Spring 3-1-1973

Law School Record, vol. 20, no. 1 (Spring 1973)

Law School Record Editors

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The crying Murther:

Contayning the cruell and most horrible Butcher of Mr. T R A T, Curate of olde Cleane; who was first murthered as he travailed upon the high way, then was brought home to his house and there was quartered and imbowedd: his quarters and bowels being afterwards perboyld and salted vp, in a most strange and scarefull manner. For this fact the judgement of my Lord chiefe Baron TANFIELD, young Peter Smethwicke, drew Baker, Cyrill Austen, and Alice Walker, were executed this latt Summer Assizes, the 24. of July, at Stone Gallowes, neere Taunton in Summerset-shire.

AT LONDON:
Printed by Edw. Alle for Nathaniell Butter.
1624.
ON THE COVER:

IN LIEU OF LAW REPORTS

The pamphlet reproduced on the cover is one of several dozen so-called “chap-books” from Tudor-Stuart times which have been located and employed in recent work by Law School Professor John H. Langbein. They constitute a genre of source material which has not been used in prior legal historical research.

Langbein’s problem was to find evidence of the criminal process for a period in which no law reports were produced. “Except for the celebrated political trials, lawyers were not usually involved either in prosecuting or defending cases of serious crime,” Langbein explains. “Consequently, law reports—which are lawyers’ literature—did not develop. The political trials reported in the State Trials are misleading in a number of respects when we want to trace the history of ordinary criminal procedure at common law. Some records do survive in the archives, and the practical legal literature of the period can shed light on particular problems. But the chap-books are the only narrative sources I know for the ordinary criminal process in the decisive period under Elizabeth and James I when the outline of modern criminal procedure began to take shape.”

In his forthcoming book* Mr. Langbein says:

These pamphlets were written by non-lawyers for sale to the general public. The authors are generally anonymous or identified by initials only. In the era before newspapers the chap-books held the place of the sensation-mongering element of the modern press. They were almost all published in London and offered for sale there, even when the events being reported occurred distantly. The crimes which the pamphlets narrate break down into three somewhat overlapping categories, each having a manifest appeal to sensation-seeking readers: (1) especially gruesome murders, often involving dismemberment or the burning of the corpse; (2) crimes of witchcraft (easily the most numerous); and (3) crimes of betrayal against a spouse or a master. Persons of gentle status appear as culprits and victims in a surprising proportion of the pamphlets, especially in non-witchcraft cases; perhaps it excited the readership when felony overflowed its normal course within the lower orders. Not infrequently the pamphlets feature crude drawings on the title page, for example, the witch with her demons, the dismembered corpse, or the hanged felons dangling in their nooses. Timeliness aids sensation; the pamphlets appeared quite rapidly after the events—occasionally even before execution of sentence. The risk of being scooped by a competitor may also have pressured the entrepreneurs of the trade into producing their pamphlets promptly after the events. Their timeliness is one of the factors which enhances the reliability of the chap-books as a legal historical source. These crimes were not legends embellished over long years of retelling. What really interested the author and his audience, and occasionally did produce exaggeration, was the gore of the crime and the drama of the culprit’s downfall. The witchcraft pamphlets, the only ones to have attracted much scholarly attention, have been regularly verified when checked against surviving legal records.

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Crosskey, Anastaplo and Meiklejohn on the United States Constitution

Malcolm P. Sharp*

I

Alexander Meiklejohn, George Anastaplo and William W. Crosskey have made contributions to an understanding of the Constitution which are not adequately appreciated or understood. As our discussion proceeds, we shall find Hugo L. Black's ideas appearing and reappearing in such a way that he may be considered a fourth major figure in our reflections.

Mr. Meiklejohn made the systematic argument for an unqualified First Amendment which has strengthened and influenced the position of Mr. Justice Black, and—sporadically—the position of the Supreme Court of the United States. Mr. Anastaplo has since strengthened that position further by establishing, among other perhaps more important things, that the unqualified application of the First Amendment is consistent with, if not required by, the meaning of its words at the time of their enactment. Mr. Crosskey has recreated a doctrine of general power, particularly in economic matters, on the part of the Congress and the Supreme Court, which was the doctrine of the draftsmen, though the vagaries of change and politics have obscured it.

It may be useful now to state and consider these new doctrines in their simplest and broadest form. The doctrines are themselves simple, and what a high school student would expect on a careful reading of the Constitution. They have however been subject to so many glosses that the argument for the simple meaning has itself become complex and startling. It seems however to be worthwhile to make that argument as simple as possible.

We shall start with Mr. Crosskey's Politics and the Constitution. His principal concern is with the economic matters subject, under the Constitution, to the control of the Congress and the Supreme Court. If a comparison is possible these matters seem to me less important than the human values associated with communication, and so with the freedom of speech protected by the First Amendment. Nevertheless, it seems useful to start with Mr. Crosskey, and so become acquainted with some neglected criteria of judicial decision.

II

1.

The criteria may be derived from Mr. Justice Black's recent observations, particularly his objections in two dissenting opinions to making the Supreme Court a "constitutional convention." To these observations, a familiar rejoinder is the remark by Charles Evans Hughes, made before he was a judge, that "...the Constitution is what the judges say it is." Each position of course starts from its own assumptions. At the same time it is hard to doubt that Mr. Justice Black's view is closer than that of Chief Justice Hughes to the practical judgments expressed in the text of the Constitution.

We may test our views about the wisdom and utility of those judgments, and get some experience

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in their application, by following Mr. Crosskey's treatment of the powers of Congress, particularly in economic matters, and the powers of the Supreme Court. His position is that the Commerce Clause, the grant of powers to the Supreme Court, and the implications of the references to "general Welfare" in the Preamble and among the grants of power to Congress, give general legislative power to Congress, subject only to exceptions provided for in the Constitution. We shall consider first, somewhat more narrowly, the effect of the Commerce Clause on the powers of Congress and the theory of the general prevalence of state law, particularly commercial private law, in the United States Courts.

The Constitution provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." Mr. Crosskey has assembled a number of meanings, current in the society in which the Constitution was drafted and adopted, for "commerce." A quite common meaning was "gainful activity," and if a more limited meaning was to be understood, it is hard to understand why that limited meaning was not made explicit. "Among" meant, then as now, "in the midst of," but it was used somewhat more generally than it is now. We would employ today one example used in conversation by Mr. Crosskey, "the ravages of the boll weevil among the southern states," including but not limited to ravages "between" the states; but we would be unlikely to say, as one did in the Eighteenth Century, that someone died of poison "among some clam soup." When we speak of a person going to work for the "state" we understand well enough that we are speaking of a particular group of people, whose activities and relationships may among other things extend far beyond a "state's" boundaries.

"Among" was not authoritatively limited to "between" until 1873, in The Case of the State Freight Tax. As a result, "commerce" came to mean gainful exchange, and "state" came to be associated with the limited territorial aspects of state government. These steps made it possible to treat the affirmative words of the Commerce Clause, granting power to Congress but not saying "only" to Congress, as limits on the powers of states in the absence of Congressional action. It was impossible to think of the Clause by itself as prohibiting state action on commercial matters "among" the states generally.

An effort to interpret the power of Congress over bankruptcy as itself limiting the powers of states over insolvency problems was defeated early in our history. There is no sufficient reason to think that the Commerce Clause itself was to be understood in its original context as automatically abolishing state power over commerce. It did give Congress power to deal with economic frictions between states in the exercise of its power generally to regulate "Commerce . . . among the several States." The contemporary reader must be reminded repeatedly that "commerce" included all gainful activity, that "among" included but was not limited to "between," and that "states" meant groups of people, with or without reference to hunks of land.

We observe that these Eighteenth Century meanings, except perhaps in the case of "commerce," are, when we look at the words, our own as well. In the case of "commerce" the Supreme Court has now, in practical effect, worked out its own extended meaning so that the Commerce Clause now applies to virtually all gainful activity. In the substitution of "between" for "among," the Supreme Court has created its own limited meaning and has thereby obscured what it has done with "commerce." We all recognize that when we deal "with the state" in daily situations, it is not "with" territory but with a group or community. Instead of referring bluntly to domestic and foreign commerce, the Constitution uses the more vivid expressions: " . . . with foreign Nations . . ." and " . . . among the several States . . .".

The Commerce Clause became in 1873 a part of an evolving system of protections to business against both state and national governments. Its first uses were against states, and gradually fitted into the doctrines of economic substantive due process of law that, among other things, invalidated much labor legislation, in a line of decisions which began to be overruled and corrected in 1937.

The Clause was first treated as including a limit on federal power in a decision that sugar refining was manufacturing and not "commerce" or "among" the "states," and so not subject to the Sherman Anti-Trust Act. Another famous case held child labor in factories to be manufacturing and not "commerce among the states" and so beyond regulation by Congress.

The systematic overruling of these last two cases began in 1937, and has continued without any
explicit verbal correction of the general doctrine by which they were supposed to be justified. Even a small field of grain for home use may now be subject, as part of a total scheme of agricultural adjustment, to control by Act of Congress. Wages and hours of work may be subject to an Act of Congress, in manufacturing industry, and even in schools and hospitals which buy considerable amounts of supplies and equipment outside the boundaries of their "states." Desegregation at lunch counters may be required by Act of Congress where substantial amounts of a lunch counter's supplies come from outside the boundaries of its state. And now "loan sharks"—lenders depending if necessary on private force for collection—may be subjected to punishment by Act of Congress. The one dissenting Justice observed, it seems correctly, that the generalizations about the "interstate" effects of crime applied in this case apply also to a large number of other crimes, indeed to "crime in the streets" generally.

A considerable number of related problems are likely in the end to reach the Supreme Court. There is the application of the federal Truth in Lending Act to "local" matters, for example the renovation of private houses. There is the application of federal rent control to private houses, including the question whether a landlord's correspondence with a tenant in another "state" makes their relationship one in "interstate commerce" or "Commerce ... among the States," and the further question whether if such correspondence is not only sufficient but necessary for such a result. As controversies approach such limits, it may prove helpful to consider carefully Mr. Crosskey's careful and extended argument that the limits of Congressional power are indeed less than we have come to think, and are better adapted to the needs of a society where geographical boundaries are less significant than they were in the days of the Founders.

2.

In these situations Mr. Crosskey's views may help to clarify and define existing doctrine. In another group of situations, to which we now turn, his views are—certainly at first glance—remote from those of the Supreme Court and the Legal Profession.

In the 1790s a Pennsylvania land company operating in western Pennsylvania found its claim to purchased lands threatened by the fact that its possession had been impeded by the course of an Indian war before the state's statutory period necessary to give the company title had passed. In the confusion of events individual settlers had taken possession, who now challenged the company's contention that it could count the period of Indian occupation in computing its time of possession for purposes of the controlling state statute. An intermediate Pennsylvania state court of appeals had decided a first case in a way favorable to the settlers and unfavorable to the company. The relatively inactive state Supreme Court was eventually to acquiesce in the final determination of a second case by the United States Supreme Court. In that second case, the company relied on the parties' diversity of citizenship to litigate the matter in the federal courts and finally in the United States Supreme Court.

In the extensive arguments characteristic of the time, counsel engaged in the Supreme Court apparently considered only problems of statutory interpretation, without any suggestion that the judgment of the state court must control the decision of this question of local land law governed by a constitutional state statute. On the question of statutory interpretation, the United States Supreme Court decided in 1805 in favor of the company and contrary to the decision of the state court. This decision prevailed in subsequent motions; and leaders of the Philadelphia Bar advised their clients, including the land company, that they might safely rely on it in dealing with the lands which were the subject of controversy.

Thirty-seven years later, in a diversity of citizenship case about a negotiable commercial instrument, the Supreme Court held that the federal courts had power to develop their own case law in commercial cases. But the Court perhaps implied that in most other cases state law must be followed in the United States Courts. This implication came to govern the United States Courts. As every lawyer knows, it has been extended in our time, so that state law usually applies in federal diversity cases. A slight correction has set in and won the approval of such respectable scholars as Professor Grant Gilmore and Judge Henry Friendly.

Mr. Crosskey would have us return to the original doctrine of the Pennsylvania land case. He argues at length and convincingly that the rule of that case,
as well as the usage of that day, requires us to recognize the common law as one of "the Laws of the United States," thereby permitting federal jurisdiction of common law disputes regardless of who the parties are. It is perhaps too much to expect a return to the earliest understanding of federal jurisdiction. Nevertheless Mr. Crosskey's arguments add support to his view of the extensive powers of Congress over economic matters. It is hard to suppose that Congress could be left without power to deal with a subject matter, land law or commercial law, on which a coordinate Court could rule. The utility if not necessity of legislative power to define, extend, limit, or change the law developed by a coordinate court is a persuasive reason for the familiar relationship in our system between legislatures and courts.

The original existence of extensive private law (and probably criminal law) powers in our United States Courts suggests, further, that it would not be revolutionary for us to embark much more extensively than we have done on a systematic program of federal codification, for example, of contract law, by Act of Congress. To help Congress keep up with the need for change in everyday law, Congress might use something like a federal Ministry of Justice. Reduction in the need for interstate private conflict of laws (apart from the inevitable jurisdictional questions) would alone be worth the energy and expense involved. The original Constitution has proved in this and other ways its possible usefulness in modern times.

Here we approach our second subject, Mr. Anastaplo and the First Amendment. A few selected transition topics seem in order.

To his argument about the Commerce Clause and his argument from the powers of the Court, Mr. Crosskey adds an argument from the Preamble and the General Welfare Clause, to derive a theory of general legislative power in Congress, limited of course by such explicit provisions as the guarantees of individual rights in the Constitution and its amendments.

The two familiar objections to such a theory should first be mentioned. These are the accepted theory of enumerated powers and the accepted theory of the Tenth Amendment.

Mr. Crosskey has an entirely adequate alternative explanation for the enumeration of powers of Congress in Article I. In each case there is a specific and limited reason for the enumeration, including the sections dealing with foreign affairs in which provision is made for giving Congress all or part of the powers at the time possessed by the English Crown.

The second objection, from the Tenth Amendment, seems adequately answered by the Amendment's function in protecting and "reserving" the power of states to deal with commerce, by regulation or taxation, in the absence of inconsistent legislation by Congress. The power was not "delegated" in the sense, familiar at least in the Eighteenth Century, of being completely given away to Congress, nor was it "delegated," in any sense, to the Court.

