LAW AND CHIVALRY: AN EXHORTATION FROM THE
SPIRIT OF THE HON. HUGH HENRY BRACKENRIDGE OF
PITTSBURGH (1748-1816)

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INTRODUCTION

This essay attempts to present an 18th century American view of
contemporary events. It commemorates the bicentennial of the first
appearance of Modern Chivalry, a work of fiction that appeared in parts
between 1792 and 1815, written by Judge Hugh Henry Brackenridge,
then of Pittsburgh. The first literary effort by an American residing
west of the Alleghenies, it was widely read by the author’s contempo-
raries in the South and West, if perhaps not in Philadelphia. A century
later, it was rated by Henry Adams as the most thoroughly American
of all early American literature. The work was satirical, borrowing
generously from Swift and Cervantes, and ridiculing many features of
law and politics in Pennsylvania.

The work was also picaresque. It recounted the adventures of a
Captain Farrago, a wise democrat selected by his fellow citizens as
Governor of the Commonwealth, and his foolish but ambitious servant,
Teague O’Regan, who encountered a series of opportunities for unmer-
tited advancement, each resulting in some misadventure. This account
was interlarded with brief essays on law and politics. A strength of this
art form is that it enables the author to intermingle his or her own
ideas with others put in the mouths of rogues so that persons having
power over the author (in Brackenridge’s case, the people of Pitts-
burgh) cannot be sure whether they have been offended by the author

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Much of the text of the body of the article is drawn from the writings of Judge Brackenridge.

1. The previous segments were published together for the first time, with some final addi-
tions in 1815. All references here are to the Hugh Henry Brackenridge, Modern Chivalry
(Claude M. Newlin ed., American Book Co. 1792) (1937) [hereinafter Modern Chivalry]. For
a comparison of this work with other satirical and polemical writings of the post-Revolutionary
era, see Henri Peter, The Early American Novel 87-165 (1971).

2. I Henry Adams, History of the United States of America 124-25 (1889). See also the
comments of John Quincy Adams reported in Wilson McCandless, Ex-President John
Quincy Adams in Pittsburgh in 1843 (1873).
or whether the author has merely made rogues more hateful by attributing to them hateful ideas.

The substance of this article is written in the voice of Judge Brackenridge. It employs much language and many thoughts appearing in *Modern Chivalry* and in other works by the same author. These are applied to the world of 1992, with some additions by the present author where they are deemed useful to make a coherent presentation. A strenuous effort has been made to assure that views thus attributed to the ghost of Brackenridge faithfully reflect his utterances of long ago, but of course no warranty can be made that all the thoughts expressed here are those that Brackenridge would have entertained about matters he never considered. The task of this essayist is not unlike that of a lawyer interpreting an ancient statute applicable to current matters unlike any considered by the legislators: the words of Brackenridge were originally employed in what may have been, to him, essentially different contexts. Moreover, they were uttered over a period of 44 years, and Brackenridge was by no means the person in 1815 that he had been in 1771, so that, like a legislative utterance, his words speak for many minds that are not all the same.

In our time, it is a common intellectual blunder to judge "Moses by the standards of Sparta." I beg the reader not to make that mistake and so to hold Brackenridge responsible for failing to adhere to standards fashioned at this later time and place. His spirit is presented not to propagate his 18th century views, but to make them comprehensible to contemporary and even "post-modern readers."

In selecting this art form, I disavow any share in the specific views here expressed by the ghost of Brackenridge. To be faithful to his character as a satirist and political critic, and to present a full view of his revolutionary values, it is appropriate to let fly with expressions that it may be useful for some readers to encounter even if neither Brackenridge nor I would be prepared to take or advocate consequential action based upon them. I admit only that I share with Brackenridge an impulse toward hyperbole.

Brackenridge was offensive to his readers in his own time; indeed, almost every person in Pennsylvania was at one time or another subject to his ridicule. There is no reason to believe that he would not ridicule many persons in the same commonwealth if he were alive today. In

thus disclaiming responsibility for what I write in his name, I am adhering to the practice of Brackenridge himself, who explained at the opening of *Modern Chivalry* that it was his purpose only to exhibit his literary style, and not necessarily to advance any of the ideas he expressed, and that his work should be regarded as a “book without thought.”

I. HUGH HENRY BRACKENRIDGE

Brackenridge was born in rural Scotland in 1748. In 1753, he was brought by his parents to live in that part of York County, Pennsylvania known as “The Barrens,” a place located on what was then the frontier. Early manifesting a preference for reading over farm labor, he was encouraged in his studies by his parents, especially his mother, and helped by the local Presbyterian minister with his Latin and Greek.

