

INTERPRETATION

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DISCUSSION

THE DEFENSE OF LIBERTY

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University of Dallas

A review of George Anastaplo, *The Constitutionalist: Notes on the First Amendment*, (Dallas: Southern Methodist University Press, 1971).

The Constitutionalist has been well received since its publication in 1971.¹ 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. Professor Anastaplo has blunted many of the usual objections to this "absolutist" interpretation of the First Amendment (while, as we shall see, opening the door to others) by arguing that the speech the Amendment protects is only political speech and that the Fourteenth Amendment should not be read to apply the prohibitions of the First Amendment to state governments. This interpretation combines or transcends the usual "liberal" and "conservative" views, and leads Anastaplo to criticize sharply the Supreme Court's free speech opinions. 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. At least one reviewer has confessed to having had to entirely reconsider the "absolutist" view although he had previously regarded the argument as it came from Justice Black to have been decisively refuted.² Another has been led to raise the argument against the "absolutist" view to a new level.³ Few books have received as many thoughtful reviews as this one—a credit not only to the reviewers but to the book.

Yet there is an aspect of this book which, if not exactly overlooked in previous reviews, has been largely ignored. Much as we, despite good intentions, cannot but turn from some gross physical deformity, reviewers have averted their eyes from the disturbing form of this book. Footnotes, usually a book's decent appendage indicating scholarly thoroughness and modesty, here overwhelm the text, multiply their numbers to 2,787, and reach a volume of words three times as great as that of the text itself. The publisher's attempt to restrict the notes to the customary measure by using the tiniest print has only emphasized their unnatural proportions,

With this article, INTERPRETATION introduces its new *Discussion* section. A response by Professor Anastaplo will appear in INTERPRETATION 9/1.—*Ed.*

for they still fill 390 pages to only 285 for the text. (And this is not to count the 130 pages of appendices that connect text and footnotes.) *The Constitutionalist* recalls a dwarf with a small body and a big head.

These notes astonish even more by their scope than by their bulk. One reviewer has credited Anastaplo with the world's best filing system;⁴ another, with the power of total recall.⁵ Whether assembled by method or natural gift, these notes challenge one to think of any subject not included. They not only expand or qualify virtually every point made in the text, but refer to everyone from Plato to Isaac Bickerstaff and offer the author's reflections on such diverse subjects as mathematics, physics, history, and literature, as well as politics and philosophy. One suspects the reviewers have been silent in part because of the undignified temptation to sing the wedding ditty; something old, something new; something borrowed, something blue. Yet, 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 a highly organized collection of serious reflections on important theoretical issues (438, 614, 736, 786-87). But why 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?

The curiosity of Anastaplo's footnotes is not simply a matter of style, but is related to the work's broader intentions. It is these broader intentions, rather than Anastaplo's more specific interpretation of the First Amendment, that I wish to examine in this review. As the title indicates, Anastaplo aspires not merely to interpret the First Amendment, but the American Constitution and, indeed, constitutionalism generally. He wishes to go beyond the received interpretation of the Constitution to the original intention, and, not to be stopped, beyond the original intention to the best interpretation (X, XII). This goal, Anastaplo suggests, requires the effort "to see American constitutional law and political thought from the perspective of our ancient teachers" (420). These ancient teachers are the Greek political philosophers, particularly Socrates, and their heirs. Anastaplo seeks to reconcile the regime initiated by the Declaration of Independence with the teaching of the *Apology* of Socrates, to the extent possible (420, 658). How is this intention to be understood and does it lead to a useful and true understanding of the American political order?