Answering objections does not of course establish a case. Mr. Crosskey's case depends on the implications of the two constitutional references to welfare. In the Preamble the reference to general welfare seems to apply appropriately to Congress, as the reference to domestic tranquility applies to the Executive, and the reference to justice, to the Court. Mr. Crosskey has a persuasive argument from the treatment of preambles in Eighteenth Century draftsmanship to support the inferences which might in any event be drawn from the Preamble. In Article I, the power to tax to promote the general welfare implies an agency, which can only be Congress, to use taxes, to finance regulation or subsidy, for this purpose.

The principal argument against the existence of the resulting general legislative power is the insistence, in ratification debates, by thoughtful contemporaries, including members of the Convention,
that there was no such general power; and that freedom of speech and press, for example, could not be limited by the exercise of any powers granted to Congress. Nevertheless, the decisions to propose and adopt the First Amendment lend support to the view that the existence of such a general power was perhaps not merely feared but reasonably anticipated by some discerning contemporaries.

Mr. Crosskey's position on this matter is somewhat more convincing than his position with respect to judicial review of congressional action. The power to review state action is clearly stated or plainly implied in the Constitution. The power to review congressional legislation is left to more doubtful inference, and contemporary state precedents did not go beyond judicial review of legislation affecting judicial procedure. Mr. Crosskey argues that review of congressional action was limited to procedural questions and to action which would usurp or restrict judicial power.

The apparently inevitable logic of *Marbury v. Madison* is of course not inevitable at all. But it seems to express an instinct about policy which has considerable force, and which fits the system of separation of powers and of checks and balances which was, and is, the great safeguard of freedom in the original Constitution. In view of the ambiguity of the Constitution on judicial review, considerations of policy may well play a part in its interpretation. Mr. Anastaplo, in the book to which we are coming, makes a persuasive argument against Mr. Crosskey on this matter.

The absence of judicial review of critical questions of war and peace is a reminder of the utility of judicial review in clarification of the Constitution and in preserving the checks and balances of our system. The strong reasons, in 1787 and now, for giving Congress exclusive power to declare or make war, except in a clear emergency, qualify what was said earlier in this essay about the absence of an "only" in the grants of power to Congress, including the power to regulate commerce. In matters of war and peace the context seems to require an "only," to limit executive power, in sharp contrast to the context of the Commerce Clause, which does not need an implication limiting the powers of states. It would perhaps be of some use for the Court at some time to deal explicitly with this question, for example in developing its Commerce Clause doctrines.

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III

1.

"Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

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

Alexander Meiklejohn developed this position in his *Political Freedom*, stating the case for an interpretation of the First Amendment which understands "freedom of speech" to be unqualified. Such an interpretation has been applied at times by the Supreme Court, and supported particularly by Mr. Justice Black.

George Anastaplo has, it seems to me, made some useful developments of Mr. Meiklejohn's doctrines, and some persuasive modifications as well. His book, *The Constitutionalist*, with what might have been two separate volumes, one of Appendices and one of Notes, rivals Mr. Crosskey's as a contribution to American Constitutional Law.

Mr. Anastaplo develops Mr. Meiklejohn's doctrine by analyzing, particularly, the first five words, "Congress shall make no law . . ." The words could hardly be clearer. With some help from illustrations of parental commands and from familiar transactions in everyday life, Mr. Anastaplo shows how easy it would have been to introduce qualifications, such as some which appear in other parts of the Constitution and the Bill of Rights, if they were to be understood.

He observes that it is only "Congress" that is named. He resists the attractive tendency to apply the Amendment to the Executive and the Courts, leaving safeguards against them to other parts of the Constitution. A strict definition of the Executive Power combined with a proper regard for procedural due process would, for example, control any loyalty program which may seem to be needed in the future.

The meaning of "freedom of speech" is given by Mr. Anastaplo a more restricted scope than that given it by Mr. Meiklejohn. By what seems a sound intuitive insight, supported by observations on electoral and legislative, particularly parliamentary,
precedents, “freedom of speech” is limited to speech about political matters. These are such matters as are discussed in considering the election of officials or proposed amendments to the Constitution. Any economic proposals, however drastic, are open for discussion as political matters. On the other hand, Mr. Anastaplo seems to understand the interests of Eighteenth Century American statesmen, in that he excludes obscenity from the scope of the First Amendment, whatever protection it may be entitled to on other grounds, for example on grounds of administrative or procedural due process of law. And he leaves open the more troublesome questions raised by science, for example Darwin and Freud, and the old and new Tennessee evolution cases.30

At the same time he supports an unqualified interpretation of the First Amendment against the most troublesome criticism it has received. This is Mr. Crosskey’s criticism, which does not appear in his book—where the Amendment receives little attention—but which has been made in conversations and in teaching. Mr. Crosskey emphasized the ordinary dictionary meaning of “abridge,” which is not “limit” or “restrict” but “lessen.” “Lessen” requires some reference to an earlier condition, and the reference which naturally suggests itself first is the contemporary law of England. That law prohibited only “previous restraints” on speech or publication, and it is that law which is said to be crystallized in the First Amendment.

Pursuing the kind of linguistic inquiry whose value Mr. Crosskey has shown, Mr. Anastaplo has found a significant number of Eighteenth Century texts of quality in which it is said that “natural rights” must not be, or ought not to be, “abridged” in the sense of “restricted.” Contemporary usage thus appears to have warranted, though perhaps not required, the use of “abridge,” in such a context, in the sense of “restrict.” Our usage today seems, if anything, less precise.31 The text is at least sufficiently flexible so that a relatively simple, as distinct from a relatively refined, meaning is legitimate. The refined meaning urged by Mr. Crosskey has been rejected by the Court, on the ground—among others—that previous restraints and subsequent punishments have much the same effects on the values associated with the words “freedom of speech” and “freedom of the press.” Nevertheless, it is satisfactory to have Mr. Anastaplo’s answer to Mr. Crosskey based on those scholarly methods which Mr. Crosskey has used elsewhere with effects so devastating for accepted scholarly doctrines.

Mr. Anastaplo seems at times to rely on a view that Congress was given no general legislative powers. On this point Mr. Crosskey’s different view has seemed more persuasive, though not indisputably so.

Rather unobtrusively, Mr. Anastaplo’s interpretation of the First Amendment renders unnecessary extended consideration of the troublesome points raised by Mr. Meiklejohn and others under the head of “incitement.” It is discussion that is protected. Mr. Anastaplo’s treatment of Schenck v. United States32 in his text and in an Appendix, indicates how discussion in politics normally merges into incitement, and how calmly the discovery of this phenomenon should be taken.33 It should not be hard to distinguish discussion even with incitement from riots, revolutions and civil wars, planned, incipient or in operation.

By way of precaution, it should perhaps be said that Mr. Anastaplo, like others, recognizes that what may seem at first to be the implications of an “unqualified” freedom of speech require some critical common sense corrections. Rules of order, for meetings, limit freedom to interrupt and so destroy debate. The indispensable regulation of streets and public places is subject only to a requirement that regulation should not be used to the disadvantage of particular views. One may protest the uses made of one’s tax money, but one can hardly expect to be immune to the processes of collection. Hijacking may be in some cases a revolutionary symbol, but it is not that alone, and can hardly be privileged. The Hatch Act disabilities of civil servants raise more troublesome questions.34

The protection of discussion has no bearing on fraud—except perhaps religious or magical fraud—or on agreements on wages or prices or on private gossip, all of which are subject to other appropriate standards and safeguards.

Finally, it has been observed that Mr. Anastaplo excludes obscenity from First Amendment protection. He recognizes that the classics present problems of classification. But he insists with some force that the obscenity which flourishes on so many book stands is in principle at least distinguishable; and that in any event it is not political discussion, whatever safeguards found elsewhere in the Constitution it may be entitled to.
In limiting the First Amendment to apply to Congress, as it says, and not to the President or the Court, and to apply—further—to political speech only, Mr. Anastaplo observes that in making the Amendment less inclusive one makes it more manageable, and less likely to be subjected for example to what have proved the stultifying effects of the “balancing” metaphors. The limited meaning is simpler and easier to think of, and is itself persuasive.

2.

Mr. Anastaplo carries further his effort to isolate and strengthen the First Amendment by observing other legitimate limitations of its scope, this time in its application to the states.

Mr. Crosskey argues convincingly but not perhaps beyond dispute that, except for the First Amendment, the Bill of Rights guaranties (with one possible minor qualification about appellate practice) applied, in the context of their time, to the states as well as to the nation. At least as persuasively he argued that these guaranties were at any rate applied to the states by the Privileges and Immunities Clause of the Fourteenth Amendment. The Supreme Court has recognized a selective reenactment or enactment of these same safeguards by the Fourteenth Amendment. It may be observed that most of these safeguards could be derived from basic doctrines of procedural due process.

Both Mr. Crosskey and the Court have urged, further, that First Amendment guaranties, originally applicable only to Congress, were applied to the states by the Fourteenth Amendment. Mr. Crosskey derives what seems to be not quite convincing support from references to problems of freedom of speech in pre-Civil War discussions of slavery. He thinks First Amendment safeguards were included among the Privileges and Immunities of citizens of the United States in the Fourteenth Amendment.

The Court, without serious discussion, incorporated both the religious freedom and the freedom of speech provisions of the First Amendment into the substantive due process which was thought at that time to be generally provided for in the Fourteenth Amendment. The reconsideration and eventual disapproval of the bulk of substantive due process, which had been used to control labor and other economic legislation, did not bring any serious reconsideration of the religion and speech cases.

Mr. Anastaplo urges persuasively that so great a transformation of the scope of the First Amendment as that defended by Mr. Crosskey and the Court requires more support than that given by either Mr. Crosskey or the Court. Here Mr. Anastaplo is legitimately faithful to the historical tests insisted on by Mr. Crosskey. He emerges, it seems at first sight, as less of a “liberal” in this matter than Mr. Meiklejohn, Mr. Crosskey or the Court.

And yet he seems quite correct in his position. It seems to me, in any event, that much of the work now done on religious and political freedom in the states can be done quite as well by the expanding doctrines of equal protection and the well established doctrines of procedural due process as by the somewhat tortured doctrines of religious freedom and the relativelyemasculated doctrines of freedom of speech and press at present applied to the states. These matters will be referred to later. Mr. Anastaplo’s position is based on a liberal regard for the role of the states in maintaining order, subject to a power of correction by Congress to preserve, but not to “abridge,” freedom of speech and of the press.

Though the differences between Mr. Crosskey and Mr. Anastaplo on this point have thus far been emphasized, Mr. Crosskey gives Mr. Anastaplo interesting support in one respect. Mr. Crosskey argues that if any powers are impliedly excluded from exercise by Congress under the Constitution, they are the “police powers” in the limited sense in which the phrase was used by Eighteenth Century French and English writers, in contrast to such larger powers as those to deal with welfare, commerce and defense. The police powers are the powers which we associate with the local police and fire departments or sometimes the state police. They are indispensable powers if the states are to govern at all.

Mr. Anastaplo reminds us of the guiding significance of the constitutional guaranty of a Republican Form of Government for the states. He explains the limitation of the original First Amendment to Congress partly by a regard for a principle related to the Republican Form of Government safeguard. Such disturbances as Shays’ Rebellion were what was to be expected at that time. Like the Whiskey Rebellion they were expected to be within the physical capacity of states to control, just as quite serious riots today can be handled, in the first instance at least, by states.
The Republican Form of Government Section provides for federal intervention to deal with local insurrections at the request of the state governments, but not only at their request. One can put a case involving planning the Civil War, or taking the first steps, as by marching, toward firing on a federal fort, in which federal intervention would be justified even against the judgment of a hesitating state. This would be in the exercise of a power “necessary and proper” to preserve the federal government, as inevitable as a war power to deal with a planned or executed foreign war.

But otherwise the guaranty of a Republican Form of Government means that the states are to have at least the elementary functions of preserving order. For these purposes, such as the prevention of something like a Shays’ Rebellion, the states are to exercise their own judgments about controlling speech and the press, subject to their own constitutions, to the traditions of revolutionary freedom (however much disregarded in the treatment of Tories), and to the power of Congress to extend but not to “abridge” protections to freedom of speech even in the states, in case of serious excesses of state control.

In view of the accepted religious powers of the states, and the political considerations suggested here, it is possible to understand why the First Amendment applied only to Congress. And it is difficult to think that a policy, however changing, expressed so clearly in the original Amendment, could have been understood to be reversed by the general words of the Fourteenth Amendment, even in the context of their time.

To these historical considerations Mr. Anastaplo adds practical arguments drawn from the advantages of preserving the elementary functions of the states, and again from avoiding the strains incidental to expanding the scope of the First Amendment which threaten the purity of its application to its expressed object, the Congress.

As I understand it, Mr. Anastaplo is content to leave his argument at about the point where I have attempted thus far to state it. To anyone alarmed by the resulting prospect of a possible loss of liberal safeguards against the states, it should be observed, as we have noticed, that the religion and speech safeguards now in force could well be supported by the Equal Protection Clause or, as in the case of obscenity (or as in Mr. Anastaplo’s own splendid case), by procedural due process.

A prayer originating in a Catholic or Protestant source may well, in context, be objectionable to one group of churches or the other, as well as to Jews and Humanists, who are entitled to equal treatment in tax supported institutions.35 Financial aid to private schools, as well as colleges and universities, from state or nation, requires controls in the interests of quality and racial justice, but not, it seems today, in the interests of religious neutrality; but this is a long story.36 An interest in Aristophanes, Rabelais or Freud is for all legitimate purposes like an interest in any other literary or scientific master, and the difficulty of defining “hard core” pornography, as well as the obstacles to unselective prosecution, may well give effective constitutional protection to printed matter generally.

