1950, from the Soviet Union in 1960 and from Greece in 1970, I look forward with a curiosity not untouched by concern as to what 1980 will bring. Thus, I may especially need your support next year.

This is not to be taken, I hasten to add, as a covert announcement of my candidacy for the United States Senate, to say nothing of even higher office. Nor is any disavowal here of candidacy to suggest, I should also hasten to add, that I consider myself unqualified for such public service—but I have noticed that it takes a while, indeed even decades, for influential people to arrive at the same high opinion of myself that I have, and a political career necessarily marches to a faster drummer than that.

My talk on that occasion (entitled, “One’s Character Is One’s Fate?”) concluded in this fashion:

Your award, if it means anything, testifies that I am being commended now for having been fortunate enough to have seen a quarter century ago what only a few other Americans trained in the law could see about the Declaration of Independence and its right to revolution, and about related issues of that desperate period in the life of our country.

My appreciation for your award—my appreciation, if *it* is to mean anything—should take the form of continuing to comment in the years ahead upon what I consider questionable in what all too many of our fellow-citizens believe about the issues of the day. Permit me, as a token of future performance, to draw upon my reputation as a constitutional scholar as I indicate reservations about three opinions

that the “better” lawyers and judges among us hold these days. The few minutes I am limited to permit me to do little more than to voice bare conclusions:

My first dissenting opinion is that we now face here in Chicago, in the prospect of mandatory busing of public school children, a tiresome ritual which promises to do little in this city for education and the invaluable neighborhood school, for racial justice, or for ordinary people’s faith in the Constitution, bureaucrats and federal judges. It would make far more sense, and hence be a far better use of the passions and resources which forced busing will waste, to do something (if only in the form of an urban equivalent of the Civilian Conservation Corps) about the scandalous unemployment rate, especially among the young, in the remarkably patient Negro community.

My second dissenting opinion is that the virtually unlimited access to abortion now available in this country is an unconscionable state of affairs. The Roman Catholics among us are substantially correct in their deep opposition to what we now have, even though they (because of a misunderstanding of the dictates of natural law) have long been misled by their leaders with respect to birth control. Particularly serious here is the unwarranted reading of the Constitution by the United States Supreme Court, which has left local governments paralyzed in any attempt to deal compassionately but firmly with our dreadful abortion epidemic (which represents, among other things, a callous exploitation of women and an endorsement of mindless gratification).

My third dissenting opinion is rooted in the argument, which I have made again and again in my publications, that the primary purpose of the First Amendment is to protect our right and duty to discuss fully, as a sovereign people, the political questions that come before us from time to time. (The “clear and present danger” test is, in these matters, simply without support in the Constitution.) Among the questions always open for discussion is that of what the community should do to train itself and its citizens for self-government and for a decent life together. Certainly, no community is obliged, in the name of liberty and self-expression, to allow itself to be corrupted by the demented, the vulgar, the selfish, the thoughtless or the doctrinaire.

Each of the three dissenting opinions I have just shared with you requires an extended argument—which many of you are better equipped to develop, if challenged to do so, than am I. I hope that that which I have said does challenge some of you. Serious thinking about the matters I have touched upon today is sorely needed among men and women in public life. In any event, I have intended, by making these remarks, to express *proper* appreciation both for your generous award and for your dedication to justice and the common good. After all, is not the most appropriate appreciation anyone in my circumstances can exhibit that of continuing to remind people such as you from time to time of the ethical, political and constitutional principles upon which we all so much depend as students of the law? I can only hope that I have indeed earned, and continue to deserve, your recognition as a colleague of sorts whose primary concern in what I have said in my public capacity over the past quarter century has been for the moral fitness, the informed sensibility, and the enduring security of that troubled nation to which a vulnerable world must look for prudent leadership if it is not to perish.

This, in any event, is how it seems to me that issues of the day should be spoken of when liberals are dealt with. (It should be instructive to record here that what I did say in this talk proved *so* challenging that the editor of the bar association's journal twice reneged on his undertaking to publish my talk, even though it had been set in type by his people.)

XVII

How issues of the day should be spoken of when conservatives are dealt with is suggested by what I had to say at Rosary College (on December 4, 1980) about a leading conservative polemicist, Harry V. Jaffa.

I began my introduction of Professor Jaffa on that occasion by observing that he is, to my mind, "the most instructive political scientist writing in this country today." (This introduction and the long conversation which followed have been recently published in the *Claremont Review of Books*.) My introduction included the following remarks:

A little more should be said by me about Mr. Jaffa now, if only to suggest matters that we might want to talk about on this occasion. A few differences between us, of which I was reminded when I heard him speak yesterday at Loyola University, could usefully be indicated.

Mr. Jaffa not only makes far more of exercising than I do—I limit myself to walking whenever possible and to the avoidance of elevators for ascents or descents of less than five floors—but he also is a much more vigorous moralist than I am, both in regulating his own conduct and in judging the conduct of others. I believe that I allow more than he does for good-intentioned errors, for inefficiency on the part of people, and for circumstances which account for, sometimes even justify, what seem from the outside to be moral aberrations. Compassion can be almost as important as moral indignation in these matters, particularly with respect to domestic relations, whether the subjects be abortion, divorce or homosexuality. Perhaps also I make more than he does of the importance—if only out of respect for the sensibilities of others and for the moral tone of the community—of discretion, if not even of good-natured hypocrisy.