The Constitutionalist's Rhetoric

There are two themes of *The Constitutionalist* that bring out what

Anastaplo means in general by this intention. In the first place he is concerned with the tension between the fully developed human being and the citizen⁶ (774). It is for this reason, of course, the *Apology*, with its classic confrontation of the philosopher and the city, is so important for him. It also explains his juxtaposition of the Declaration of Independence (which Anastaplo understands to be a political work addressed to citizens⁷) with the *Apology* [which Anastaplo regards as a dialogue instructing potential philosophers and their friends (702)]. The form of *The Constitutionalist* is reflective of this tension as Anastaplo understands it (438). The book is divided into three parts: text, appendices, and footnotes. The text interprets and defends the First Amendment, the Constitution, and the American regime generally (3-4). In it Anastaplo most often speaks as “the Constitutionalist,” rather than in his own name, addresses the thoughtful citizen, and seeks to “articulate the principles of the American republic” (15). The appendices are a connecting link between text and footnotes. They move from the non-personal, public concerns of “the Constitutionalist” in the first appendix (on the drafting of the First Amendment) to Anastaplo’s own bar admissions case in the last, a case he sees as exemplary of the limitations of legal justice. In the footnotes Anastaplo qualifies the text’s arguments and judges the merits of the American regime in the light of his literary and philosophic studies (x). Ranging far afield from the text’s legal and constitutional concerns, he tantalizes our desire to know not only our duty as citizens, but all that we might see (see, e.g., 805-08).

Anastaplo’s second and related concern is to reconcile the duties of American citizens with their freedom (ix, 269, 745). He seeks to curb the materialism and concern for security he sees as too characteristic of American life, and to encourage such virtues as generosity, good-naturedness, and, above all, reasonable deliberation. Yet these virtues are not to be purchased at the price of freedom—indeed, free speech is to be made more “absolute” and secure.

One of the footnotes poses a problem that explains Anastaplo’s way of dealing with these twin tensions:

A cherished prize is to be awarded to the owner whose mounted horse comes in last in a race. What is the simplest way of arranging this horse race to make it both interesting to spectators and a fair test of the horses? (464)

The answer, as another note confirms, is that no owner should ride his own horse. The moral seems to be that an owner of a slow horse should contrive to ride a fast horse, but arrange the race so that the prize goes to his own. To the uninitiated spectators it will appear as though he has

skillfully brought the fast horse to victory, while in fact the old nag at the rear has secretly carried off the prize. The knowing spectators will have cause to admire both the rider's horsemanship and his cleverness (534).

Applying this rhetorical principle to *The Constitutionalist* we see Anastaplo, in the habit of the Constitutionalist, riding a very fast and sleek horse indeed. Moreover, his riding is so skillful that the horse looks even sleeker than we had imagined. This thoroughbred is, of course, the famous "absolute freedom of speech." He seems a sure winner in the political race. Although one might have some doubts on the grounds that the "absolutist" interpretation of the First Amendment has never been formally accepted by a Supreme Court which has accepted nearly everything else (and this despite its having been sired by one of its own members), still one would be hard put to think of any limitation on free speech that would be accepted in principle by enlightened opinion. Furthermore, Professor Anastaplo improves the odds. He uses his own court battle as a lesson in the injustice that can result from denying a claim to free speech. In addition he sets limits on free speech that broaden its appeal. By arguing that the First Amendment protects only political speech and by denying that the First Amendment applies to the states, Anastaplo can appeal to contemporary conservatives as well as liberals.⁵ But he does not only rely on the force of his personal example or merely appeal to contemporary opinion to speed his horse to victory. He seeks to give free speech the strength of patriotism. He identifies freedom of speech as the central element of the United States' two founding political documents, the Declaration of Independence and the Constitution, and thereby of its regime. Freedom of speech, he argues, is the everyday equivalent of the "right of revolution," the fundamental right of the Declaration (721, DI 414-15). And he adopts the view that the First Amendment is the centerpiece of the Constitution, the "declaration of our political faith as a united and self-governing people" (x). To be patriotic is, above all, to believe in free speech (283).

Assuming for the moment the success of these arguments, how does the victory of "absolute freedom of speech" result in the prize being given to the old nags of philosophy and virtue? And what is the prize that they receive?

The Federalist and The Constitutionalist

Now it is easy to see how free speech would be beneficial to philosophy. For surely a philosopher would want to be free to investigate and question everything. (Unless, Anastaplo suggests, a philosopher might be content to do these things in private. [795; see 774-75]). The question is rather how free speech contributes to political virtue, and what place

the philosopher has in the common good (767). Anastaplo answers this question through an interpretation of the character of the United States. In assessing this interpretation, it will be useful to make a comparison invited by *The Constitutionalist*. Its first chapter explicitly adopts *The Federalist* as its model. The title of the book itself recalls *The Federalist* while perhaps suggesting Anastaplo's ambition: to replace a federal, or partisan, interpretation of the Constitution with the true, non-partisan interpretation.