At the age of 15, Brackenridge became the schoolmaster at nearby Gunpowder Falls, Maryland. When challenged by older, larger boys, Brackenridge won the hearty support of their parents by pulling a poker from the fire and branding the biggest aggressor, thereby reducing his class to a malleable crew fearing not to do its lessons.

After five years at Gunpowder Falls, Brackenridge enrolled at Princeton, where he distinguished himself as the most literate member of a class that included his friend, James Madison. His literary taste even then ran to satire and parody. Illustratively, he wrote of a luckless classmate named Spring who had uttered Tory sentiments in verse:

I will declare, for all must know it,
I long have strove to be a poet.
Besides this sin, alas, God knows,
I've wrote some dirty things in prose.

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4. Modern Chivalry, *supra* note 1, at 4-5.
5. CLAUDE M. NEWLIN, THE LIFE AND WRITINGS OF HUGH HENRY BRACKENRIDGE 1 (1932).
6. *Id.* at 1-2.
7. Henry Marie Brackenridge, the son of Hugh Henry, reported that his father “derived all his genius” from his mother. HENRY M. BRACKENRIDGE, RECOLLECTIONS OF PERSONS AND PLACES IN THE WEST 61 (1834) [hereinafter *RECOLLECTIONS OF PERSONS*].
9. *Id.* at 7.
10. *Id.* at 8-14. The college was then known as the College of New Jersey.
11. *Id.* at 13.
Brackenridge's teacher at Princeton was John Witherspoon, a Presbyterian minister recently arrived from Scotland who would a few years later become a signer of the Declaration of Independence and a leading advocate of the war. Among Brackenridge's student writings was an epic poem written as a valedictory with a classmate, Phillip Freneau, entitled The Rising Glory of America, published in 1772. Brackenridge remained at Princeton an additional year to assist Witherspoon and to prepare for the ministry.

Brackenridge did not, however, undertake a ministry on completion of his study. Instead, he accepted another schoolmastership in Princess Anne, on the eastern shore of Maryland. While at Princess Anne, he made a serious effort to establish himself as a poet. His Poem on Divine Revelation, written on a scale worthy of Milton, was published but widely unread, as Madison and other classmates were pained to advise him.

In 1776, Brackenridge wrote and published a drama entitled The Battle of Bunkers Hill, celebrating the valor of his fellow colonials.

12. Given the mission of Princeton to train Presbyterian ministers, see generally Mark A. Noll, Princeton and the Republic 1768-1822 (1989), it is unsurprising that it selected as its President, and sole professor, a leader of the Church of Scotland who held a chair in divinity at the University of Edinburgh. For a brief biography see generally Varnum L. Collins, President Witherspoon (1925) reprinted in Religion in America (Gaustad ed. 1976). It was said of Witherspoon that "He stood four square on doctrines empirical and to him America owes, for what it is worth, the philosophy of common sense that permeated its thinking for so long." See Dictionary of American Biography 437 (Allen Johnson & Dumas Malone eds., 1936). Witherspoon was a formidable scholar. See The Miscellaneous Works of John Witherspoon (Philadelphia, Woodword 1803) (6-volume compilation).

13. Witherspoon was elected to the Continental Congress and to the New Jersey legislature. He served on dozens of federal committees and commissions during and after the War. Like Brackenridge, he was a leader in the campaign for ratification of the Constitution drafted by his student, Madison.

14. Freneau ultimately settled in Philadelphia, where he became a poet of note. See Poems of Philip Freneau (Fred L. Pattee ed., 1902). He also edited the National Gazette, which published essays of Brackenridge. Daniel A. Marder, Hugh Henry Brackenridge 50 (1967). This was reciprocal, for Brackenridge had published Freneau’s poetry in The United States Magazine. Id. at 75.


16. Id. at 23-24.

17. Brackenridge became indifferent to the church. He took no interest in the religious training of his children. Recollections of Persons, supra note 7, at 60. He was an advocate of an ecumenical church in Pittsburgh that would be known merely as the Christian Church. Marder, supra note 14, at 41-43.

18. Newlin, supra note 5, at 25.

19. Id. at 27-33.

20. Id. at 34.
Upon the signing of the Declaration, he enlisted as a chaplain in Washington's army, serving in the New Jersey and Pennsylvania campaigns.\textsuperscript{21} His patriotic sermons were published in that year as \textit{Six Political Discourses Founded on the Scripture}.\textsuperscript{22} That year, also, he left the army to establish \textit{The United States Magazine}, which he edited in Philadelphia for the one year of its existence.\textsuperscript{23} While so engaged, he delivered a July 4 eulogy of fallen soldiers to an audience that included the members of the Continental Congress.\textsuperscript{24} That he was invited to present a eulogy on such an occasion attests to his reputation as an orator.