We differ as well with respect to the conduct of foreign relations. We do share an abhorrence of tyranny, whether of the Right or of the Left. But we sometimes part company on assessments of how constitutional government and American republicanism can best be defended abroad. Thus, he was much more hopeful than I could ever be that our involvement in the Vietnam War (however noble in intention that involvement might have been, and *that* it was, in some respects)—he was much more hopeful than I was that our Vietnam involvement could do the American *or* the Indochinese people some good. Today we differ as to precisely what kind of threat the Russians pose to us. I see them as much more vulnerable (both politically and militarily) than does he; and I consider all too many calculations about nuclear war "scenarios" to depend too much on game theories and not enough on political judgment. I believe, for example, that the Russian leaders are much more constrained by domestic public opinion (by a pacific, even though patriotic, public

opinion) and by other factors than many of us recognize. They have suffered, at home and abroad, a considerable setback in Afghanistan; we can only hope that they, and we, do not suffer an even greater setback by a Russian invasion of Poland. But whatever happens in Poland, it is now evident that the cause of freedom is bound to be in better shape in Eastern Europe than it has been since the Second World War—in part because of what Polish workers have done in showing the world how things really stand there. The only question may be what price the Polish people will have to pay, and this may depend, in part, on their prudence and on ours.

Perhaps at the heart of the differences between Mr. Jaffa and me—whether the differences be as to the status of exercise or as to assessments of the Russians—is with respect to how much one should be concerned with the preservation of one's life. An immoderate cherishing of what happens to be one's own can lead, it seems to me, to psychic paralysis or to undue combativeness: either can undermine that relaxed competence which makes healthy statesmanship more likely. Certainly, Mr. Jaffa responds much more than I do to the apocalyptic as against the comic and somewhat less than I do to "liberty" as against "equality." Obviously, we touch here on questions about the nature of human existence, of virtue, and of happiness.

On the other hand, at the heart of our deep affinities—besides the fact that we were both fortunate enough to share a great teacher in Leo Strauss—is our minority belief that fundamental to sensible political science and to a decent life as a community is a general respect for natural right and what is known as natural law. This means, among other things, that discrimination based on arbitrary racial categories cannot be defended, especially by a people dedicated to the self-evident truth that "all men are created equal." It also means that the family as an institution should be supported.

Thus to challenge one's fellow citizens—whether they be "liberals" or "conservatives"—seems to me the duty and privilege of the citizen. One can see, in the two talks I have just drawn upon, anticipations of themes touched upon in what I have suggested would be an appropriate response to Mr. Thurow. Such talks should suffice as well to refute the curious "Dallas" contention that I do not concern myself sufficiently with "the dignity of politics" (pp. 196, 198–199).

EPILOGUE

I praise the American regime, flawed though it may be, when it is appropriate to do so. One might not expect this, if one took at face value Mr. Thurow's reservations about my determination to defend the Constitution. But that defense has been abundantly displayed both in word and in deed, beginning during the Second World War.

Praise of the American regime may be seen, for example, in various of my writings I have quoted from on this occasion. It may be seen as well throughout the *Constitutionalist*, which even concludes with an extended patriotic speech worthy of the Fourth of July. (I refer here to the text, since

the book's notes, which *are* for a much more limited set of readers, conclude [as Mr. Sharp indicated] with certain discoveries I have made in mathematics and physics which I have extended, not altogether playfully, to political relations. These discoveries can be connected with what I say in my Leo Strauss eulogy about something I call the "ultron.")

Thus, the closing words of the text of the *Constitutionalist* are the following:

American republicanism remains not only "the world's best hope" but also the noblest testimony that men have today of their faith in one another—in, that is, the ability of man to use his reason properly to secure for himself and his posterity the good things of this life. Timid men should be reassured that our republican experiment not only has worked, but has worked much better than eighteenth-century republicans had a right to hope for: it may well be the best which our political circumstances, nature, and traditional opinions will admit.

The republican of our day, however subject to continual re-examination his salutary opinions should be, is entitled to conclude, "We must not be afraid to be free."

We have to be counseled, in the words of Justice Black, not to be "afraid to be free." In our day and time, respectable intellectuals do not have to be counseled not to be afraid to be equal (except when "affirmative action," which can sometimes be both useful and just, seems to threaten them). It is freedom which frightens them, not equality. On the other hand, their thoughtless dedication to a doctrinaire equality can make them indignant, especially when they encounter talented men who insist on going their own way. One is reminded of the hostility provoked among ambitious politicians by the Socrates both of Aristophanes and of Xenophon, as he "arrogantly" walked *through* the marketplace.

However all this may be, it should not be assumed that I take issue with all of Mr. Thurow's criticisms. On the contrary, I can imagine myself agreeing with some of them "in principle"—but I do have difficulty seeing how most of them apply to me or to my book "in particular."

But then, I have suggested, Mr. Thurow must be aware of what he is doing in his misapprehensions. To conclude otherwise would be to leave doubts about his care in reading, about his preconceptions and standards, if not even about his good will and sense of fair play—to say nothing about his sense of humor.

Still, clouds remain which I, for one, cannot altogether dispel. Perhaps some "gentle rain from heaven" is necessary.

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