Past (or even present) membership with knowledge and support of purposes, in far left or right wing revolutionary organizations seems an inadmissible basis for classifying bar admission applicants. This seems a legitimate objection to the New York bar admission procedure recently approved by the Supreme Court, over dissents which might well be supported on equal protection grounds.37

It is to be noticed also that the implications of the Constitution may change with changing times. The Bill of Rights amendments concerned primarily with procedure may develop new meanings under the influence of equal protection standards and refinements by Justices who are particularly expert in matters of procedure, and with changing circumstances. Their words are in some cases, at least, evaluative as well as descriptive. “Due” is evaluative, “process” descriptive. As wardens know, if policemen do not, capital punishment is cruel. It would not have been unusual in the Seventeenth Century, when public drawing and quartering were familiar, but today it is unusual in expressing and stimulating extreme sadomasochistic impulses. It has become unusual in still another respect in recent years in being rarely carried out. It is most frequently ordered against the poor and members of minorities; though it is not altogether unique among punishments in this respect, its peculiar savagery makes it in this respect uniquely objectionable.38 Its abolition
should be added to all the improvements made by the Warren Court in criminal procedure, in which Mr. Justice Black generally concurred, though modification—as distinct from refinement—of Fourth Amendment meanings called for one of his warnings that the Court is not "a... constitutional convention."

These points seem to me important. They comfort us about the preservation of libertarian safeguards against the states. At the same time they remind us again of the significance of the Republican Form of Government guaranty. That is significant as a safeguard or a warning against the most extreme developments of federal judicial powers in constitutional matters, and against related developments of the powers of Congress to implement the Fourteenth Amendment. Such developments might accomplish a greater and more questionable change in the federal system than anything likely to occur soon under the influence of Mr. Crosskey's views of the economic powers of Congress and of the General Welfare Clauses of the Constitution.

Mr. Anastaplo's States' Rights instincts and Mr. Crosskey's Federalist instincts at this point reinforce one another. Taking a larger and more general view of constitutional history than he sometimes did, Mr. Crosskey in conversation and teaching used to warn us against letting the Equal Protection Clause develop the generality and undependability of the old substantive due process. He would have confined the Clause to racial matters and to the carpetbaggers' abuse of granting legislative monopolies to named persons, and he would have limited "protection" to common law types of criminal and civil responsibilities, including perhaps common law "public utility" responsibilities, but not public education.

It seems to me that the results of equal protection decisions, including the desegregation and voting decisions, have thus far been constructive and linguistically defensible. The Connecticut birth control decision may best be explained by the inequalities of selective enforcement inherent in the punishment of birth control itself and in the bizarre types of investigation, hardly consistent with procedural due process, which would be necessary for general enforcement. The discovery of a constitutional protection for union members' and union lawyers' consultations about members' problems may arguably be justified on grounds of an extended equal protection, or on grounds of the important procedural features of legal advice on civil and criminal matters alike. It is perhaps barely arguable that equal protection is a part of substantive or procedural due process which is applicable to Congress, and a ground, though unmentioned by the Court, for the District of Columbia school desegregation case. Or perhaps the District of Columbia is a "state" or to be dealt with by analogy to states.

We should remember here that the Equal Protection Clause, thus treated, has critical philosophical implications. The Golden Rule, the Categorical Imperative, and Utilitarian doctrine exhibit the necessity of using the idea of equality in practical matters, including lawmaking, however difficult its application may be. The idea is not inconsistent, as Aristotle and Thomas Jefferson will remind us, with an internally consistent scheme of differential economic returns. But experience with the old substantive due process, developed generally from even more speculative ideas of liberty and property, reminds us also that law is not identical with equity.

The illustrations which follow of both the uses and the dangers of equal protection in economic matters will serve as a final warning that Mr. Crosskey's disposition to confine the principle strictly to racial matters and grants of private monopoly has a thoughtful philosophical basis, too.

The Equal Protection Clause has useful and perhaps growing applications to taxation. If "subsidy" can be adequately defined, or only its cruder forms considered, equal protection might prove not only a safeguard against "discrimination" immediately unfavorable to nonresidents. It might prove also a limit on discrimination immediately favorable to nonresidents, but ultimately unfavorable to residents and nonresidents alike. An example is the great range of tax benefits, from differential assessments to "industrial revenue bond" exemptions, used to attract and please corporations in selecting sites for manufacturing and perhaps for other activities.

Economic policy has perhaps in any event been found, as a result of our experience with substantive due process, a subject more fit for legislative treatment, state or national or both, than for judicial treatment. An ironical example may be suggested. An effective minimum wage, like an effective union scale, tends to be immediately advantageous to the relatively employable and immediately disadvan-
tageous to the relatively unemployable, and hence the relatively poor. The case for collectively set wage scales depends on long-run problematical social considerations. It is doubtful whether a decision is to be expected returning constitutional doctrine to the 1920s and invalidating state minimum wage laws, this time on equal protection grounds. The equalization of women’s opportunity for overtime work and wages and the removal of unions’ remaining exemptions from antitrust laws may be in the spirit of the coming times, even if they are not required by the Equal Protection Clause.

A fascinating problem of straightforward and serious inequality combined with troublesome problems of taxation is presented by the public school equal expenditure cases. Here the Supreme Court has been faced with the application of counsels of justice on the one side and of judicial caution and the appropriate sphere of state policy on the other. My unrealized expectation was a decision extending the scope of equal protection and limiting, however cautiously, the scope of state determinations. There is a curious contrast between the two cases decided since this paper was prepared, in the recognition of a right of privacy in the abortion case, and the inability to recognize a right to equal expenditures on public education in this more recent case. On the other hand in the latter case, there is a rational reluctance to interfere with state policy determinations, particularly in a somewhat intricate matter of taxation.44

The development of equal protection as a safeguard for religious and civil liberties generally, and for civil rights, will doubtless be limited by a caution derived from considering the consequences of applying formulations in such cases to the somewhat different controversies and complexities of economics. Mr. Anastaplo and Mr. Crosskey combine to emphasize the importance of such caution on general principles. Considerations of States’ Rights and of the appropriate scope of Legislative and Congressional powers alike will indicate the continuing need for a degree of judicial self-restraint. Mr. Justice Black’s two warnings that the Supreme Court is not a constitutional convention will reinforce our sense of the limitations of judicial proceedings as means of deciding great social, economic, and political issues, and of the limitations of even the greatest Justices as well.

IV

1.

Mr. Meiklejohn served as President of Amherst from 1913 until he was removed by the Trustees in 1923. The removal was itself a drama in free speech, with the opposition to Mr. Meiklejohn led by such middle income reactionary Amherst graduates as Calvin Coolidge, and with Mr. Meiklejohn supported until the end by at least one high income conservative Trustee, Dwight Morrow, a Morgan partner. I studied under Mr. Meiklejohn at Amherst and later taught in his Experimental College at Wisconsin, where we had the first—and best—college house plan in this country. Mr. Meiklejohn moved later to Berkeley where he became more and more active in advising young lawyers and their clients about the free speech issues which had been, throughout his teaching, major subjects of his interest. He was relied on—it seems fair to say—more than anyone else, by Mr. Justice Black in his development and expression of a theory of an unqualified First Amendment. When the New York Times libel case was decided in 1964, not long before Mr. Meiklejohn’s death, he said to a friend that it was “an occasion for dancing in the streets.”

Mr. Meiklejohn was rightly happy about what was partly his own victory. His influence on Mr. Justice Black, and on the Court, was symbolized at the Washington memorial service, attended by Mr. Anastaplo, for Mr. Meiklejohn. Mr. Justice Black left a conference of the Court, for the first time in his career—as he told the assembly—to speak at the service. In a related sequence, the daughter and son of Mr. Anastaplo, who is in many ways a reincarnation of Mr. Meiklejohn, were stirred at the Washington funeral service for Mr. Justice Black, by hearing the conclusion of his dissent in their father’s case read first in a series of excerpts from Mr. Justice Black’s opinions.45

The relationship between the University of Chicago and the development of a sensible constitutional theory since the Second World War is indicated by what may be more than a coincidence. Mr. Meiklejohn gave at the University his celebrated lectures on freedom of speech, to an audience which included Mr. Anastaplo, just before Mr. Anastaplo himself became a student of Mr. Crosskey. The cause of freedom was being advanced in other ways as well by the University economists.
2.

Mr. Meiklejohn once said, rather proudly it seemed to me, that no student of his had ever agreed with him. It is at any rate not surprising that his thought seems both to have started much of the development described here and to oppose some of it. His criticism of the First Amendment “present danger” qualification, going back to the 1920s and 1930s, was an important feature of a period rich with critical attacks on accepted constitutional doctrine. His criticism did not affect the law until the late 1950s. But it has always been a stimulus to rethinking the Constitution.

He deplored my own disposition, expressed in this essay, to give great significance to historical meanings of constitutional texts and, where such meanings cannot be discovered, to simple laymen’s meanings. I justified my position then, as I would today, on the ground that it is the best approach to keeping judges under some control, to prevent what might politely be called their rhetorical skill from turning a court into a “constitutional convention.” But Mr. Meiklejohn had more confidence than I in lawyers and their reasoning. He was ready to trust himself and them to remake the Constitution, or at least its broadly generalized portions, to suit the times.

Here he was in opposition to Mr. Crosskey’s methods. On the other hand, he was—I think—in basic agreement with Mr. Crosskey’s view of federal power. Walton Hamilton taught at Amherst in my day. Later, in a book warmly expressing his debt to Mr. Meiklejohn, he anticipated a part of Mr. Crosskey’s discussion of the Eighteenth Century meaning of “commerce,” and came to conclusions anticipating Mr. Crosskey’s conclusions about the scope of congressional power to regulate “Commerce . . . among the several States.”6 This was part of a constitutional reform movement that did succeed to some extent, beginning in 1937, with the discrediting of the old sugar refining and child labor cases, and a related Due Process and Commerce Clause case limiting the power of Congress to protect labor organizations, even on the railroads.67

And yet—returning to unions—Mr. Meiklejohn was not doctrinaire. I once urged him to incorporate in his Free Speech a distinction which I think it fair to say he was at least ready to consider approving in conversation. He defended the first picketing deci-
sions of the 1930s, on the ground that in one case picketing was the only means of bringing the workers’ grievances to the attention of a local community, and that in the other case the picketing was on a construction job for a government.68 In both cases there was in his view “public speech,” which was entitled to First Amendment protection, even against the states. He was ready to consider the possibility, at any rate, that ordinary picketing in a private wage dispute otherwise known to the public was entitled only to the protection given price agreements generally. This would include that “due process” protection to which all human activity is entitled.

It will be seen that Mr. Meiklejohn’s approach has influenced Mr. Anastaplo’s thinking, but not controlled it. Mr. Meiklejohn’s “public speech” has a larger scope than Mr. Anastaplo’s “political speech.” I think Mr. Meiklejohn would have had no difficulty about Darwin and Freud, and in his later years he was, as I understand him, disposed to extend First Amendment protection at least to allegedly pornographic classics. Nor did he have any difficulty about applying First Amendment limitations to the states.

Mr. Meiklejohn was ready to use “incitement” as a test of the outer limits of free speech, a matter about which we used to engage in some of those happy arguments that were characteristic of our relationship. I used to insist that “incitement” would in a time of stress revive the “present danger” qualification. On the other hand language “planning” or “commanding” violence may raise elementary problems about the order which any state must by its nature maintain. (But an idle dream is not a “conspiracy,” whether to corner a market or to overthrow the government.) On this point, as I have indicated, I am happy to find that Mr. Anastaplo has found a legitimate way of avoiding what in this case seems an unproductive linguistic discussion.

Philosophically, Mr. Meiklejohn was convinced that freedom of communication may be preserved in communities where, in the interests of public welfare, economic liberties are considerably restricted. This position disposed him to accept in general the conclusions of both Mr. Anastaplo and Mr. Crosskey, if not their way of reasoning, about the Constitution. Mr. Anastaplo is somewhat appre-
hensive about any concentration of economic as well as political power. Mr. Crosskey was, despite his opinions on federal power, definitely opposed to syndicalist or "central" planning, as well as to socialism. He started his book as support for a hoped for improvement in capital markets by theSecurities and Exchange legislation of the 1930s, and its optimistically awaited implementation. He said that he left Wall Street (where he was much admired) in the 1930s because he was "the only man there with any respect for private property." He was, like me, neither a Pelagian nor a Jansenist; but, like me, he had a healthy Eighteenth Century regard for the limitations of the human being, including the human being in power. While history as usual is ambiguous, economic liberty seems to me, in experience and in principle, a necessary and probably in the long run a sufficient condition of freedom in communication.

In this view there is great merit in the simple and flexible, but disciplined, Constitution for which Mr. Crosskey, Mr. Anastaplo, and Mr. Meiklejohn have worked. Whatever our economic policies, liberal or collectivist, they will increasingly require self-consistent national implementation; and they will increasingly require the fullest possible discussion of even the most drastic and unlikely appearing suggestions.

An example is the "negative income 'tax'," which I have heard discussed, off and on, since 1926. It will be noticed that any family income plan based on allowances given by the United States depends on the spending powers of Congress. In view of the traditional concern over the regulatory powers of Congress, it is ironical that its spending powers have seldom been questioned. Even state spending has received little if any effective check. It is only in the case of the first Agricultural Adjustment Act that federal spending has been impeded by the Supreme Court. State and federal welfare spending will be increasingly in need of coordination. Comprehensive schemes of regulation, for example wage and hour regulation, may need to be coordinated with welfare programs. Do wage and price controls lessen or increase poverty? If they do neither, are they useful for other purposes? Poverty and unemployment seem, on questionable grounds, to affect decisions on military spending and hence on strategic policy.

The problems of poverty and of war and peace require national solutions reached with the most complete freedom of discussion that can be obtained.

V

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.

1 This essay includes observations which have been stimulated, or originally made, by a great number of unnamed students, teachers and colleagues. The person who should be selected for special mention here is Harry Kalven, whose influence is most readily identifiable among all those going back to the earliest days of someone born in Madison and largely reared in academic communities. Mr. Kalven's conversation and writing have been exceptionally useful with respect to the subjects discussed in this essay. My own view is that his general ideas can be expressed in the language used here, and that his principles will often if not generally lead to results like those reached by means of the principles stated here. The statements of the three principal authors considered in this essay have some advantages in persuasiveness, accuracy and clarification, along with some disadvantages, no doubt, in unfamiliarity of approach. Mr. Kalven will perhaps not object if I express a hope that his new book will be published before too long. I am sure it will join the recent classics here under discussion.
Another colleague, Philip B. Kurland, has written a survey, perhaps somewhat comparable to the present essay, expressing views different from those developed here, particularly his views about equality and about the Warren Court. See Kurland, Politics, the Constitution and the Warren Court (Chicago: University of Chicago Press, 1970). But see note 35, infra.