In 1779, when his magazine failed, he undertook the study of law with Samuel Chase in Annapolis.\textsuperscript{25} Licensed to practice law the next year, he decided not to return to Philadelphia because the dominating presence of John Dickinson, James Wilson, and others suggested to him the wisdom of seeking another venue where greater opportunity might be presented. In the spring of 1781, while the war continued, he migrated over the mountains to the village of Pittsburgh, which then consisted of a small fort and a few dozen families residing in cabins along the river. Brackenridge was 33 at the time of his arrival; the population of Pittsburgh was not more than 400. He commenced to practice law in Westmoreland County and in the courts of newly-established counties at Washington and Pittsburgh.\textsuperscript{26}

In 1786, Brackenridge assisted in the founding of the \textit{Pittsburgh Gazette}, and wrote for it a series of political tracts often satirical in tone. That year, he was elected to the state legislature. While there, he secured a grant of 5000 acres to establish the Pittsburgh Academy, which became the University of Pittsburgh. He also secured the first public road to the west, but was persuaded to withdraw his support for a bill authorizing sale of public land on credit, a bill favored by the west, and one that he had supported while campaigning.\textsuperscript{27} And, like his teacher John Witherspoon in New Jersey, he led the campaign to secure ratification of the Constitution of the United States, although it was opposed by most of his western constituents.\textsuperscript{28} Accordingly, he was

\begin{footnotes}
\footnote{21. \textit{Id.} at 37.}
\footnote{22. \textit{Id.} at 41.}
\footnote{23. \textit{Id.} at 44-57.}
\footnote{24. \textit{Marder, supra} note 14, at 32.}
\footnote{25. \textit{Newlin, supra} note 5, at 56-57.}
\footnote{26. \textit{Id.} at 58-70.}
\footnote{27. \textit{Id.} at 71-86.}
\footnote{28. \textit{Id.} at 87-106.}
\end{footnotes}
not returned to the legislature, being defeated by the efforts of a rival, William Findley, a weaver by trade.29

His defeat gave him time for writing and something to write about. The result was an enrichment of the *Pittsburgh Gazette*, which featured exchanges of satirical poetry by the Jeffersonian Brackenridge with a worthy adversary, David Bruce, a Pittsburgh shopkeeper who espoused the Federalist views of Alexander Hamilton.30 Among the topics on which Brackenridge wrote was the French Revolution, which he ardently supported, until it collapsed in mayhem and genocide.31

In his law practice, Brackenridge represented many individuals engaged in distilling whiskey. Distilling was the best way to preserve grain for sale on markets not easily reached from the frontier. Some of his clients were in trouble with the law on account of their resistance to the tax on their product, originally imposed by the English but continued by the new federal government under the leadership of Hamilton as Secretary of the Treasury. Brackenridge and others repeatedly urged the government to repeal the tax, but it was not repealed, and open rebellion appeared at Mingo Creek, near Pittsburgh, during which a federal soldier was killed in 1794. While trying to maintain relations with those in rebellion (who included some of his clients), he widely and publicly counseled restraint and urged the rebels to seek amnesty, which they did. He was nevertheless accused by many of treasonous participation in the Whiskey Insurrection, a charge that was upon investigation quickly dropped by the national government in the person of Alexander Hamilton.32

In 1798, Brackenridge returned to politics as founder of the Jeffersonian Republican Party of western Pennsylvania, and contributed barbs to a congressional and gubernatorial campaign that achieved

29. *Id.* at 79-80.
30. *Id.* at 177, 202-04, 216-19.
31. *Id.* at 131-33.
levels of vituperation seldom if ever equalled in America. In 1799, he was appointed to the Supreme Court of Pennsylvania, to the bitter disappointment of Federalists, some of whom sought his impeachment and removal. Brackenridge moved to Carlisle in 1801 to continue his judicial duties, thus completing two decades as a resident of Pittsburgh.

As a judge, he remained active in politics to the extent of resisting populist assaults on the law and legal institutions, turning his satirical artillery against those whom he viewed as importing the excesses of the French Revolution into democratic Pennsylvania. A large segment of *Modern Chivalry* was published in 1805 to ridicule the radicals of that time.

Brackenridge remained on the Pennsylvania Supreme Court until his death. In his later years, he gave thought to writing a legal treatise on the scale of Blackstone, but settled for a single volume of *Law Miscellanies*, published in 1814. That book set forth his thoughts on the role of the judiciary in a democratic society, on legal education, and on many features of the existing law of the Commonwealth. It was republished in 1972.