The Federalist offers an unapologetic defense of the Constitution. Publius announces in the first *Federalist*, "I will not amuse you with an appearance of deliberation, when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded." He offers his readers not his doubts, but his arguments which, he says, "will be open to all and may be judged of by all. They shall at least be offered in a spirit, which will not disgrace the cause of truth" (*Fed.* #1). Deliberation has reached its end in choice, and may now defend its choice, even on someone else's grounds. It is true that in order to defend, Publius must interpret the Constitution, but the aim is frankly advocacy not simply understanding. In comparison, the *Constitutionalist* seems much less a partisan of the Constitution. He professes to be primarily interested in understanding, not defense. The *Constitutionalist* says his task is that of "explaining, and perhaps refining and thereby even strengthening something which is inherent in our way of life" (12). Defense comes only as a by-product. He expresses "far more interest in having my reader agree with me about the questions and problems to be raised and about the general standards that may be invoked than about the solutions and interpretations I happen to offer" (11). He hopes, with Montesquieu, not "to make people read, but to make them think" (11). *The Federalist* defends the Constitution in order to lead men to make the reasonable choice of submitting to it; *The Constitutionalist* interprets the Constitution in order to lead men to be reasonable (see 795).

Now, this might seem simply the difference between a political and a scholarly work, but that would be an error. At least the text of *The Constitutionalist* is addressed, as is *The Federalist*, to "all considerate and good men" (to use the words of *Federalist* #1), and means to contribute to political as well as intellectual health (11). It might also seem that this difference is to be explained by the different circumstances faced by Publius and by the *Constitutionalist*. Publius wishes to persuade the people to establish a constitution; the *Constitutionalist* wishes to make the men who govern under the established constitution more reasonable. This is true, as far as it goes (282, 643, 787). But both *The Federalist* and *The Constitutionalist* are concerned not only with immediate political

problems but with the characteristics of the American polity in general (x, 7). Anastaplo understands the fundamental character of the United States to be revealed in its dedication to deliberation; Publius, in its choice of the Constitution.

Free Speech and the Right of Revolution

Anastaplo considers the “fundamental constitutional document” of the United States to be the Declaration of Independence. In his major work on the Declaration, he argues that its deepest element, the “right of revolution,” cuts even deeper than the Constitution itself (DI 414). The right of revolution “is an insistence upon ends which transcend all forms of government, including that form incorporated in our Constitution” (DI 400). It may even justify rebellion against the Constitution if the Constitution becomes destructive of the proper ends of government. But these ends are not known or stated in the Declaration; they are “left to men to discover and define” (DI 400). The Declaration only indicates that they

have something to do with “the Laws of Nature and of Nature’s God,” something to do with “certain unalienable Rights, *among which* are the rights to Life, Liberty and the pursuit of Happiness” (DI 400).

Because of men’s ignorance of these ends, they have the duty as well as the right to question (DI 400-01). Men must rely upon governments, but they cannot legitimately surrender to them “that which distinguishes man from the other creatures; they cannot surrender the right, and the duty, to examine and evaluate the deeds of their governors and of themselves” (DI 400). “In short,” Anastaplo says, “the right of revolution implies an insistence upon the supremacy of man’s reason” (DI 400). The Declaration, although a political document, points beyond politics to man’s desire to know (DI 396).

Anastaplo’s domesticated version of the right of revolution, as previously indicated, is to be found in the First Amendment’s protection of freedom of speech. It is the “declaration of our political faith” and expresses the primary right and duty of the American people, as well as the principal means for securing free government. Like *The Federalist*, *The Constitutionalist* considers the Constitution to be essentially popular in character (644, 648). *The Constitutionalist* understands this to mean that the people are the ultimate rulers (89). Just as there has been free speech within the parliament of Great Britain because the parliament has been the ruling body, so there must be free speech among the people of the United States because the people are sovereign (115-20, 124-26, 538-41).