This paper began as a deliberately noteless and correspondingly readable essay. In the course of discussing specific obscurities and objections, notes have been regrettably added. It must be obvious that they are selective. They do not pretend to deal with all obscurities or objections. Citations are limited to easy aids and to cases of special interest. Lower court and state court citations particularly make no pretense of completeness, and much the same thing is true of United States Supreme Court decisions.


His Apology article was commented on by Willmoore Kendall, the conservative political scientist, in his review of Ancients and Moderns, where he speaks of "the touching essay on Plato's Apology by George Anastaplo (himself the author of perhaps the only 'apology' of our time that demands a place in any anthology of American oratory); it is hardly too much to say that Anastaplo gives us a wholly new Apology . . ." 61 American Political Science Rev. 783 (1967).

In his Appendices, in effect the second of three volumes in The Constitutionalist, Mr. Anastaplo includes, with other interesting materials, selected materials on his bar admission case. In re George Anastaplo, 396 U.S. 82 (1961). That case still seems to me an outstanding contribution to legal education. The briefs in that case, prepared by him as counsel pro se, merit particular attention as do the dissenting opinions of Mr. Justice Bristow in the Supreme Court of Illinois and of Mr. Justice Black in the Supreme Court of the United States.

Professor C. Herman Fitchett, in a recent review (60 Calif. L. Rev. 1476 [1972]), expresses his admiration for The Constitutionalist, and recognizes its relationship to the studies of Mr. Crosskey.

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.


See, on Mr. Crosskey, the Memorial Issue, 35 U. Chi. L. Rev. 229 (1968). See also note 1, supra.

Mr. Meiklejohn's book can be used without an index. Mr. Crosskey's and Mr. Anastaplo's books are well indexed.

5 For some purposes it would be desirable to start with Mr. Anastaplo and Mr. Meiklejohn. Mr. Anastaplo's book, dealing with material with which both he and Mr. Meiklejohn are concerned, is new. Its discussion will lead to my expression of some views about equality. In the end, equality and freedom are perhaps more important, more general, topics than power to regulate commerce.

One theme on which Mr. Crosskey, Mr. Anastaplo and I are in agreement is the treatment of the Constitution. Mr.
Crosskey, the most uncompromising of us all, is opposed to the rhetorical manipulation of the Constitution which has appeared throughout its history. Mr. Meiklejohn does not agree with us. He would be more disposed than we to have judicial policy prevail in conflicts with text.

The historical approach to the Constitution in which I claim to share applies to the whole instrument. It seems to me indispensable to describe that approach at the beginning and then move to the topics which are perhaps now more controversial, and which are illuminated by Mr. Anastaplo's brilliant book. Among other things, this beginning will supply materials for those, perhaps including Mr. Anastaplo, who will wish to complain that my own treatment of Constitutional freedoms and equalities is inconsistent with the historical criteria with which I begin.

6 Note 4, supra.

7 Griswold v. Connecticut, 381 U.S. 479, 520 (1965); Katz v. United States, 389 U.S. 347, 364-74, particularly 375-74 (1967). The content theme in both cases was, to Mr. Justice Black's view, the creation of a constitutional right of privacy. Compare the discussion in the text at notes 39-41, infra.


Compare: "What's the Constitution between friends?" Attributed to "Timothy J. Campbell, about 1885, to President Cleveland who refused to sign a bill on the grounds it was unconstitutional. Campbell was a Tammany member of the House of Representatives, and the attribution to him is on the authority of William Tyler Page." Burton Stevenson, _The Home Book of Quotations_, 207 (New York: Dodd, Mead & Co., 1964).

9 Politics and the Constitution, 1278. Mr. Crosskey did not use the boll weevil illustration in his book. It might have appeared among the illustrations on pages 53-54, except for the view that states' territories are no more "discrete" than "vacant lots"; or on page 76. Mr. Crosskey was intent on relating "among" to "states" as collective units. He was more skeptical about his view of the meaning of "states" than he needed to be. Anyone whose views are affected by life in an incompletely urbanized "state," like New Mexico, will realize to what an extent one uses the word "state" to refer to the community and not to the territory.

One may recognize that it would be "hilarious" today to speak of activity "among" a level plain; but it does not seem to me inappropriate to speak of boys playing baseball among "vacant" or "back" lots; and state boundaries create in our minds, it seems to me, a sense of discreteness like that of "among" islands or mountains. When one adds the common use of "states" as communities Mr. Crosskey's argument, based on an overwhelming number of instances of "among" with groups of people, seems unanswerable. His fastidious dependence on these latter instances seems to me, as I go back to them, to have limited the force of his argument for the contemporary reader. "Among" includes but is not limited to "between" even in its application to more than two territorial units, including the territories of states; and even more clearly, perhaps, in its application—of which Mr. Crosskey has such a wealth of examples—to more than two communities.

This note is meant particularly for readers, of whom I hope there will be a number, who will be encouraged to go back to the book itself and compare it with my treatment of its meaning and implications.

10 15 Wall. 232 (U.S., 1873). See note 43, infra. Mr. Crosskey, and others, attribute the 1873 development to such cases as Gibbons v. Ogden (9 Wheat. 1 U.S., 1824) and to the anti-federalist influence of pre-civil war days. My own view is that the judicial statements to this effect before the Civil War are few in number, _dicta_ in the simplest sense of the word, and cautious. They are inconsistent with what happened to the bankruptcy power in litigation which had considerable political interest. The relation between substantive due process and the negative implications of the Commerce Clause is illustrated by the protections developed for insurance, which was not even "commerce," beginning with All­gayer v. Louisiana 165 U.S. 578 (1897), and proceeding to a scheme with remarkable resemblance to that developed for occupations which were "commerce" and "interstate." The whole scheme of protections was an appropriate mark of that era, foreseen by Tocqueville, when the freedom of the great and powerful, if not the aristocrats, was to have its last day, before it lost its vitality and was succeeded by equality and perhaps authority. See my "Movement in Supreme Court Adjudication," _op. cit. supra_, note 1, with conclusions on this matter which I have seen no reason to change since 1933.

11 See notes 14-18, infra.


15 United States v. Darby, 312 U.S. 100 (1941).


19 Lest it be supposed that all such questions are "settled," one should recall the questions raised by the application of statutes with "among" tests but limited by interpretation to "interstate" commerce, such as the Labor Standards Act and the Sherman Act, when labor conditions or monopolies in the construction industry are under consideration. The Labor Standards Act leaves things somewhat unpredictable. See 48 Am. Jr. 2d. "Labor," § 1503. Unions seem to be more vulnerable, so far as the "commerce" criterion is in question, than do employing contractors under the Sherman Act. Compare Industrial Ass'n of San Francisco v. U. S., 268 U.S. 84 (1925) with Allen Bradley Co. v. Union, 325 U.S. 797 (1945).

Unpredictable questions about the Truth in Lending Act, which has no "interstate" language, and which seems meant to depend on monetary powers, and about rent controls, which has no "interstate" language either, have arisen, recently in Albuquerque (along with a federal gun control case under a statute properly given an "interstate" interpretation by the Supreme Court [United States v. Bass, 404 U.S. 336 (1971)]). The truth in lending case was settled favorably to the client, but probably less favorably than it would have been but for the probable necessity for and the chances on taking it to the Supreme Court. When last I knew the rent control case was still in litigation.

The recent federal act applicable to bombings creates here the traditional "interstate" classifications which may seem to the detached lay observer somewhat bizarre.

20 Huidkoper's Lessee v. Douglass, 3 Cr. 1 (U.S., 1805).
24 See note 9, supra.
25 1 Cr. 137 (U.S., 1803).
26 The absence of "only" is a strong reason for not inferring it, like the reasons for not usually making interchangeable, in the ordinary interpretation of writings, words as different as "or" and "and." But the context of a writing may require an "only," or it may change an "and" to "or" or an "or" to "and."
28 Note 2, supra.
29 Note 3, supra.
31 See the discussion in the text at notes 9 and 11, supra.
33 There is a reproduction in the Appendix of the pamphlet which led to the conviction of the defendants in the Schenck case and to the affirmation of the judgment of conviction by Mr. Justice Holmes on behalf of his associates.
36 In view of a persuasive but at present ineffectual case for the position that equal protection requires contributions to parochial schools, it is possible to think that cases limiting such contributions will be reconsidered. Brusca v. State of Missouri ex rel State Board of Education, 335 F. Supp. 275 (three-judge court, E.D. Mo., 1971), aff'd 405 U.S. 1050 (1972). But see Lemon v. Kurtzman, 403 U.S. 602 (1971) (inclusion of salary payments; state legislation) Compare Tilton v. Richardson, 403 U.S. 673 (1971) (buildings; federal legislation). See also note 44, infra.
40 Griswold v. Connecticut, supra, note 7 (Mr. Justice Black dissenting).
41 Compare, however, Roe v. Wade, 41 L. W. 4213 (Jan. 29, 1973). A recognized factor in the situation is the difficulty of the relatively poor and the facility of the relatively prosperous in getting abortions, particularly safe abortions, in a number of jurisdictions, at least. Illinois is one such jurisdiction, and Texas seems to have been another. This factor would have justified a decision based on the principle expressed in the Equal Protection Clause.
42 Privacy may be included in the Ninth Amendment, but a more likely explanation of that Amendment is that it was and is to be understood as applying to philosophical "rights." The simplest example is the "right" of revolution, clearly not enforceable in any court. It is hard to suppose that the Amendment was to be understood as meant to expand the power of the Supreme Court to create substantive constitutional law governing either the states or Congress, free from anything but debatable philosophical guidance. What proved a limitation on the application of the Bill of Rights to the states, and the questionable historical basis for the Supreme Court's power to disregard acts of Congress except for its own protection or on procedural grounds, are special warnings against expanding the Ninth Amendment. See Anastaplo, The Constitutionalists, supra note 3, pp. 23, 432-433.
43 The Ninth Amendment seems, however, a more straightforward basis for the result in Roe v. Wade (the case from Texas) than is "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" which Mr. Justice Blackmun, speaking for the majority, says "we feel" to be the source of "the right of privacy." He includes the Ninth Amendment as an alternative source.
46 Compare, again, Allied Stores of Ohio v. Bowers, supra, note 42. An extended dictum is carefully limited in its application. Compare also Weaver v. Palmer Brothers, 275 U.S. 402 (1926) and especially Liggett Co. v. Baldridge, 278 U.S. 105 (1928) (Equal Protection and Substantive Due Process).
47 The useful purposes of the negative implications of the Commerce Clause could be served by a carefully drafted Act of Congress or by the application to new problems of Equal Protection doctrine. Existing applications of the "burden" test could be left, during a period of evolution, as a diminishing monument to stare decisis.
45 See, also, the "Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black," April 18, 1972, reported in 405 U.S. v.—ivii (1972). The tribute read by the Solicitor General includes a long quotation from Mr. Justice Black's dissenting opinion in Mr. Anastaplo's case. The authors of this tribute add after the quotation an interesting comment which may, one hopes, represent an opinion about future bar admission problems: "[Mr. Justice Black's] stirring dissent in Anastaplo, quoted above, led to a long exchange of letters with the unsuccessful petitioner and, more importantly, to an ultimate change of the Court's position. Batrd v. State Bar of Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971)."


51 A review by Laurence Berns of The Constitutionalist (Dallas Morning News, Nov. 28, 1971, p. 6H) includes the following observations on Mr. Anastaplo's Notes:

"As the author explores in his Notes 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 deals with penetratingly and carefully these 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 philosophical writing 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 dilemmas 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 the principles of the American polity and the principles of classical ("Greek") philosophy."

See, among other reviews of The Constitutionalist, the following: C. Herman Prickett, 60 Calif. L. Rev. 1476 (1972); L. A. Powe, Jr., 8 Crim. L. Bull. 650 (1972); A. J. Thomas, Southwest Review, Winter 1972, p. vi; Gary L. Starkman, Chicago Sun-Times, June 18, 1972, sec: 5, p. 18; Elnor Gertz, Panorama—Chicago Daily News, Jan. 22-23, 1972, p. 7; William Gargi, Nation, Sept. 15, 1972, p. 218; Fred J. Naffziger, St. Louis Post-Dispatch, Oct. 3, 1972, p. 3B. See, also, New York Times Book Review, June 18, 1972, p. 33 (where The Constitutionalist was advertised by some of Mr. Anastaplo's University of Chicago students as "the thinking woman's treasure trove").
Reflections on Consumerism

Richard A. Posner*

In recent years the country has been swept by a consumer movement whose imprint is visible in a host of new statutes and judicial rules concerned with the plight of the deceived, the coerced, or the endangered consumer. My purpose here is to sort out the major kinds of consumer-protection programs that have emerged, to discuss their economic foundations and consequences and—less hopefully—to attempt an explanation of why consumer protection has become a significant element of our public policy.

Ten years ago one could have justly described the consumer as typically the victim rather than the beneficiary of economic regulation. We had an agricultural policy designed to increase the income of farmers at the expense of consumers; a labor policy designed to increase the income of workers at the expense of consumers (and other workers); the ICC, CAB and other administrative agencies in order to enforce cartel pricing. Looking broadly at government regulation of the economy one could find substantial support for the conclusion that the purpose in fact of most regulation (with a few notable exceptions, such as the Sherman Act) is to redistribute wealth from consumers.

Such a conclusion was attractive not only because it coincided with the results of observation but also because it was plausible on theoretical grounds.

The theory of cartels would lead us to predict that consumers, by virtue of their large number and the small stake that any individual consumer has in a particular regulatory program, would be especially difficult to organize into an effective political group.

This approach worked well with most of the older regulatory statutes. Even in the case of the Federal Trade Commission's consumer protection activities, one could find evidence that a major albeit covert purpose was to protect established firms from the competition of new products.