Few novice lawyers would not settle for a legal career as distinguished as that of Brackenridge. He, however, had hoped to make a more memorable mark, and he was disappointed, although not embittered, by the knowledge acquired in his later years that he would not be long remembered. He attributed this result to natural limitations on his creative talents. Another reason, perhaps disclosed in the pages that follow, was his seemingly irresistible impulse to reveal to his audience truths (as he saw them) that they did not wish to countenance, an impulse that is seldom rewarded in democratic politics or literary criticism. It may nevertheless have been a useful impulse, one worth celebrating every couple of centuries or so. What follows in text is my effort to repackaging his prose for a late twentieth century audience; it

33. *Newlin, supra* note 5, at 198-213.
34. *Id.* at 213-39.
35. *Id.* at 239-40.
36. *Id.* at 241-66.
37. *Id.* at 292-303.
39. Or in romance. Brackenridge was made aware of his tendency to offend by women to whom he presented poems (as he thought of respect and affection) that produced resentment. *Modern Chivalry, supra* note 1, at 574-75.
40. Brackenridge has no responsibility whatever for the footnotes.
sets forth what I believe Brackenridge would say if he were present at his own bicentennial.

II. BRACKENRIDGE REVIVIFIED

I am enchanted to participate in my own bicentennial.

The book you are kind enough to note by publication of this essay was about an idea new and untested in 1792. That idea of constitutional democracy is today acclaimed through much of the world. It is, however, in much jeopardy. My purpose is to summon you to its support and nurture.

A. On Modern Chivalry: The Office of Ridicule

First I must speak of my book. It is about time that its worth be recognized! Although I never asked for pay, five booksellers made a fortune by it. Yet it never got up in the world. Why is it that Congress never bought up an edition to distribute among its members? It would be of more use to them than the Library of Congress.41 The problem was that no one ever attacked it; not one person ever said that my book was insipid, libellous, treasonable, immoral or irreligious. Were you asleep down there in Philadelphia?42

I began my book with the promise that it would contain no ideas, but would be a mere exercise in literary style. There was one prematurely “post-modern” critic who, responding to this disclaimer, said that: “on some occasions there would seem to be a semblance of an idea [in Brackenridge’s book], yet this we must attribute to the imagination of the reader, just as in looking upon a plastered wall attentively for a long time, you will conceive the inequality of the surface, or accidental scratchings, to be the shapes of birds and beasts, or the letters of the alphabet.”43 Perhaps if you are very attentive to this lecture, you may acquire ideas in just that way.

My book had some good consequences. For example, the American Philosophical Society has not admitted a single ignorant and illiterate member since I ridiculed its membership, at least not since Oric McSugan, the house carpenter, who did the inside work of a stable for one of its members and was therefore admitted.44 It contained a good

41. Modern Chivalry, supra note 1, at 807.
42. Id. at 250.
43. Id. at 162.
44. Id. at 805.
deal of moral sentiment, "[a]ll which I saw and part of which I was." I acknowledge that my ideas were for the most part those that are near the surface; I had not time for such as swim in deep water. And whenever a thought led me to a quotation, I did not make a scruple of conscience to run after it, especially if I had any reason to think, upon the small reflection I could give it, that the quotation will be better than the original idea that might have taken the place of it.

My book is a caricature of Pennsylvania in my time, but it is by caricature that the ridiculous is discovered. Ridicule is not the test of truth, but it exposes error. [The human mind] is a strange compound of the rational and the irrational and it is only by turns that the rational predominates. Human nature is capable of being brought to absurdity by many causes. Thus, who would think it possible were it not a fact established by ten thousand testimonies that human sacrifice could ever have been thought acceptable to the divinity? If, as has happened, no innovator in our government has thought of implementing some of the extravagant policies I described, can you be sure that it is not owing to my ridicule that the things have not taken place?

My book owed much to Cervantes. It is, like Don Quixote, about the adventures of a master and squire, but for my two adventurers, it is the master and not the squire who exhibits good sense. The title of my book and of this lecture were drawn from the mystic purpose of Quixote, whose sanity was defeated by the supremely foolish notion of chivalry. He had, we are told, read too many "books of chivalry" that fantasized about intrepid knights ever willing to risk all for remote but revered ladies.