The power of sovereignty includes the right to consider all alternatives. The sovereign may limit, he cannot himself be limited. "Would, then," Anastaplo asks, "the American people truly be sovereign if they should not have before them all opinions bearing on the decisions they must, as a people, make?" (498).

Free speech is a duty as well as a right. Because sovereignty is essentially the examination of alternatives, its ultimate justification and dignity is to be found in the distinctively human capacity of reason. Every human being has a duty to inquire, examine, and be reasonable. No human being is free to shirk this duty, and cannot give it up without ceasing to be a human being (499).

Although all men must question to be fully human, in practice few are thoughtful. The duties of sovereignty can be fulfilled only to the extent it is possible to give weight to thoughtful men. The problem of republican government then becomes how to make as many men as possible thoughtful and how to give the minority who are thoughtful political power (581). (It is indicative of Anastaplo's understanding that those whom *The Federalist* refers to as "considerate and good" and others refer to as "gentlemen," he calls "thoughtful.")

Anastaplo suggests that thoughtful men can be formed through liberal education, and can be protected and given political influence through a belief in freedom of speech. Because free speech is a democratic right, originally intended to aid the people against tyrannical government (and still useful for that purpose), the people will adhere to it, especially if they are reminded of it by the Constitution and vigilant constitutionalists. Yet, it is also a protection of minorities against the tyrannical rule of the majority. By attending to the requirements of their own sovereignty (free speech), the people learn that there are limits to their will. Although the protected minorities may include the merely eccentric or the fanatical, their excesses can be checked by a judicious federalism and their numbers reduced by liberal education. The First Amendment reveals its dignity in protecting thoughtful men in a democratic society. Moreover, through the habit of protecting these men, the people may even be led to give them honor and office. The prize to be awarded the thoughtful man is not merely security, but political influence (224-29).

The only passage from the Declaration that is specifically quoted in *The Federalist* is that stating the right of revolution. It is quoted (incompletely) in the context of justifying the action of the Philadelphia Convention in proposing a new constitution instead of merely reforming the Articles of Confederation as its instructions had authorized. Though the right of revolution is a right of the people collectively, Publius argues, it can be used to justify a few men departing from their authorizations.

“Since it is impossible for the people spontaneously and universally to move in concert toward their object,” a few must take the initiative and propose a course of action—the people can only ratify or reject (*Fed.* #40). Revolutionary activity by the Convention is justified because the Articles of Confederation are not consistent with “the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed” (*Fed.* #43). The right of revolution, according to *The Federalist*, is not an individual right reflecting the transcendence of reason in man’s nature, but a collective right of the people to secure the political end of their safety and happiness. It does not culminate in questioning: not among the people because their questioning must be limited, if there is to be a common revolution, to the alternatives presented by a few; not among the few, because they ought to judge according to known and transcendent laws. The right of revolution is not a deliberative, but a judicial and executive power.⁹

Anastaplo wishes to portray the height of the United States in the image of the thoughtful man freely examining himself and others. It is intoxicating, but imprudent, to see that image in the “right of revolution.” This refined notion of the “right of revolution” will not generally be understood by others who will be much more likely to think of guns than of the University of Chicago when revolution is mentioned. As David Schaefer has suggested, one need only consider who revolutionaries are likely to be in our circumstances.¹⁰ But, Publius would argue, our situation is the common situation. All men, including Socrates, stand in need of government because the alternative, revolution, is so fraught with the dangers of anarchy and war. It is even more fraught with the danger of bad government because it is so hard to find some few who will make a good proposal and so rare to find many who will be willing to adopt it, if made (*Fed.* #37, 38). The success of the revolutionary Constitutional Convention appeared to our savvy founders as little short of miraculous—not a precedent to be frequently imitated.

What, then, is our “political faith,” according to *The Federalist*? The first *Federalist* notes:

It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.