The old consumer-victimization programs are still with us but the past few years have seen a series of legislative and judicial initiatives—the product, apparently, of the resurgent consumer movement whose most prominent advocate has been Ralph Nader—that seem to contradict the theory that economic regulation redistributes wealth from consumers to concentrated groups of producers. Consumer-protection programs may not, as we shall see, do much for the consumer; but they are not readily explicable as devices by which other groups exploit the consumer.

These programs can be divided into three major groups. The first comprises measures designed to increase the consumer's information about a product. A notable example is the "truth-in-lending" legislation. The second group comprises measures designed to protect consumers against sales methods deemed exploitive, but where no issue of deception is involved. Here the courts have been the principal innovators, a noteworthy example being the Supreme Court's recent Fuentes decision which outlawed statutes that permit installment sellers to repossess goods from a defaulting purchaser without a prior hearing. The third group comprises meas-

*This presentation by Richard A. Posner, Professor of Law, The University of Chicago, was made at a conference on government policy and the consumer at the University of Rochester, Graduate School of Management, October 27, 1972.
ures designed to protect consumers from physical hazards in products. The law requiring seat belts in automobiles is an example. These measures should be distinguished from safety regulations designed to protect, also or only, people whom the consumer might endanger. Thus laws regulating the brakes on cars, unlike seat belt rules, are not pure consumer-protection measures. The courts have also been active in this area. More and more state supreme courts are ruling that the seller of a product is strictly liable (that is, even if he was not negligent) to anyone injured as a result of a defect in the product.

These laws limit the freedom of action, and impose costs on, the sellers subject to them. I do not see that the sellers derive benefits from them analogous to the benefits that airlines derive from being regulated by the CAB or motor carriers from being regulated by the ICC or lawyers and physicians from occupational licensure by the states. Perhaps some day the sellers will succeed in twisting these laws to their benefit, but meanwhile they are sustaining costs not offset by benefits from them. I may be overstating the point. Conceivably the automobile safety laws, for example, operate to reduce the price advantage of imported cars and so strengthen the competitive position of the domestic manufacturers. But it seems unlikely that this kind of explanation will be able to reconcile the consumer statutes with the view of the consumer as a cat's paw of producer groups.

Let us examine the economic effects and possible economic justifications of the consumer-protection movement. I begin with measures designed to increase the flow of accurate information about consumer products.

I would not argue that as a matter of theory governmental measures to increase or improve the consumer's information are never appropriate. The theoretical question, it seems to me, is a difficult one. On the one hand, it is surely incorrect to argue that since the theory of perfect competition, as conventionally formulated, explicitly assumes perfect knowledge about product qualities and prices, measures for increasing the existing, and obviously imperfect, knowledge of consumers are prima facie warranted. The conventional formulation is misleading. It ignores the fact that market processes themselves generate information about products; consumer knowledge is therefore not an exogenous condition of effective competition. Moreover, since information is costly both to create and to absorb, the optimum amount of such information is not infinite.

On the other hand, one cannot be confident that market processes alone will generate the optimum amount of information. There are free-rider problems that may be serious. Suppose one of my competitors is misrepresenting the qualities of his product. If his false advertising is effective the sales of my product will be impaired and this will give me an incentive to incur costs to combat his deception. But my incentive to rebut his falsities will be limited by the amount of injury my business has sustained. In cases where the amount of sales diverted from any single seller is small, no seller may have an incentive to take effective steps to dispel the deception even though the aggregate injury to the consuming public may be substantial. Perhaps this is why disparagement of competitors is apparently infrequent.

A partial answer is provided by trade associations, a traditional function of which has been to police against false advertising. But in a way this is part of the question, for it is something of a mystery how trade associations are able to exist in the face of the free-rider problem. Certainly where the association is engaged in suppressing false advertising, rather than in selling a service to members that is not available to nonmembers, the nonmember derives about the same benefits as the member, and at zero cost. Trade associations do exist and do engage in a certain amount of policing of false advertising; there are also important intermediaries between sellers and consumers, such as department stores, that ascertain and guarantee the quality of products. There are, in short, private methods that operate to prevent deception and provide consumers with accurate information about product qualities and prices but there is enough of a free-rider problem to make one cautious about claiming that the free market will provide as much information as consumers would be willing to pay for.

Whatever the theoretical uncertainties, there are practical reasons for suspecting that the recent measures designed to increase the consumer's information about products are misconceived. The truth-in-lending law is an illustration. The assumption of
the law is that if people knew the percentage interest rate that they were paying to borrow money, they would, in many cases, not borrow, or they would shop successfully for a cheaper lender. There is in fact little basis for expecting these behavioral consequences except in the case of the professional investor, who does not require the protection of the act.

A person borrows either to invest or to buy a good. In the first case it is useful to know the percentage interest rate because that is the form in which the return to invested capital is ordinarily expressed. If you are planning to invest borrowed money in real estate that has an expected return of nine per cent per annum, you want to know what the annual cost of the borrowed money, expressed also as a percentage, will be. But for a consumer, the percentage rate of interest is usually a quite useless detail of the transaction. He is interested in the total cost of the product he is buying. This will include an interest charge if he is using borrowed money to buy the product. He will therefore purchase from the seller (or the combination of seller and lender) where his total cost, including interest charge, is lowest. To repeat, it is the total cost that he is interested in, not the interest component, and in being able to compare total cost as between competing sellers of the product.

Assume that a consumer, shopping for a color television set, is quoted three prices: $450 cash; $20 a month for 36 months; $22 a month for 36 months. He should be able to figure out readily enough that if he buys from either the second or third seller the total cost will be higher than if he buys from the first and that if he decides to buy on time, the second seller is cheaper than the third. He will have to compare the advantage of paying a lower price all at once with the advantage (crucial if he does not have $450) of paying a larger amount in monthly installments that he can afford. He will not be helped in this comparison by an interest-rate figure unless he is in the habit of saying to himself: “my personal discount rate is ___%.” He would be well advised to find out what a bank would charge him, per month, if he borrowed $450 from it to buy the set for cash, but if he does this, he will still be comparing dollar amounts, not percentages. Thus will he be guided to the purchase that is optimum from his standpoint without ever being given an interest-rate figure.

To require the seller-lender to compute and disclose the interest rate does not give the borrower useful information. The interest rate is superfluous if the cash charge, the monthly charge, and the number of months are known by the consumer. To require a seller to disclose information that is not useful to the consumer is to impose a cost without a corresponding benefit.

The preceding analysis is somewhat oversimplified, however, in that it ignores such complications as balloon payments and service charges which may make it difficult for the credit buyer to compare the cost of alternative transactions (a similar problem is said to plague comparison of life insurance policies). I would still argue that the consumer will normally have all the information he wants without disclosure of a percentage interest rate. Suppose in our example of the color-television set that one seller offers the following terms: $10 a month for 24 months, plus $600 due the twenty-fifth month. The buyer can readily compute that under this payment plan, the total amount he pays—$840—is greater than under the alternative plans available to him. He must balance the additional burden against the advantage to him of a lower monthly payment the first two years. Again I would contend that unless the purchaser is accustomed to thinking in terms of percentage discount rates, a disclosure that the interest rate is higher—or lower—under the balloon-payment plan than under the other plans will not be useful to him.

The concern with exploitation (other than deception) of the consumer has centered on various devices for the enforcement of creditors’ rights. There is the holder-in­due­course rule that permits the holder of commercial paper to enforce the consumer’s debt to him free of the defenses (such as defective merchandise) that the consumer might interpose in a suit by the seller of the good for nonpayment. There is the creditor’s right of summary repossession, extinguished by the Fuentes case (at least for some consumer transactions). There is the more general problem of clauses in so­called “adh­esión” (standard or printed) contracts that waive various rights that the consumer enjoys under general contract law.

The attacks on these provisions proceed from the premise that the seller enjoys greater bargaining
power than the buyer and so is able to impose coercive provisions that the buyer would reject were there parity of bargaining power. Analysis must therefore begin with an examination of the concept of "bargaining power."

The level of discussion of consumer problems would surely be raised if the use of the term were banned and the user forced to find a synonym. Such an exercise would show that when a person alleges unequal bargaining power he means, or can be shown to mean, one of three things: one of the parties to the transaction is ignorant of an essential term, perhaps due to misrepresentation by the other; one of the parties has a monopoly; one of the parties is compensated for accepting a term that is favorable to the other party.

The holder-in-pawn rule will illustrate the utility of thus decomposing the charge of unequal bargaining power. It is possible that many consumers are unaware that one consequence of buying on the installment plan is that the seller may discount the consumer's note to a finance company which can then sue the consumer, if he defaults, in an action in which the consumer cannot assert the defenses he would have against the seller. If such ignorance is widespread, and if the cost of the seller's dispensing it is lower than the cost of ignorance to the consumer and the cost to the consumer of becoming informed, the appropriate remedy is to require the seller to disclose the consequences of an installment sale more clearly; it is a deception case. To be sure, the information may be of the useless sort because most of the people who are sued by finance companies may not be willing to pay more in order to preserve all of their defenses. But in any event the complaint would be deception rather than coercion.

A second possibility is that sellers and finance companies have conspired to force all installment purchasers to agree to waive their defenses against sellers in actions by the finance companies. It is most unlikely that there is such a conspiracy. Retail selling and consumer financing are both highly competitive fields. If there is a conspiracy the solution is to attack the conspiracy, lest the conspirators simply switch the focus of the conspiracy to another term in the sales relationship.

The third and most realistic possibility is that the holder-in-pawn rule is accepted by consumers because it minimizes the cost of goods to them. It does, after all, enable the lender to dispense with an investigation of the quality and probity of the seller's operations. Were the lender liable for the seller's misconduct, the lender might have to conduct such an investigation or include an additional risk premium in the lending charge; in either case the cost of purchasing goods on credit would be higher. (Alternatively, the seller might agree to indemnify the lender for any loss resulting from interposition of a defense against the seller in a collection suit: this would presumably decrease the seller's costs and be reflected on an increase in his prices.) It is quite rational for consumers to prefer lower prices for products or credit to retention of certain legal defenses.

Outlawing the holder-in-pawn rule is a goal of the consumer movement but if the foregoing analysis is correct the abolition of the rule is likely to make the consumer worse off rather than better off by making credit purchases more costly. If there are problems of deception or monopoly in the application of the rule they can be dealt with directly, without forcing up the cost of installment purchases generally.

The third major thrust of the consumer-protection movement has been toward increasing the safety of consumer products. My analysis here is a little similar to my earlier analysis of deception. The market itself creates incentives to approach the optimal level of safety but they may not be sufficient to attain it.

The cost to the consumer of a product that involves a hazard to health or safety has two elements: the price of the product and an expected accident or illness cost that can be viewed as the cost of the insurance premium necessary to insure against the hazard created by the product. Competition should operate to compress this cost. If methods can be developed for reducing the expected accident cost at a cost lower than the saving, they will be developed. To be sure, this conclusion must be qualified by reference to the existence of divergent attitudes toward risk. If consumers are risk averse, the cost-justified level of safety will be higher than the expected accident cost; it will be lower if they are risk preferring. In either event, the competitive process should work toward an optimum level of product safety.

There is, however, an information problem that
undermines this conclusion. Most people have very little direct experience of accidents and it is difficult for them to judge whether, say, seat belts reduce the expected accident cost of driving an automobile, or whether a special type of bottle construction would reduce the chance of a coke bottle's exploding in one's face. In principle, the innovator of such a safety advance has an incentive to inform the consumer of the reduced hazards that the advance makes possible. An inevitable consequence of such a campaign, however, is to bring to the consumer's attention safety problems of which, lacking direct experience, he may be unaware. The result might actually be to induce some consumers to substitute different products that were safer. Very few people, for example, think often (or ever) about the danger of exploding bottles; the danger is indeed slight. If a soft-drink manufacturer advertised that his bottle reduced the danger, one effect would be to plant a concern in the consumer's mind where none had existed before.

Recognition that advertising of this sort can backfire led the cigarette manufacturers, with the FTC's blessing, to agree to discontinue references to tar and nicotine content in their advertising. The example is two-edged: the fact that the members of the industry had to agree to discontinue such references suggests that, in the absence of such collusion, they would have continued. Still, this kind of advertising may be relatively infrequent because of its boomerang potential.

To complete the analysis, if producers are reluctant to inform consumers of safety improvements, and if the information is not otherwise forthcoming, producers will be reluctant to undertake them: such improvements will lack clear-cut marketing value. Of course it does not follow that the particular safety measures required by the government for automobiles and other products have been cost-justified; but this is a question on which I am ill informed.

The movement toward the imposition of strict liability for injury resulting from defective products is frequently defended on the ground that it will lead to safer products. This may be correct if the alternative is no liability (caveat emptor), although for reasons not expressed by the judges and lawyers who take this position. First, if many consumers are risk preferring, a strict-liability standard will induce firms to take safety precautions that they would not take if they were not liable. Since under a strict-liability standard the cost of accidents is a cost to the seller, he will adopt any safety precaution that is cheaper than that cost. If he were free to negotiate with his risk-prefering consumers over the level of safety, the result would be a less safe product, as they would prefer. Observe, though, that it is the lower, not the higher, safety standard that is optimal in terms of consumer preferences.

Second, the information point discussed above suggests that firms may sometimes forgo opportunities to reduce the (net) expected accident cost of their products, due to difficulty in marketing safety improvements. A strict-liability standard induces them to make any improvements that reduce their net expected accident costs.

But the foregoing discussion is somewhat misleading, since the movement in the law has not been from no liability to strict liability but, in recent years anyway, from negligence to strict liability, and to this latter movement the above two arguments do not apply. Assuming that the manufacturer is forbidden to disclaim liability for his negligence, a negligence standard will lead him to adopt any cost-justified improvements. If disclaimer is permitted, then either a negligence or strict liability standard becomes the equivalent of no liability.

Thus, given negligence liability, a movement to strict liability seems unlikely to increase product safety. And, again given negligence liability, the utility of many direct governmental regulations of safety is called into question.

I conclude that there are economic grounds for questioning whether a completely free market will bring about an optimum level either of product information or product safety. (The argument of "exploitation" based on "unequal bargaining power," however, lacks, so far as I can see, any economic basis.) But that the free market is unlikely to work perfectly is not a sufficient condition for government intervention, since government, too, is invariably imperfect in actual operation. If truth-in-lending legislation and restrictions on consumer financing practices are typical examples of how government intervention to protect the consumer is likely to operate, we may well prefer to rely on a
highly imperfect market. The evaluation of the government's efforts in the area of safety is somewhat more complex, although Sam Peltzman's recent paper suggests that here too government intervention may often be counterproductive.