45. Id. at 803.
46. Id. at 654.
47. Id. at 803.
48. MARDER, supra note 14, at 43.
49. MODERN CHIVALRY, supra note 1, at 719.
50. Id. at 717.
51. Id. at 718.
52. This subpart, unlike the rest of the lecture, relies very little on the language of Brackenridge, for the reason that he never fully developed the case for his satirical style, nor did he, so far as I have discovered, ever explain the obvious relationship between his work and that of Cervantes.
53. Brackenridge shared his association with Cervantes with Tabitha Tenney, a contemporary Pennsylvanian. Ms. Tenney published a novel entitled FEMALE QUIXOTISM: EXHIBITED IN THE ROMANTIC OPINIONS AND EXTRAVAGANT ADVENTURES OF DORCASINA SHELDON (Boston, Peaslee 1829). The unhappy Dorcasina read too many romantic novels, had her head too full of romantic love, became a chump for unworthy males, is brought to her senses by ridicule, and lives out her years unmarried.
54. Quixote was in a prolonged irrational state. His friends and niece were greatly troubled
Equally foolish notions are in circulation today. Are there not as I speak people who are reading “books of chivalry” that romanticize other ideas that have little or no practical merit, or even cause harm without benefit, and that fill their readers with mindless zeal? Are there not now abroad in this land many intrepid persons who in the name of some high-flown rhetoric are slaying sheep in the fevered belief that a bleating drove is an invading army?

B. Irrationality, The Hazard to Democracy

The “modern chivalry” of which I wrote was the notion of pure democracy, an idea at least as foolish as chivalry. There were in my time many “books of chivalry” that fantasized about republics in which just government was administered by the governed themselves.

In the days of the Revolution, I was myself imbued with the foolish notion that all citizens could participate equally in democratic government. Indeed, I even edited and published a magazine devoted to the idea that the honest husbandman who read my publication would rapidly improve in every kind of knowledge. I promised that he would shortly be able to arbitrate the differences that may arise among his neighbors. He would be qualified to be a magistrate. He would be equal that the old bachelor had been deprived of his reason by overexposure to “books of chivalry” that romanticized the role of knights-errant. Cervantes quotes some of the prose that so affected Quixote; thus Quixote, we are told, had read too many times that: “the reason of my unreason with which my reason is afflicted weakens my reason that with reason I murmer at your beauty.” MIGUEL DE CERVANTES, THE ADVENTURES OF DON QUIXOTE DE LA MANCHA, pt. I, ch. 1 (1605, Ormsby trans., 1885) [hereinafter DON QUIXOTE].

55. DON QUIXOTE has long been regarded as a major literary classic, often assigned as reading to undergraduates. As the reader knows, many such works have in recent years been removed from reading lists in basic literature courses, to be replaced by works deemed more representative of diverse cultures. Sometimes substituted as representative of Hispanic cultures has been FRANZ FANON’S WRETCHED OF THE EARTH. DINESH D’SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 78 (1991). There is irony in the replacement of Cervantes with Fanon. Fanon (1925-61) was a native of Martinique who studied medicine in France and practiced psychiatry in Algeria, where he was a sympathizer with the anti-colonial revolution. He died in an American hospital to which he had come for treatment of cancer. His only book was written during his illness and was published posthumously. It is a book arguing that those persons living in former colonies are greatly victimized by citizens of the developed world and that the victims should in truth and justice repay their exploitation by destroying the peoples who have enjoyed economic development. Fanon’s book could be characterized as the ultimate “book of chivalry” for our time. There is the further irony that Cervantes also suffered in Algeria. Although a hero in the war with the Turks, he was on his way home captured by Algerine pirates and held in the Bey’s dungeon for five years. FERNANDO DÍAZ-PLAJA, CERVANTES THE LIFE OF A GENIUS 32-40 (Sue M. Soteraso trans., 1970).

56. DON QUIXOTE, supra note 54, at pt. I, ch. 10.
to the task of legislation. He would be capable of any office to which the gale of popularity amongst his countrymen may raise him. 57

People who took that notion too seriously were in danger of losing their minds, of mistaking windmills or wineskins for hostile giants, 58 and of doing much harm to others and to themselves. As Cervantes so forcefully observed, it is the human condition to be guilty of such invincible stupidity. Therein lies the dilemma of democracy: how can any people be expected to govern themselves for more than a few months or years without succumbing to some preposterous and destructive notion? "O, Israel, thou are destroyed for lack of knowledge." 59 "O, my people, they which lead thee cause thee to err, and destroy the way of thy path." 60 The human trait of unreason that I assailed with ridicule is an infectious disease. It has a way of spreading like a moral influenza. 61 Even when all are happy, one who blows a trumpet for change will have followers. It may be impossible to trace the very point in the community at which a wild idea took its rise, or what passion in the individual gave it birth, but its progress, like the influenza, may be traced; and its gradual march from north to south, or from east to west. 62 The outrageous, when first presented, shocks and then domineers over understanding. 63 The absurd is always popular. "Hence it is that mere morality, and the dictates of nature and truth in the conduct of men, are undervalued in comparison of the dogmata of fanatical faiths." 64