Our “political faith” is to be found, not in trust in free speech, but in

reliance upon the capacity of men to deliberately choose good government. This capacity was perhaps put to its greatest test in the choice of the proper form of government, but the institutions of republicanism continue to test this capacity because they reflect the “honorable determination, which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government” (*Fed.* #39). This faith differs from that of Anastaplo’s understanding by putting the emphasis on the duty of choosing good government instead of on the freedom of deliberation. Deliberation there ought to be, but it is to be judged by its end in good government, not extolled because of its questioning of all opinions. The capacity of mankind, when egged-on by the designing few, to disobey or overthrow governments was never doubted; what was in question was whether a people had the wisdom and discipline to form and perpetuate good government.

Federalism

Anastaplo reinforces the dignity of politics by insisting that the First Amendment protects only political speech. Yet he recognizes that the requirements of good government and civic virtue cannot be attained without some restraint of even political speech. He argues that the necessary restraint can be introduced partly through a reinvigoration of federalism. Here again, this argument can usefully be seen in comparison with that of *the Federalist*.

The Federalist teaches a new doctrine of federalism. It rejects the old criteria for a federal government: that the laws must apply only to states, not individuals; that the central government must be restricted to foreign affairs; and that the central congress should be constituted on the principle of equal votes for equal states. Governments constituted on such principles, Publius claims, have been characterized by “incurable disorder and imbecility” (*Fed.* #9). The alternative of a consolidated government, on the other hand, has the defect that, under it, the society cannot be large and remain republican. The chief virtue of the true view of federalism is that it allows one to have a large republic without the weakness and factionalism characteristic of previous federal governments. The true view is that a federal (or confederal) republic is simply “an association of two or more States into one State.”

So long as the separate organisation of the members be not abolished, so long as it exists by a constitutional necessity for local purposes, though it should be in perfect subordination to the general authority of the Union, it would still be, in fact and in theory, an association of States, or a confederacy. (*Fed.* #9).

On this new theory a confederation can be erected which has the advantage of “the great and aggregate interests being referred to the national, the local and particular, to the state legislatures,” in contrast to the division under the old federalism between foreign and internal affairs (*Fed.* #10). The new view permits a large country without ignorant tyrannizing over local interests. In turn, a large country is essential to self-government. “The larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self government” (*Fed.* #51).

A large territory, coupled with the familiar devices of modern representative government, permits the defects of previous republics to be remedied. Their defects were external weakness and internal factionalism that nearly obliterated the rays of republican freedom. The large republic made possible by the new federalism can be strong without factionalism or the domination of a faction, as Publius shows in the famous arguments of *Federalist* #10 and #51.

With respect to the issue of free speech, Anastaplo seems to return to the older view of federalism against the new federalism of Publius. There ought to be the greatest possible division, he argues, between those responsible for the country’s foreign policy and defense and those responsible for any curtailment of internal freedom (179). The first is properly a duty of the central government; the second, a duty of the states. Yet, to repeat, Anastaplo emphatically thinks that political speech can present a threat to the nation (518). Thus a “great and aggregate interest,” the safety of the country insofar as it involves limitations on speech, ought to be the responsibility of the “local and particular” states.

Anastaplo presents several arguments to show that we need not overly fear that his scheme would allow local prejudices to destroy free speech. Not only does he argue that these prejudices may be checked by the federal courts through the Constitutional requirements of due process of law and its guarantee of republican government, but he cites the tendency to protect one’s own (he points to Joseph McCarthy’s silence about the University of Wisconsin despite its being at least as radical as McCarthy’s favorite target, Harvard), the financial limitations of the states, and the diversity of jurisdiction that would allow the persecuted to escape a state’s tyranny by simply going to another state. Yet all of these arguments, to the extent that they are valid, only suggest that there may be limitations on the ability of state officials and majorities to practice the tyranny they may desire. Publius would reply that liberty would be more secure if the ruling majority did not desire tyranny in the first place, and that the diversity of a large republic is the only way to get such majorities.

Anastaplo (as have others) does suggest, perhaps seriously, that the states are a distant reflection of the antique *polis*—a community that fos-

ters the virtue that preserves and enhances republican freedom (612–15, 775). Of course, the American states (some of which are larger than all of ancient Greece) do not much resemble ancient cities, as Anastaplo knows, and are likely to foster only a weak imitation of ancient virtue, at best. This suggestion may simply be a less-than-straight-forward way of reminding us of a political possibility that is not possible for us (438, 597). But it needs to be more, if the limitations of free speech as a means to good government are to be remedied by states' rights.