I also conclude that the efficiency justifications for the consumer-protection movement are too tenuous, in theory and practice, to explain the movement. Here, then, is an important area of public policy that seems explicable neither on traditional public-interest grounds nor on grounds of effective political power. How then is it to be explained? This, it seems to me, is our most challenging and baffling question.

The following points occur to me as elements of the answer:

1. Ignorance of the economic dimensions of the consumer problem is a pervasive characteristic of public discussion of the problem. The efficiency (and distributive) effects of forbidding certain methods of financing consumer transactions are obvious to a few people steeped in economic theory and profoundly unobvious to everyone else. This ignorance is to be distinguished from the ignorance of a businessman who cannot tell you what the term "marginal cost" means. Since the concept, although not the term, is an inescapable and intuitive feature of business activity, his ignorance of formal theory has no consequences for his behavior; and so with the consumer who has never heard of a "utility function." But there is nothing intuitively obvious about the economic effects of outlawing the holder-in-deed's rule. The finance companies should understand its effect on their practices and they may try to educate the consumer advocates; but to the latter, the concepts will be alien and the source suspect.

2. The costs of consumer-protection programs tend to be (a) diffuse rather than concentrated and (b) low. The programs typically cover entire industries so that the added costs they impose (which anyway represent only a small fraction of the cost of the industry's product) can be reflected in higher prices with only a small decline in sales and profits. Hence, the incentive of the affected sellers to incur costs in opposing such programs is relatively small.

3. The interest-group theory of the political process does not hold that consumers never get legislation passed in their favor, only that it is hard for them to do so. It is politically very difficult to eliminate the motor carriers' cartel because the consequences would be very severe for shareholders and employees of the affected firms, and the benefits to consumers, in contrast, would be highly diffuse. But diffuse benefits may be sufficient to procure enactment of measures, such as consumer-protection measures, the costs of which are also diffuse. Moreover, there are concentrated and substantial benefits conferred by such measures, not on consumers, but on a small but influential minority who believe passionately in the abuses of the competitive process and the iniquities of large firms. I doubt that the minority is strong enough to obtain legislation that would impose substantial and concentrated costs on American industry, but perhaps it can obtain a symbolic victory over the forces of deception, exploitation, and hazard—which may be all that it really wants.

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3 It should be noted, however, that the effective-political-group approach, properly understood, allows for redistribution to particular consumer as well as particular industry groups. See Richard A. Posner, "Taxation by Regulation," 2 Bell J. Econ. & Management Sci. 22 (1971).


6 Suppose the expected accident cost to the buyer of a coke bottle, which may explode, is $.16. Under a strict-liability standard the bottler can expect to be liable for this cost and he will therefore adopt any safety measures that enable a net reduction in it. If he were not liable, and ignoring the information point discussed earlier, he would adopt only those safety measures whose cost consumers are willing to cover in the form of a higher price for the product. Consumers who are risk preferring will not necessarily be willing to pay for a safety measure that brings about a net reduction in expected cost. They may prefer the higher risk of an accident to the certainty of paying to reduce that risk.


8 The Benefits and Costs of New Drug Regulation (Dept. of Econ., U.C.L.A.).

9 Cf. James Q. Wilson, The Politics of Business Regulation (Dep't of Gov't, Harv. Univ.).
The 1970 Census Enumeration
As
A Social Action Report Card

Julian Levi*

General Robert Wood, the Board Chairman of Sears Roebuck & Company who led that giant into the retail business, once said that his favorite reading was The Statistical Abstract of the United States, which consists primarily of materials drawn from the United States Census enumerations.

Publication has commenced of the volumes dealing with the general social and economic characteristics for the United States en toto and then for the various states of the Union as shown by the 1970 enumerations. This data ought, but probably will not, be used to test the effectiveness of our domestic governmental problems. Specifically:

Since the 1920s states have enacted zoning legislation with the thought that the control of land uses and densities would assist in the maintenance of values and the development of a stable society.

Since 1937 the Federal Government has provided "financial assistance to the States and political subdivisions thereof for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income, and for the reduction of unemployment and the stimulation of business activity, to create a United States Housing Authority." Year after year the Congress has pumped hundreds of millions of dollars into this program.

Since 1949 in support of "the goal of a decent home and a suitable, decent environment for every family" the Congress has pumped hundreds of millions of dollars each year into slum clearance, urban renewal, model cities and community development programs.

Since 1965, through Title I of the Elementary and Secondary Education Act, the Congress has authorized and appropriated something over six and one-half billion dollars in order to improve the educational opportunities for the children of low-income families.

Housing and building codes in which the states have exercised their police power for the purposes of health and safety have been with us for well over

a century and a half.

The legislation just enumerated is, of course, no more than a fraction of what is now on the books. I propose that we look at the 1970 Census and certain other materials, all incidentally in the public domain, and then judge the achievement of these programs.

To set the size of our universe, the 1970 Census found our total population to be approximately 203 million people, 178 million of whom were white; 22½ million black, and 9,200,000 of Spanish heritage.

Of this number, 149 million lived in urban communities; 42 million in rural non-farm areas; and 10½ million in rural farm areas. Accordingly, the drift of population from rural areas to urban conditions continued, as well as the flow of blacks from the rural south to urban centers. The black population in this country is increasingly an urban population. Of the 22½ million blacks, 58% lived in central cities compared with 28% of the white population.

Analysis of the urban population discloses that 76 million live in suburbs compared with 64 million in the central cities. Since 1950 central cities added 10 million people; the suburbs added 35 million.

Half of all employment in the fifteen largest metropolitan areas in the country is now outside city limits. In the Los Angeles-Long Beach standard metropolitan area, for instance, in 1970 there was a reported total of 2,483,000 workers, of whom 1,133,000 worked in the cities and 1,350,000 worked in the suburbs.

Employment, or what is more to the point unemployment, is not uniformly distributed among the population. In California in 1970 of the total labor force 6% was unemployed but whereas 5.7% of the white labor force was unemployed, 10.6% of the black population was unemployed and 7% of Spanish heritage were unemployed.

Of even greater significance to those interested in crime and delinquency are the figures for males 14 and 15 years old. In California 12.4% of this total group were unemployed—for whites the figure was 11.6%; for blacks 29%; and for youths of Spanish heritage 16.5%.

Median income of all families in California was $10,732 per year, but $7,484 per year for blacks.

Statistics as to housing conditions are not yet available. The sole indicium now shown relates to the percentage of households lacking some or all plumbing facilities. Nationally the statistic is 2.7%.

However, as to households with income less than the poverty level the figure is 8.4% and as to non-metropolitan areas 25.9%. The comparable San Diego figure, incidentally, for all households is 1.9% but for poverty families 4.4%.

I would suggest that it not be necessary that you be burdened with statistics as to broken homes, unemployment, dependency, crime and delinquency. All of this follows from the materials just enumerated.

The central city is increasingly a backwater, separated from the growth elements of the American economy. Paradoxically, at the very time when the need for government services to a low-income population develops, the assets upon which the city must rely move out. The results are not startling—they were predicted in the reports of Presidential Commissions, Congressional Committees, Planning and Educational Authorities—world without end!

The plumbing statistic is a good place to begin the analysis. Lack of adequate, sanitary facilities is not a matter of taste or luxury, nor is the risk limited to the particular household concerned. Epidemics are no respecters of income characteristics.

Moreover, the lack of sanitary facilities is only the most glaring evidence of conditions dangerous to health and safety. If the pattern of former years continues, we will find an appreciably larger percentage of households lack adequate fire exits and safe electrical wiring and are overcrowded.

These conditions present a blatant, continuing violation of local housing and building codes. The facts are apparent to any building inspector and, in truth, they may be photographed.

There is, nevertheless, a pretense about this business all over the country. Enforcement of housing and building codes occurs in the half world of the quasi-criminal violation. The fine, if ever assessed, is more a license than a deterrent. Effective enforcement ought to be an administrative, rather than a judicial, proceeding. Some states now permit this alternative which, however, has not been taken up by a single municipality. Most recently the authorities of New York State refused to finance such an effort in New York City.

Two well known doctrines have long existed in our law. First, that a contract ought to be interpreted in accordance with the intentions of the parties; and, second, compliance with the law is fundamental to the exercise of jurisdiction. Yet
there are two related instances, among others, demonstrative of our failure:

Both landlord and tenant in any multi-unit residential structure anticipate that the landlord will provide the essential services required to make the dwelling unit habitable. The tenant expects hot and cold running water and the landlord certainly does not anticipate that the tenant will be tinkering with the hot water heater or pump. Now in almost all of the relationships between buyer and seller, or lender and borrower, on the American scene the performance of one party is conditional upon performance by the other. Yet as a result of nothing more than a historic accident, the tenant's obligation to pay rent is considered independent of the landlord's obligation to perform his part of the bargain.

Ordinarily we determine value on the assumption of legal operation—the highest and best use of a property is considered to be its highest and best lawful use. The true value of a structure unfit for human habitation ought to be the value of the raw land, less the cost of removing the structure. Even this suggestion is generous. Property which is used contrary to public policy is generally subject to confiscation, to-wit the automobile used to transport narcotics. But how many instances do any of us know where in Urban Renewal proceedings value reflects lawful income rather than the capitalization of income achieved only in violation of the building code?

Zoning doctrine first emerged in the 1920s under the aegis of Mr. Herbert Hoover, then United States Secretary of Commerce. It is interesting to note that regulations of land use, of density, and the like, originally attacked as socialist interference with the rights of property, are now enshrined as the greatest legislative innovations of this century on the theory that proper zoning enables a governmental unit "to keep them out." Recently Bernard Seigal published his LAND USE WITHOUT ZONING. For years the City of Houston has been the horrid example of a municipality which was so backward as to refuse to enact a municipal zoning code. Seigal concludes there is not one whit of difference between land development as it has occurred in Houston without benefit of zoning and land development elsewhere where planners, lawyers and others have played what Richard Babcock describes as THE ZONING GAME.

What we have done by enactment of zoning has been to separate employment generating use from place of residence. Increasingly the city neighborhood becomes a backwater separated from the growth elements of the American economy. The problem of an industrial use in a residential neighborhood is really an issue of nuisance rather than a drain of land use. In cities over the world one can find case after case where the factory, properly shielded and built, is a perfectly acceptable neighbor. Our difficulties in mass transit and in employment may often be traced to the heavy, and unwarranted, hand of zoning.

In 1956 Catherine Bower, commenting on public housing, said:

"The tendency of normal families to reject our projects is an indication of an illness that may well be fatal."

In the intervening sixteen years the Federal Government spent hundreds of millions of dollars in public housing subsidies and in the financing of additional units only now to have the Secretary of the Department of Housing and Urban Development say what ought to have been clear a decade or more ago—the program was a total failure.

The story has been told again and again—eligibility for either entrance into or retention of public housing requires low income. Improvement in income and employment is rewarded with an eviction notice. The result is that the family mix increasingly is represented by the broken home, welfare family and at that point public housing is no longer housing for people only with low income, it becomes instead the county welfare farm for socially disadvantaged and dislocated people. The rejection predicted by Catherine Bower has occurred. There are hundreds and hundreds of vacancies in the public housing projects in the larger cities of this country.

Having thus had demonstrated to us that income limitations inherent in subsidized housing are counterproductive, we continued the device with Section 236 housing but to this we added a pleasant additional feature—instead of only building housing for the poor, you build a tax shelter for yourself. The motivation is, of course, quite clear. A full page advertisement in the Chicago Tribune of November 1, 1972, featured a copy of the 1040 income tax return over which is printed, "The Man with a Plan asks you fed up?" The Man with a Plan then
volunteers, “to show you how to earn more, to own more and pay far less income taxes!” This is the announcement of the Final 1972 Tax Shelter Seminars—“The Amazing Story of 56 Real Estate Partnerships!” Admission, incidentally, is by advance reservation only. Now, of course, there is nothing wrong with the device of the tax incentive. Higher education, both public and private, is dependent upon that incentive. The difficulty in the housing field is that the incentive has operated to produce continued construction, particularly in the subsidized field which in the public interest ought to have been halted years ago.

The advocates of housing legislation are a mixed bag—the planners, the tax shelter packagers, the architects, the trade unions, the real estate promoters, etc. A collection of these interests account for the omnibus housing bill this past year which justifiably fell of its own excessive weight. One would hope that the new Secretary of the Department of Housing and Urban Development would paraphrase Winston Churchill by saying that he has come to preside over the liquidation of much of the agency and its programs.

In 1966 a group of professors, led by Dr. James S. Coleman, published EQUALITY OF EDUCATIONAL OPPORTUNITY, a study made possible through a Federal grant of some millions of dollars. That study concluded that black children did better in the integrated middle-class classroom. In 1972, Coleman again writes on the Coleman Report. He says that while the Report showed, “that certain kinds of attendance patterns provide higher achievement for children from lower socio-economic levels,” the courts in examining school attendance patterns looked upon this conclusion as “some kind of evidence on which they can base a decision.” This consequence, according to Coleman commenting on Coleman, now produces dismay:

“But I don’t think that a judicial decision on whether certain school systems are obeying or disobeying the constitution ought to be based on that evidence.”

At the same time the author contends the report is:

“... appropriate for legislators and school boards in encouraging the kind of student body mix which can provide achievement benefits.”

and says social science research is often not used because:

“... it’s not commissioned by a policy-making body.”

The late Carl Byoir, pioneer public relations man, was equally cynical. Most of his recommendations, he said, told his clients what they already knew, but he charged them a great deal of money so that they would be obliged to take his recommendations seriously. Most legislators and school boards would be reluctant to accept the assumption that the evidence submitted to them as a basis for making policy was of lesser quality than required by a court. Therefore, unless Byoirism applies, the source of financing the report ought not to matter.

This month Christopher Jencks with his associates published “Inequality: A Reassessment of the Effect of Family and Schooling in America.” Jencks, of course, was a co-author with Coleman. The trumpeted conclusions are:

“Educational reform cannot bring about economic or social equality.