The antihero of my novel, Teague O'Regan led a life that was an unbroken series of outrages against good sense. In his mendacity, O'Regan persisted in putting himself forward, or was put forward by others, for positions for which he was grossly underqualified. Never did O'Regan act in the public interest. Among the positions he sought for selfish purposes were Congress, the bar, the ministry, membership in Doctor Franklin's philosophical society, and employment as an actor, a professor, an Indian chief, a pharmacist, and a military officer. He also offered himself as husband to several women who deserved better. The

57. Modern Chivalry, supra note 1, at 10; Newlin, supra note 5, at 44-57.
58. Don Quixote, supra note 54, at pt. 1, ch. 23.
59. Isaiah 3:12.
60. Hosea 4:12. The sermon based on these texts was published in the Pittsburgh Gazette, Mar. 22, 1788 quoted in Marder, supra note 14, at 44.
61. Modern Chivalry, supra note 1, at 641.
62. Id. at 642.
63. Id. at 700.
64. Id. at 676.
heroic Captain, master to this unworthy squire, was ever at pains to prevent harmful results, but did not always succeed.

One of the foolish notions that I ridiculed was the dogma of Dugald Stewart, a Scotsman whose ideas were popular in my time. Stewart wrote that human nature was improving over time, that our baser instincts were declining as a result of some natural process. Of course, Stewart had not witnessed the horrors of your century, so perhaps he should be forgiven for his invincible stupidity. Yet there are, and I suppose ever will be, irrational optimists like Stewart who refuse to see the ubiquitous dark side of human nature.

Evolution there may well be, although I personally question whether man was ever an oyster. But it is nonsense to conduct government on the assumption that one's fellow citizens are by nature less mendacious or less cruel than their parents or grandparents. Men in all ages are the same, and nature is herself to blame. What is different in time and place are the social and political institutions that serve to constrain our common bestiality. The cupidity of man continues and if not well-managed will result in convulsions that will overthrow liberty.

I ridiculed the preposterous optimism of Stewart by advancing a proposal that suffrage in Pennsylvania be extended to quadrupeds. I argued that if Stewart was right, then other mammals must surely also be improving in their morals and intellect and should therefore participate in our political process on equal terms with us. Thus, one of my citizens argued with the voting registrar that his horse should vote because the horse served with General Wayne in 1793. Another tried to register an ox named Thomas Jefferson. Yet another urged the admission of a panther (or was it perhaps a Nittany Lion?) to the Pennsylvania bar; the panther was rejected by examiners on the ground that lawyers were bad enough even when made of the best materials. My Teague O'Regan was one time cloaked in a panther skin in the hope that he might be mistaken for one competent to practice law. He later

65. Stewart is identified as the object of parody in Modern Chivalry, supra note 1, at 708.
66. Id. at 665.
67. Pittsburgh Gazette, Dec. 1, 1787, quoted in Marder, supra note 14, at 85.
68. Modern Chivalry, supra note 1, at 676.
69. Id. at 649.
70. Id. at 666.
71. Id. at 689-90.
taught a cat to talk. An experiment was conducted with canine advocates in court and some were found to have precisely the right snarl.72

Others argued that we would do better to send real cattle to participate in public bodies,73 where they might chew their cud and hold their tongues,74 and thereby enhance the quality of public discourse. It was observed that if we sent a few asses, not figuratively but literally to the Senate, they would bray, but for no more than a reasonable length of time, and thus would suffer the more intelligent of the members to arrange and carry through the business of the house.

I preached against Stewart's doctrine not merely because it was wrong, but because it was a source of confusion about the reason for democracy. If he is to be believed, then we should settle upon some of his morally advanced persons and make them our oligarchs. It is precisely because the universal dark side of humanity sooner rather than later makes despots of all rulers that democracy is and should be the favored form of social organization. Indeed, if justice cannot find a certain residence in a democratic government, she must leave the earth.75 The problem of democracy is that the ignorance and malevolence of the people make them prone to destroy its institutions, thereby creating insecurity and chaos, which is always soon resolved by new despotisms.

Thus, I call myself a democrat. You may ask, what is a democracy? I take my definition from a speech put into the mouth of Pericles, by Thucydides. It is to the Athenian people.