None of Anastaplo's arguments show that the states would be effective in curbing the dangers of free speech when the circumstances require it. It seems probable that those who are not chosen for their grasp of national affairs and who do not have responsibility for the national good are not likely to be good judges of the dangers the nation faces or the proper remedies for them. Instead, Anastaplo denies that there is much danger. With regard to recent events, for example, he argues that the Communist danger has been greatly overestimated and that, consequently, we are free not to concern ourselves overly much with defense against it (742). This estimate is a very happy one, if not overly reassuring in the light of recent events. But even if infrequent, may not the need for effective, informed, and speedy defense be crucial?

Anastaplo also argues, however, that defensiveness is likely to undermine republican virtue. Fear, he says, does not move "the best men or . . . the best in men" (585). Political suppression, even of dangerous men, "tends to bring out the worst in both persecutor and victim" (802). To seek too diligently to secure the conditions of freedom undermines freedom because one develops bad habits in denying freedom to the enemies of freedom (802–05). Liberty, as well as republican virtue, is threatened. The attempts of the courts to reconcile free speech with the need for defense, such as through the "clear and present danger" formula, have only undermined liberty by providing sliding standards likely to slide out of sight at the moment of greatest need (x, 45ff.). It is better both for the preservation of American virtues and for the security of thoughtful men to have dirty deeds performed inefficiently, or even ineffectively, but kept out of sight in the states, than to sully the noble principle of absolute free speech in the country as a whole.

There are, indeed, dangers here. Yet Anastaplo's position downplays too much the need to face up to the tasks of republican government. Despotism, Publius reminds us, more often appears in the guise of a defense of the people's rights, than under "the forbidding appearance of zeal for the firmness and efficiency of government" (*Fed.* #1). It is in defending their choice that free men take responsibility for their choice, including the unpleasant or harsh things that choice entails. In denigrating this defensive-

ness, Anastaplo is denigrating political life, for the political differences emerge in the impulse to defend or attack. It is in comparing ourselves to others and seeing that we have something that is superior (or inferior) that one becomes aware of, and concerned with, the differences in regimes. Indeed, only then does the question of the better and best regimes emerge. The self-contained man, oblivious to or contemptuous of his surroundings, is not a political man; nor would such a country be a political country. It is only men who take those differences so seriously that they wish to attack or defend who are the political men. The dignity of politics is visible in the fact that men are willing to die for their country, as it is, in a different way, in the debates in the halls of Congress. It is the merit of *The Constitutionalist* that it shows us the nobility of freedom as visible in those debates; it is the merit of the *Federalist* that it shows us that the nobility is visionary unless we choose good government.

Freedom and Constitutionalism

The Constitutionalist frequently portrays political life in exalted terms. But the book as a whole does not adequately present the political side of the tension between philosophy and politics (See 558). The book begins with a eulogy to thoughtfulness and ends with mathematical physics. The overwhelming weight of the “philosophic” notes in comparison with the “political” text is a further indication of this skewing. This imbalance is due, in no small part, to Anastaplo’s attempt to interpret American constitutionalism through the First Amendment.

It should be remembered that the First Amendment is not a grant of political power, but states an exception to political power. This exception may in fact or potentially serve the end of good government, as Anastaplo argues. But can government be given its due by beginning with an exception to government and proceeding from there to philosophy? Should not one begin with what points man to government, not what points him away from government if one is to understand the tension between philosophy and politics? In the case of the United States, at least, one should take seriously the fact that the First Amendment is attached to the end of the Constitution—after the powers have been granted, the exception is stated.¹¹

Similarly, there are many specific arguments in *The Constitutionalist* that encourage good citizenship and moderation. But in stressing that the good citizen must, above all, be dedicated to his freedom to transcend mere laws, Anastaplo leads men away from the Constitution. In the text he teaches that all men should try to be philosophic, while in the footnotes he teaches that only a few men can be (11, 534). But if the latter is true, is the former opinion the basic opinion a good citizen should have? For

does it not lead all men to make the claims that are proper only to philosophers?