“Genes and IQ scores have relatively little effect on economic success; and

“School quality has little effect on achievement or on economic success.”

The suggestion is made that society should get on with the task of equalizing income rather than waiting for the day when everyone’s earning power is equal. Thus:

“Instead of trying to reduce people’s capacity to gain a competitive advantage on one another, we would have to change the rules of the game so as to reduce the rewards of competitive success and the costs of failure.”

Thus:

“Employers could be constrained to reduce wage disparities between their best- and worst-paid workers.”

“The net effect would be to make those with the most competence and luck subsidize those with
the least competence and luck to a far greater extent than they do today.”

In so far as elementary education is concerned, Jencks and his associates conclude:

“There seem to be three reasons why school reform cannot make adults more equal. First, children seem to be far more influenced by what happens at home than by what happens in school. They may also be more influenced by what happens on the streets and by what they see on television. Second, reformers have very little control over those aspects of school life that affect children. Reallocating resources, reassigning pupils, and rewriting the curricu-lum seldom change the way teachers and students actually treat each other minute by minute. Third, even when a school exerts an unusual influence on children, the resulting changes are not likely to persist into adulthood. It takes a huge change in elementary school test scores, for example, to alter adult income by a significant amount.

“These arguments suggest that the ‘factory’ model which pervades both lay and professional thinking about schools probably ought to be abandoned. It is true that schools have ‘inputs’ and ‘outputs,’ and that one of their nominal purposes is to take human ‘raw material’ (i.e. children) and convert it into something more ‘valuable’ (i.e. employable adults). Our research suggests, however, that the character of a school’s output depends largely on a single input, namely the characteristics of the entering children. Everything else—the school budget, its policies, the characteristics of the teachers—is either secondary or completely irrelevant.

“Instead of evaluating schools in terms of long-term effects on their alumni, which appear to be relatively uniform, we think it wiser to evaluate schools in terms of their immediate effects on teachers and students, which appear much more variable. Some schools are dull, depressing, even terrifying places, while others are lively, comfortable, and reassuring. If we think of school life as an end in itself rather than a means to some other end, such differences are enormously important. Eliminating these differences would not do much to make adults more equal, but it would do a great deal to make the quality of children’s (and teachers’) lives more equal. Since children are in school for a fifth of their lives, this would be a significant accomplishment.” (pgs. 255-256)

Now, of course, the conclusions just read to you are in complete conflict with the premises of the Federal Elementary and Secondary Education Act which to this point represents a disbursement of something over six and one-half billion dollars, as well as most of the social legislation of the 1960s. Logically you would assume that a book written in 1972 would draw greatly upon the results of this six and one-half billion dollars of expenditure and effort. No such thing occurs. The basic Jencks material is a re-working of the Coleman 1966 data. In Jencks’ defense, however, despite the six and one-half billion dollars and the comings and goings of the educationalists, both in and out of government, there is a remarkable paucity of data.

The Jencks thesis, as an example, pays no attention whatsoever to the work of his colleague B. F. Skinner or the work of other behaviorists throughout the country such as Dr. Israel Goldiamond at Chicago. At the very time that the laboratory of the behaviorists discloses examples of control and change in human behavior, Jencks is concluding that these things are impossible.

Thus the programs analyzed have achieved little. In some cases they may even have aggravated the very ills they sought to heal. What should we learn?

1. Time after time we have proceeded to macro programs upon great theory and very little evidence. It will be recalled that the current Model Cities Program began with a suggestion that a few cities in the United States ought to be encouraged to develop new and different programs to solve their difficulties. Before the first dollar was appropriated or the program authorized, the notion had been enlarged to include city after city over the country. Appropriations at this moment run to some billions of dollars and the first bit of evidence as to either success or failure is yet to be received.

2. We do not solve human problems with brick and mortar. Public housing is the obvious example. It would be far more effective and cheaper to provide rent and purchase assistance to the poor family as against the tax shelter to the promoter.
3. Institutional and bureaucratic answers will not suffice. I have seen maps prepared by local boards of health and state departments of health which, in effect, assign to certain inner-city hospitals the responsibility of medical care for adjoining populations since the private practitioner has departed. In this exercise no one thought about asking the patient. What will medical care be like and how will it be accepted when those administering the treatment know that the patient, whether he likes it or not, has no alternative and when the patient knows that his choice is either to suffer or go to this one dispensary? In this, as in most other cases, the solution is money to the consumer; not a subsidy to the provider.

4. The 1970 Census thus ought both humble and encourage us. For the vast majority of our citizens, with all our difficulties, the standard of living and the amenities available are far beyond the expectations of past generations. These successes stand as testament to human resource and effort for all segments of the American population. Thus encouraged, we ought be emboldened to confess our failures.
Phil C. Neal, Professor of Law and Dean of the Law School, was reappointed Dean, effective January 1, 1973. Dean Neal was first appointed Dean in 1963 when he became the sixth appointed dean in the Law School’s 70 year history.

Prior to coming to Chicago in 1962 as Professor of Law, Dean Neal was on the faculty of law at Stanford for seventeen years. He began his career as law clerk to Associate Justice Robert H. Jackson of the United States Supreme Court and then practiced law for three years in San Francisco.

Dean Neal studied at Harvard University where he received his A.B. degree summa cum laude and his LL.B. degree magna cum laude. An authority on constitutional antitrust and administrative law, Dean Neal has also been teaching civil procedure. Among his current projects he is writing a part of a multi-volume history of the United States Supreme Court in collaboration with Professor Owen M. Fiss. This volume will deal with the period from 1888-1910, when Melville Weston Fuller, an Illinois lawyer, was Chief Justice.

Dean Neal is a director of the American Bar Foundation and a member of the Chicago Council of Lawyers, the American Law Institute, the Chicago Bar Association, the American Bar Association, the Legal Club of Chicago, and the Law Club of Chicago. He is also a Fellow of the American Academy of Arts and Sciences.

Richard A. Epstein has accepted an appointment as Professor of Law effective July 1, 1973, having spent the 1972-1973 academic year as a Visiting Associate Professor at the Law School. Prior to his joining the faculty, he taught four years at the University of Southern California Law Center, first as an Assistant and then as an Associate Professor.

Mr. Epstein, a native of Brooklyn, New York, received an A.B. summa cum laude in Philosophy from Columbia University in 1964, where he was elected to Phi Beta Kappa after his junior year. Having been awarded the Kellett Fellowship for Study at Oxford, he received a B.A. (Juris.) with First Class Honors from

Richard A. Epstein
Oriel College, Oxford University, in 1966. In 1968 Mr. Epstein was awarded the LL.B. cum laude from Yale University. While a student at Yale he was Editor of the Yale Law Journal, a member of the Order of the Coif, and Champion of the Harlan Fiske Stone Moot Court Competition.

Mr. Epstein is teaching courses in Civil Procedure, Land Development and Federal Taxation III. This spring he is offering a seminar in Roman Law, which will examine selected topics in the Roman law of contracts, torts and procedure. Next year he will teach the first year contracts course.

A native New Yorker, Mr. Landes received his B.A. in 1960 from Columbia College and his Ph.D. in 1966 from Columbia. While at Columbia he received a President’s Fellowship, a Ford Foundation Doctoral Dissertation Fellowship, an I.B.M. Watson Fellowship and the Ansley Award Nomination from the Economics Department.

In 1965-66 he was an Assistant Professor at Stanford. The following three years he was an Assistant Professor of Economics at the University of Chicago. He then served on the faculty at Columbia from 1969-1972 as an Associate Professor.

His Essays in Law and Economics, Volume 1 which he edited with Gary S. Becker is forthcoming and he has published numerous articles in the area of law and economics.

At the Law School he will teach a group of courses and seminars in law and economics, including the course on Economic Analysis of Law.

Geoffrey R. Stone

Geoffrey R. Stone, a 1971 graduate of the Law School, has accepted an appointment as Assistant Professor of Law, beginning in the fall of 1973.

Mr. Stone was awarded a B.S. in Economics in 1968 from the Wharton School of Finance of the University of Pennsylvania. While at the Law School, Mr. Stone received the Joseph Henry Beale Prize for outstanding work in the first year writing program. In his second year he served as a staff member of Law Review and consequently as Editor-in-Chief of the Law Review in his third year.

He was graduated in 1971 cum laude and was elected a member of the Order of the Coif.

Following graduation Mr. Stone clerked for Judge J. Skelly Wright of the U. S. Court of Appeals, for the District of Columbia. He is currently serving as law clerk to Mr. Justice William J. Brennan of the United States Supreme Court.

At the Law School Mr. Stone will teach courses including the Regulation of Competition and Evidence.

Joachim Herrmann

Joachim Herrmann has been appointed Visiting Professor of Law for the academic year 1973-1974.

Mr. Herrmann has studied at the universities of Heidelberg, Basel, and Freiburg. He received his J.D. degree in 1959 from the University of Freiburg. The following year he received an M. Comp. L. degree from Tulane University. For ten years he then served as Assistant at the Max Planck Institute of Foreign and International Criminal Law in Freiburg where he was responsible for the departments of American law, English law, and international criminal law.

In 1971 he served as Universitätsdozent at the University of Freiburg and then as Visiting Professor of Law at the University of Virginia School of Law.

At the Law School he will teach Comparative Law centered on the criminal justice system.
James B. White

Currently Professor of Law at the University of Colorado, James B. White will be Visiting Professor of Law next year.

Mr. White was graduated from Amherst College with an A.B. in 1960. He received an A.M. in 1961 and an LL.M. in 1964 from Harvard University. While at Harvard he served as Treasurer and Book Review Editor of Harvard Law Review. Following graduation he was associated with the Boston firm of Foley, Hoag & Eliot for two years. He became Associate Professor of Law at the University of Colorado in 1967 and was made full Professor there in 1971. His teaching interests include criminal law, domestic relations, criminal procedure, and legal research and writing. Mr. White will teach criminal procedure, criminal law in the College Program, and a seminar covering materials he has gathered together and which will soon be published by Little, Brown called The Legal Imagination.

David G. Epstein

Currently Assistant Professor of Law at the University of North Carolina, David G. Epstein will be Visiting Associate Professor of Law during the Winter and Spring Quarters of 1974.

A native of Texas, Mr. Epstein received his B.A. in 1964 and his LL.B. in 1966 from the University of Texas at Austin. While in Law School he received the Law Review Research Scholarship and served on the Moot Court Board of Governors. He was Associate Editor of the Texas Law Review and was elected to the Order of the Coif. In 1969 he received his LL.M. from Harvard University.

Following graduation he clerked on the Texas Supreme Court. He was then associated with the firm of Kramer, Roche, Burch, Streich & Gracchiolo in Phoenix for three years. In 1972 he became Assistant Professor of Law at the University of North Carolina. In the same year he was awarded the Frederick B. McCall Teaching Excellence Award. This past year he was Visiting Assistant Professor of Law at Michigan and this fall he will be a Visiting Professor at the University of Texas.

His teaching interests include Commercial Law, Contracts, Corporations and Creditors' Rights. At the Law School he will teach Commercial Law and Bankruptcy. He is the author of Better Creditors' Law in a Nutshell (West, 1973). Another book, also to be published by West, is Debtor-Creditor Relations Teaching Materials.

New Books by the Faculty

In mid-December Injunctions, a coursebook by Owen M. Fiss, Professor of Law, was published by The Foundation Press, Inc. as a unit in its University Casebook Series. Since its publication these schools have adopted it: Emory, Georgetown, George Washington, Harvard, New Mexico, Ohio State, Pennsylvania, San Francisco, and South Carolina.

Mr. Fiss's new coursebook, which concerns the remedial aspects of equity, is innovative in several ways. Injunctions, one equitable remedy, is analyzed in depth with the hope that the principles emerging from this study can be applied to other equitable remedies. The perspective on injunctions is contemporary: historical material is used to en-
lighten the present scene; only recent cases, mostly labor, antitrust, First Amendment and post-Brown civil rights cases, are cited. With an emphasis on the litigative process, many procedural rules are analyzed from the injunctive perspective.

Legal Regulation of the Competitive Process (The Foundation Press, Inc., 1972), a new casebook by Edmund W. Kitch J.D. '64, Professor of Law, written in collaboration with Harvey Perlman, presents cases, materials, and notes on Unfair Business Practices, Trademarks, Copyrights and Patents. The function of this work is to revive the teaching of that part of trade regulation not normally encompassed in traditional antitrust study, such as: the common law of unfair competition, the common law appropriation doctrine, consumer actions, the substantive law of the FTC, labeling requirements, and promotional practices such as lotteries, stamps, premiums and coupons. Integrated into the materials are the insights of economists into the operation of a market system.

In his forthcoming book Prosecuting Crime in the Renaissance: England, Germany, France (Cambridge, Mass., 1974), John H. Langbein, Associate Professor of Law, refutes the conventional view that English common law criminal procedure came under the influence of Continental inquisitorial procedures. This book cuts across a number of legal specialties and across the law/history line.

In recent years, economists, and academic lawyers with a bent for economic analysis, have used the theoretical and empirical methods of economics to illuminate a variety of issues and problems in the law. Where formerly law and economics intersected only in the fields of antitrust and public utility regulation, today one can find economic analysis of crime control, accident law, contract damages, race relations, judicial administration, corporation and securities regulation, environmental problems, and other areas of central concern in the contemporary legal system. Economic Analysis of Law (Little, Brown & Co., August 1973), a new book by Richard A. Posner, Professor of Law, weaves exposition of the relevant economic principles into a systematic survey of the rules and institutions of the legal system. In this book economics proves to be a practical tool of analysis with a remarkably broad application to the varied problems of the legal system. The emphasis on concrete application rather than abstract theory should be congenial to law students and lawyers trained by the case method.

The University of Chicago Press has recently published Deterrence: the Legal Threat in Crime Control, written by Franklin Zimring, Professor of Law and Associate Director of the Center for Studies in Criminal Justice, in collaboration with Gordon Hawkins, Associate Professor of Criminology, the University of Sydney, Australia.

Deterrence is the first book-length attempt to bring together empirical and analytic discussions of deterrence from the areas of criminology, law, and the social sciences. This book tries to establish a conceptual and philosophic basis for further studies of deterrence and defines the method of its research to this end.