This our government is called a democracy, because, in the administration, it hath respect, not to a few . . . but to the multitude: [because] . . . there [is] an equality amongst all men, in point of law[,] . . . yet in conferring . . . dignities one man is preferred before another . . . according to the reputation, not of his power, but of his virtue . . . And we live not only free in the administration of the state; but also, one with another, void of jealousy towards each other in our daily course of life; not offended at any man for following his own humour, nor casting on any man censure or sour looks, which though they be not punishment, yet they grieve . . . [And] we stand chiefly in fear to transgress against the public; and are able always to be obedient to those that govern, and to the laws . . . 76

72. Id. at 705.
73. Id. at 663.
74. Id. at 661.
75. Id. at 497.
76. Id. at 530-31.
C. Preconditions to Democracy: Inclusion and Integration

A democracy is beyond all question the freest government: under this, every man is equally protected by the laws, and has equally a voice in making them.77 As the Greeks and Romans, Machiavelli and Montesquieu have taught us, democracy must be founded on the rock of public virtue; that is on the ideas of truth, honor, justice, integrity, reason, moderation, civility and firmness.78

1. Universal Suffrage

Thus, the virtuous exercise of the right of suffrage is the first spring of happiness in a republic. All must have a voice in a democracy, for who can undertake to say of another that he wants sufficient sense to participate?79 “We the people” admits of no exclusion.80 In my time, property qualifications were an issue. For myself, I should not like to live in a republic where a man must be worth so much to have equal rights; indeed, it is most honorable to enrich the republic and to remain poor yourself. The man or woman who has set his heart on riches is lost to the public spirit. In the possession of office, he or she is thinking what can be made by it.81 It is often the most ignoble who have acquired wealth. They have had better luck or they have been more selfish and kept what they got. Neither luck nor greed is a special qualification for suffrage.

I also favor hospitality to foreigners: I would make them citizens and give them suffrage the moment they set foot in our Commonwealth.82 For I cannot see on what ground we can justify refusal. The only qualification that is justified is age, and I should have no objection to see this restricted to a greater age than 21—say even 45 years.83 That is the time when men cease to be fit for service in the militia, and the absence of vain young men from our councils would be no great loss.

Of course, women did not vote in my time. This was not because they were less knowledgeable, but because democratic politics was thought at first to be a surrogate for military action in which women

77. Id. at 20.
78. Id. at 535.
79. Id. at 639.
80. Id. at 638.
81. Id. at 533-34.
82. Id. at 532.
83. Id. at 533.
were not required or expected to participate. Physical intimidation was a feature of primitive elections. Also, we thought of men and women as bound to one another so that they shared common interests. In a sense, male voters represented their mothers, wives, and sisters, who, you may be sure, often influenced the votes of their men, for women almost absolutely controlled the moral education of all young people. There were in my time no competing influences of public school teachers or of broadcast media of any kind, or of any adolescent peer groups prematurely provided with wheels and money. Of course, when the advantage of the secret ballot was discovered, and when travel to a voting place became less burdensome and hazardous, the vote could scarcely be denied to American women.

No one was in my time denied the vote in the Commonwealth of Pennsylvania on the basis of race, and the Fifteenth Amendment was but the inevitable expression of the Declaration of Independence. Indeed, during the debate on ratification of the Constitution, I ridiculed some of the opposition with the observation that my friend Madison's draft had been carefree on these issues. I observed that

The first thing that strikes a diligent observer is the want of precaution with respect to the sex of the president. Is it provided that he shall be of the male gender? Without [such an] exclusion, what shall we think, if in progress of time we should come to have an old woman at the head of our affairs? But what security do we have that he shall be a white man? Is there any security that he shall be a freeman? 84

2. Mutual Trust

Universal suffrage is a necessary condition for democracy, but it is not sufficient. People can share power only if they have a measure of trust in one another. By 1810, I was doubtful that our democracy could be maintained. Our nation's life hung by a thread. My neighbors here in Pittsburgh wished to secede. They saw no reason to pay taxes to a federal government that did not protect them from savages and that showed little interest in opening the great river valley to commerce. The Whiskey Insurrection was one manifestation of this, but there were others. In my book, my Captain Farrago secured a federal appointment

for Teague O'Regan as a tax collector; this resulted in O'Regan being tarred and feathered.\textsuperscript{86}

It was, however, New England that talked most of secession in my time. They expected too much, but could not have everything their own way. I do not believe that the people of New England were ever serious, for them the talk was all \textit{in terrorem}. But there were some individuals who for ambition and the hope of obtaining power from a change may actually have favored it.\textsuperscript{86}

And of course, there were the slave states, whose interests were uncongenial to those of us who were free. As Montesquieu had observed, democracy cannot tolerate slavery.\textsuperscript{87} It seemed even in my time likely that the slave states would leave or be expelled from the union. It was at that time unimaginable that anyone would fight a war to save the union.