In contrast, *The Federalist* makes an argument from equality as well as freedom.¹² We have seen that it suggests that our political faith is a faith in “the capacity of mankind for self-government.” That is, it claims that citizenship ought to be based upon a general capacity of mankind, not upon some unique capacity of a particular part of mankind. The proof of this claim, however, can only be shown in practice by establishing good government upon this principle of human equality, something which had never been done before and which there were many reasons to believe could not be done.¹³ It is through recognition of the proper practical application of equality, Publius contends, that the problem of good government can be solved. This is nowhere more evident than in Publius’ discussion of federalism. The principle of his discussion is that the more the oneness of humanity is recognized—the larger the country, and the greater the diversity of mankind included—the more the democratic problem of majority tyranny is capable of solution.

It is essential to stress that Publius’ view is the very opposite of the modern view that equates equal participation and good government. Indeed, the distinction between the American and other republics is said by Publius to lie in “the total exclusion of the people in their collective capacity” from any share in the American government (*Fed.* #63). Drawn from a large and diverse country and based on the principle of representation, the government can represent the whole people, not just a particular part—even the majority part—of the people. The people, to govern on the grounds of human equality, must be willing to moderate their own claims to rule collectively rather than through republican institutions. It is the task of American institutions and statesmanship to bring about this moderation which subordinates one’s own claims to those of the Constitution. Anastaplo’s argument underestimates both the difficulty and the dignity of this moderation.

Liberal Education

Anastaplo suggests that the American founders, with the possible exception of Jefferson, paid insufficient attention to the problem of educating thoughtful men (662). *The Constitutionalist* can even be seen as primarily intended to lure and educate the best (499, 603). Its footnotes, in particular, seem intended to be a model for the liberal education the best should receive, leading men towards a freedom that transcends, not merely rejects, political loyalties. Within them is much to encourage and guide the student who wishes to truly converse with the most thoughtful men of the West. The discipline, erudition, and reflectiveness they display stand in stark

contrast to most modern writing. But are footnotes the proper vehicle for liberal education?

Footnotes as a means of liberal education might be traced to Rousseau. Indeed, Anastaplo appropriates the “Notice on the Notes” from Rousseau’s *Second Discourse* for his own notes:

I have added some notes to this work, following my lazy custom of working in fits and starts. These notes sometimes stray so far from the subject that they are not good to read with the text. I have therefore relegated them to the end of the Discourse, in which I have tried my best to follow the straightest path. Those who have the courage to begin again will be able to amuse themselves the second time in beating the bushes, and try to go through the notes. There will be little harm if others do not read them at all. (420-21)

But footnotes have limitations as a form of writing. They come in bits and pieces and are inherently distracting. They lead one a little way down some subject and then drop it. One expects the next note to start from a different place and lead down another way. It is irritating to read footnotes with a text because of their tendency to interrupt a train of argument. Ambitious intellectuals are fond of footnotes because they are more interested in who says something about a subject than in the subject itself; or more interested in a striking observation about some subject than in following someone else’s long argument.

Now one can write in such a way as to minimize these characteristics of footnotes as a way of writing. One can connect footnotes together, and lead the reader from one to another down a coherent path. One can make individual footnotes long. One can make references not merely to others who have written on the same subject, but to those who have something significant to say. All of these things have been done by Professor Anastaplo, yet the original limitations of the form remain. One might think that Rousseau has shown that these limitations can be overcome. But, given his view of intellectuals, it is not clear whether Rousseau’s footnotes contain the truth the bushes of the text conceal, or whether they are the bushes that conceal the truth of the text. In any event they differ from Anastaplo’s in that there are only a few of them. This leads to two important differences. Rousseau’s qualifications of his text’s political argument are inconspicuous in a way Anastaplo’s are not. (Some editions of Rousseau have even left the footnotes out—something that would be inconceivable in the case of *The Constitutionalist*.) In addition, because there are only a few notes, the whole of which they are a part is, in at least a minimal sense, visible.