Although deterrence has been considered one if not the leading purpose of the criminal justice system, this book does not attempt to debate whether punishment deters crime. Instead, Deterrence investigates various factors which condition the differential effects of legal threats. In this regard the authors discuss differences among men and types of crimes; variations in penalty and risk of penalty; factors that help explain the success and failure of legal threats. Mr. Zimring and Mr. Hawkins also consider methods of comparing legal threats and propose new areas of research.

Published by the Law School is a paperback book by Adolf Sprudzs, Foreign Law Librarian and Lecturer in Legal Bibliography, entitled Information on Recent Treaties—Some Observations on Tools, Techniques, and Problems: The Conventional and the New. This publication was originally "A paper submitted to the Special Section of the Eighth International Congress of Comparative Law, August 30-September 5, 1970, Pescara, Italy."
In December Soia Mentschikoff, Professor of Law, was named President-elect for 1973 of the Association of American Law Schools by the Association at its annual meeting in New York City. As an authority on commercial and international law, Miss Mentschikoff’s chief contribution to civil legislation has been the drafting of the U. S. Uniform Commercial Code with her late husband, Karl N. Llewellyn who was Professor of Law at Chicago from 1951-62.

Miss Mentschikoff is also Director of Curriculum Development at Antioch Law School in Washington, D. C. This new non-traditional law school, which held its first sessions in September 1972, offers a curriculum emphasizing clinical orientation and an open commitment to the elimination of social injustice in contrast to the academic and moral neutrality of the casebook method.

In the first year curriculum the real innovation is found not so much in the content of courses, although the structure of these courses varies, but in a required living experience. Not only must students reside with families in the Washington Black ghetto for the first six weeks of class, but they must also come into contact with the same institutions which their “families” have contact with. They must, for example, observe procedures at D. C. General Hospital, spend a night in jail and apply for welfare, etc. Classes are also held in “The Lawyering Process,” which is concerned with lawyer-client relationships, and fact-collection and development in the adversary process, and in “Legal Decision Making,” concerned with the relationship between substance and procedure in the adversary context.

In the proposed second year curriculum, in which property and civil procedure are required, there are four-month internships during the year with Federal and D. C. governmental agencies.

Miss Mentschikoff has also recently been named a member of the Board of Trustees of the Rand Corporation, the West Coast “think tank.”

At the December Convocation ceremony in Rockefeller Memorial Chapel Miss Mentschikoff presented an address on “Awareness.”
LEGAL HISTORY WORKSHOP AT THE LAW SCHOOL

The first meeting of The Legal History Workshop of the Law School was held in October 1972. The object of the Workshop is to encourage and to facilitate discussion on legal history among students and faculty members of the Law School.

At the first meeting Harold M. Hyman, William B. Hobby Professor of History at Rice University, spoke on "The Reconstruction as an Opportunity for Reform: Cities and the Constitution."

The second meeting of the Workshop was held in February 1973. At this time Robert M. Fogel, Professor of Economics and History at the University, and Stanley Engerman, Professor of Economics at the University of Rochester, spoke on "Law and Force in Slave, Free, and Semi-Free Societies."

At the third meeting of the Workshop on April 12, 1973, S. F. C. Milsom, Professor of Legal History at the London School of Economics, spoke on "Approaches to Legal History." Professor Milsom is currently Visiting Professor at Harvard Law School.

The Legal History Workshop is made possible by funds from The Leonard M. Rieser Memorial Fund. Mr. Rieser, a prominent Chicago attorney and former Lecturer in Law, took a personal interest in the affairs of the Law School, and in the education of law students. The Rieser Fund was established in 1959 by his family and friends.

ZEISEL ON FBI STATISTICS

In the January issue of the Bulletin of the Atomic Scientists Hans Zeisel, Professor of Law and Sociology, comments on his study demonstrating how the FBI has been using incorrect statistics "with a serious, if unintentional and until now perhaps even unnoticed, bias toward increasing the apparent rearrest rates" of defendants who were dismissed or acquitted by the federal courts.

Mr. Zeisel's recently completed study now shows that statistics used by the FBI comprised less than a fourth of all defendants dismissed or acquitted. This fourth was in itself a biased sampling due to the fact that the FBI did not receive information of case dispositions from many other federal agencies which bring cases before the federal courts. Since the FBI does properly file its federal court dispositions, the FBI cases comprise an inaccurately large proportion of the cases upon which the FBI bases its attack on the court.

Mr. Zeisel recommends that "a group of specialists whose career interests are in objectivity and accuracy" compile and evaluate data on crime and that the FBI devote its full energies to law enforcement activities. As far back as 1969 Mr. Zeisel had made this recommendation in his report on the present state of crime statistics for the President's Commission on Federal Statistics.
In March 1973 Walter J. Blum, Professor of Law, served as Chairman of the panel on "Tax Reform—Proposals and Prospects" at the 21st Annual Management Conference, which was sponsored jointly by The University's Graduate School of Business and the Executive Program Club, and held this year at McCormick Place.

Gerhard Casper, Professor of Law and Political Science, has been elected Vice President of the Chicago Council of Lawyers.

Kenneth W. Dam, Professor of Law, has recently been appointed Executive Director of the Council on Economic Policy, and in that capacity serves as a deputy of George Shultz, Assistant to the President. Mr. Dam is on leave of absence from the Law School and previously had served as an Assistant Director of the Office of Management and Budget.

Last November Stanley N. Katz, Professor of Legal History, presided as chairman of the session "Directions in American Legal History" at the American Society for Legal History, held in the Williamsburg Lodge and Conference Center in Virginia. Mr. Katz is Editor of Studies in Legal History and of the ASLH Newsletter.

The second edition of A Brief Narrative of the Case and Trial of John Peter Zenger (Harvard, 1963), of which Mr. Katz is editor, was published by Harvard in January, 1973. It contains a revised introduction and a new appendix containing minutes of the earliest recorded habeas corpus proceeding in the American Colonies.

Mr. Katz has been appointed Chairman of the Littleton-Griswold Committee of the American Historical Association, which administers a fund to support research in legal history. He has also been appointed to the Executive Council of the newly formed Section on Legal History of the American Association of Law Schools.

Last December at the American Bar Association Conference on the Creation of a National Institute of Justice, Spencer L. Kimball, Professor of Law, provided one of the contributed papers on the subject of legal research and also served as reporter for one of the discussion groups.

In February 21, 1973 Mr. Kimball gave testimony before the Senate Antitrust and Monopoly Subcommittee.

Edmund W. Kitch, Professor of Law, was appointed Special Assistant to the Deputy Attorney General of the United States and assumed his duties in Washington at the end of the last quarter.

In February Philip B. Kurland, Professor of Law, spoke to students on "The New Supreme Court" at the Woodward Court Lectures, a series of informal lecture-discussions, sponsored by Izaak Wirzup, Professor in Mathematics and the College and Resident Master of Woodward Court.

Last November John H. Langbein, Associate Professor of Law, spoke at the American Society for Legal History, held in the Williamsburg Lodge and Conference Center in Virginia. "The Origins of Official Investigation and Prosecution of Ordinary Felony in Sixteenth Century England" was the title of Mr. Langbein's speech, which he presented in the session on "Police and the Police Function."

The French government nominated Edward H. Levi an Officer in the Order of the Legion of Honor this past January. On March 6th the presentation of the award was made at Mr. Levi's house by Philippe Olivier, Counsel General and Minister Plenipotentiary of France, who was accompanied by Jean Beaulieu, Cultural Attaché.

Membership in the Legion, established in 1802 by Napoleon I as an honor society similar to the ancient orders of knighthood, is bestowed by the French government for only the most distinguished merit.

Mr. Levi has also been elected to the Board of Trustees of the Woodrow Wilson National Fellowship Foundation.

Julian H. Levi, Professor of Urban Studies, Division of Social Sciences, has recently been appointed chairman of the Chicago Plan Commission by Mayor Richard J. Daley. The Chicago Plan Commission comprises a board of 15 citizens and 8 public officials.

Bernard D. Meltzer, James Parker Hall Professor of Law, has been involved in various activities apart from his teaching responsibilities. He served as Chairman of the Hearing Committee on the Cook County Hospital Dispute last spring. Mr. Meltzer is a member of the Subcommittee on International Anti-Trust and Trade Regulations of the American Bar Association. He is also currently serving on the Board of Managers of the Chicago Bar Association.

Norval Morris, Julius Kreeger Professor of Law and Criminology and Director of the Center for Studies in Criminal Justice, has been named to the special task force of the Chicago Crime Commission. The task force will investigate the wide discrepancy between the number of arrests and convictions for criminal offenses in Cook County.

Mr. Morris was given the honor of "Outstanding New Citizen of the Year" by the Citizenship Council of Metropolitan Chicago.

In February Gary H. Palm, Assistant Professor of Law and Director of the Mandel Legal Aid Clinic, appeared on the "Perspectives" talk-show, WLS, channel 7, to discuss the Mandel Legal Aid Clinic. Appearing with Mr. Palm were Law School students, Michael

Associate Justice of the Supreme Court, Harry Blackman, rated the abilities of competing law students in the Law School's annual Huston Moot Court Competition on May 9th. U.S. appellate judges Harold Leventhal and Wade H. McCree also sat on the bench with him.
Schatzow and Anne Hamblin Schiave, and staff attorney, John Elson. They discussed the role of students in the Legal Aid Clinic as well as the services the Clinic offers to the community. Ranlet Lincoln, Associate Professor of the New Collegiate Division and Dean of the University Extention, is moderator of “Perspectives.”

Richard A. Posner, Professor of Law, has been appointed by President Levi to serve on the University's Faculty Committee on the Neighborhood.

In May, Max Rheinstein, Max Pam Professor Emeritus of Comparative Law, will be teaching at the Strasbourg session of the International Faculty of Comparative Law; he will also be teaching at the Amsterdam session in August.

Mr. Rheinstein is serving as associate reporter on the Science of Law for the UNESCO survey of Trends in Learning.

This fall Malcolm P. Sharp, Professor Emeritus of Law, joined the faculty of Rosary College in River Forest, Illinois, as Chairman of the Political Science Department. Previous to this appointment Mr. Sharp had taught for 30 years at the Law School and for five years at the University of New Mexico Law School.

Mr. Sharp also was a Lecturer in the University Extension during the Winter Quarter. He taught a Political Science course entitled “Anarchy and Law Among the Nations.” The course focused on three major issues—anarchy and law, war crimes, and the cold war. In relationship to these issues wars as recent as Vietnam and as ancient as the Greek wars were discussed.

In September 1973 Hans Zeisel, Professor of Law and Sociology, will be a guest speaker at the annual Conference of the Second Circuit in Buck Hill Falls, Pennsylvania to discuss the operation of the Federal jury system with the judges of the Second Circuit. In particular Mr. Zeisel will speak about the use of jurors in civil and criminal cases, the comparative advantages and disadvantages of six-man and 12-man juries with reference to current studies which he is undertaking with respect to juries.

In October The 25th Annual Federal Tax Conference sponsored by the Law School was held in the auditorium of the Prudential Building in Chicago.


Effects of the tax laws on philanthropy were also discussed in presentations on developments in estate and gift taxes and a practical guide to operating and terminating private foundations.

Three 1972 graduates of the Law School have been chosen by U. S. Supreme Court Justices to join their clerking staffs this year. John J. Buckley, Jr., formerly Editor-in-Chief of Law Review, will become a member of the staff of Associate Justice Louis F. Powell, Jr. He is presently clerking for Judge John Minor Wisdom, Fifth Circuit, New Orleans.
Presently serving as law clerk for Judge Harold Leventhal in Washington, D.C., Hal C. Scott, also a former member of Law Review, will clerk for Associate Justice Byron R. White.

Robert I. Richter was chosen by Associate Justice Harry A. Blackmun. Mr. Richter, formerly Comments Editor of Law Review, is a clerk for Judge Irving Goldberg of the Fifth Circuit in Dallas.

**INAPPROPRIATE JURISDICTIONS**

"The Economics of Inappropriate Jurisdictions: The Stream Channelization Controversy" is the title of a speech given by John P. Brown, Fellow in Law and Economics at the Law School, during the Urban Economics Workshop, held at The University this past February.

**LSA LECTURE BY KASANOF**

The Law Students Association sponsored a lecture at the Law School last October by Robert S. Kasanof JD '52, Attorney-in-Charge of The Legal Aid Society, Criminal Courts Branch, of New York City. Mr. Kasanof spoke on "Poverty Law for New York Criminals."

**William Leuchtenberg, DeWitt Clinton Professor of History at Columbia University was speaker for the second annual William Crosskey Lecture held in the Law School Auditorium in February 1973. Mr. Leuchtenberg spoke on "A Klansman Joins the Court."**
**CHICAGO JURY STUDY CITED**

In a recent *Ford Foundation Letter, The American Jury* (Little, Brown, & Co., 1966) by Professors Hans Zeisel and Harry Kalven, Jr., was mentioned as one of the classic scholarly works, which was supported as a research project by the Ford Foundation.

It was also announced that Professor Kalven will act as a member of a group of prominent judges, police officials, lawyers, and academic authorities to advise and review successive drafts for author Charles E. Silberman, whose study of crime and justice the Foundation is currently supporting. The Honorable Walter V. Schafer J.D. '28 of the Illinois Supreme Court is also serving with this group of advisors.

**WILKINSON APPEARANCE**

Last January Frank Wilkinson, executive director of the National Committee Against Repressive Legislation, spoke in the Law School auditorium on "The Nixon Administration and Civil Rights." Mr. Wilkinson has the dubious distinction of being one of the last persons jailed by the House UnAmerican Activities Committee for contempt of Congress. His appearance was co-sponsored by the Law Students Association and Student Government.

**WINNER OF THE WOMEN'S BAR ASSOCIATION SCHOLARSHIP**

Third year law student Marsha E. Novick was awarded the annual law scholarship by the Women's Bar Association of the Illinois Foundation last October. This award, named in memory of the late attorney Mary Shaw, a member of the foundation's board of directors, is given each year to an outstanding woman law student in Illinois. Miss Novick is associate editor of *Law Review.*
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E. Carol Stein, pp. 2, 40; Stephen Lewellyn, p. 38; Kathy McCartney '73, p. 41. Other photography by John Beal '73.