The underlying limitation of footnotes is that they are divorced from the two higher forms of human discourse. We find good human speech coming either in the form of a coherent argument issuing from one man’s

mouth; or in the form of a reasonable dialogue between two or more men. To use the Greek examples, the dialogues of Plato and the treatises of Aristotle both seem but perfected forms of the best speech we hear every day. Footnotes, on the other hand, have neither the coherent growth of one line of argument, nor the fruitful interaction and testing of dialogue. They resemble, rather, the distracted babble of a multitude. They make points about some argument taking place off stage (in the main text), but are not subject to the discipline of that argument. If they have discipline, it must be imposed upon them; an artificial construction must be made—one that leads not by the natural movements of speech, but by the devices of a mathematical puzzle. Because of the cleverness required to reconstitute hundreds of footnotes into another form, one tends to become interested in the cleverness rather than the substance. One pursues the leads, not to find the truth, but to pin Anastaplo down. Will the best be sufficiently attracted by puzzles to pursue a lead laboriously to its end? 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.

¹ Corrections of *The Constitutionalist*, as well as a bibliography of Professor Anastaplo's subsequent articles elaborating its arguments, can be found in Leo Paul S. de Alvarez, ed., *Abraham Lincoln, The Gettysburg Address, and American Constitutionalism* (Irving, Texas, 1976), pp. 130-32.

² William Gangi, "Congress Shall Make No Law. . .," *The Nation* (September 18, 1972), p. 218.

³ David L. Schaefer, "Federalism and the First Amendment," *Publius* III, No. 1 (Spring, 1973), pp. 31-55.

⁴ Gangi, p. 218.

⁵ C. Herman Pritchett, in *California Law Review*, LX (September, 1972), p. 1484.

⁶ Anastaplo has developed this theme further in *Human Being and Citizen* (Chicago, 1975).

⁷ Anastaplo develops his view of the Declaration in "The Declaration of Independence," *Saint Louis University Law Journal*, IX (1965), pp. 390-415. (Hereafter referred to in the text as DI.)

⁸ The proof is to be found in reviews of *The Constitutionalist*. Compare Raleigh Smith, "In Re George Anastaplo, Constitutionalist," *The Political Science Reviewer*, IV (Fall, 1974), pp. 169-191, with the review by Randall W. Bland, in *The Journal of American History* (December, 1974), pp. 850-51.

⁹ For a discussion of the right of revolution as understood by the authors of the Declaration and as understood today, see Harvey C. Mansfield, Jr., *The Spirit of Liberalism* (Cambridge, Mass., 1978), pp. 72-88.

¹⁰ Schaefer, p. 51.

¹¹ The First Amendment, Anastaplo suggests, merely makes explicit what was

already implicit in the Constitution as a whole (Chapter VI). His argument is persuasive, but does not explain why the Bill of Rights was not placed at the beginning of the Constitution or integrated with its text. For an excellent discussion of this question as understood by the authors of the amendment, see Herbert J. Storing, "The Constitution and the Bill of Rights," in M. Judd Harmon, ed., *Essays on the Constitution of the United States* (Port Washington, N.Y., 1979).

¹² The general significance of Anastaplo's stress upon freedom rather than equality as the fundamental principle of the United States is discussed in the review of *Human Being and Citizen* by Thomas G. West, *Southwestern University Law Review* IX (1977), pp. 278–82.

¹³ In complete agreement with Publius, Lincoln, fifty years later, described the ambition of the Founders as the aspiration "to display before an admiring world, a practical demonstration of the truth of a proposition, which had hitherto been considered, at best no better than problematical; namely, the capability of a people to govern themselves." *Collected Works* (New Brunswick, 1953), I, p. 113. Lincoln shared this aspiration. When he called the "self-evident truth" a "proposition" at Gettysburg, it was less because he doubted the truth of human equality, as Anastaplo suggests (DI 396, 398), than because it was doubtful whether the proposition could be made the basis of successful, free government. It was doubtful whether "this nation, or any nation so conceived and so dedicated can long endure." See my *Abraham Lincoln and American Political Religion* (Albany, 1976), pp. 72–75.