Slavery illustrates how difficult it sometimes is for democratic government to do what has to be done. Most Americans of my generation had earlier supposed that somehow slavery would disappear. We did abolish it in Pennsylvania in my time, but gradually, and we did not actually free the slaves; many of them were sold to Southern slavemasters.\textsuperscript{88} It was not a proud moment. Captain Farrago presented some of my thoughts when he made the case for slavery in an argument with a Quaker, and then slyly extended it to justify the enslavement of whites as well as blacks.\textsuperscript{89} The Captain explained that he would prefer a white slave to a black, especially in the summer season, as being a more light and airy color.

The reason given for gradual abolition was that those who owned slaves could not afford to give them up all at once. On this principle, I have always thought it a defect in the criminal codes of most nations not to permit the perpetrators of offenses to proceed for a limited time in their larcenies or burglaries until they get their hands out of use of these pursuits, and in use in others. I contended that the principle of

\textsuperscript{85} \textit{Modern Chivalry}, supra note 1, at 267-305.
\textsuperscript{86} \textit{Id.} at 804.
\textsuperscript{88} The legislation was enacted in 1780, while Brackenridge was in Annapolis studying with Samuel Chase. It was on this account that the slave states objected to placing the capital at Philadelphia, then the largest city and centrally located. For an account of the early anti-slavery movement, see \textit{David B. Davis, The Problem of Slavery in the Age of Revolution 1770-1823}, 255-84 (1975).
\textsuperscript{89} \textit{Modern Chivalry}, supra note 1, at 136-37.
gradual abolition violated our state Constitution and that any judge should issue a writ of habeas corpus in favor of any negro held in bondage after that Constitution was adopted in 1779.\textsuperscript{90}

As Lincoln asserted, democracy could not long continue in a country half free and half slave. Somehow, between my time and 1860, the idea of America gained such a hold on the minds of many citizens that large numbers of men would give their lives to save it. But democracy was not by their sacrifice made permanent. Whether there will be sufficient cohesion in America in the future is influenced by our past, but is not controlled by it.

3. Integration

Cohesive trust requires reasonable integration of subcultures. Integration is a cooperative process. It requires time and patience. The Irish of my time were an amiable lot, but often ignorant and violent. Their children were a continuing threat to others. Public schools were later invented to tame the Irish.\textsuperscript{91} Over time, largely as a result of Irish effort, immigrants' grandchildren learned the ways of democratic citizenship and became very useful participants in American institutions. The Irish-American school marm became a stereotype.

President Jefferson tried to mend the division of Americans that Alexander Hamilton had created. When he said in his inaugural, "We are all Republicans; we are all Federalists," I supported him and proposed that what was needed to extinguish animosities was intermarriage. The Federalists having been in possession of the government had amassed wealth; we Jacobins (as the Federalists called us), on the other hand were poor, but we were then the heirs apparent of promotion. But why should a prudent Jacobin hesitate to marry a young girl of fortune just because her father was a Federalist?\textsuperscript{92} And should Federalist parents not seek poor Jacobins for sons-in-law, in light of their evident promise? By such intermarriages, the President's efforts to unite us would surely have succeeded.

But there can be cultural gulfs so broad and deep that integration is not possible. Where that exists, as perhaps it does today in what was Yugoslavia, it is impossible for different peoples to share democracy. If, as it seems, Croats and Serbs cannot trust one another, then democracy

\textsuperscript{90} Id. at 140.
\textsuperscript{91} Michael B. Katz, The Irony of Early School Reform (1968).
\textsuperscript{92} Tree of Liberty, June 20, 1801 quoted in Newlin, supra note 5, at 236.
is impossible. They must separate physically, or the despotism of one over the other will soon emerge.

There was in my time in Pittsburgh a population that we could not integrate. These were the native Americans. This difficulty was a divisive problem for the nation because those remote from it so little understood it. Europeans, such as Voltaire, and many Americans in secure places like Philadelphia persisted in trying to make peace where there could be no peace. 93

I hold that people of any tribe from any place who wish to participate in our republic should be welcomed, but it is their burden to learn the rights and the duties of citizens. This most native Americans would not do; it was their choice to resist assimilation and such resistance cannot be overcome.

Individual Indians were not less admirable than Irish and Scotsmen or Yankees, at least if measured by their own standards. The life style afforded by the culture of those in our area was equally admirable by certain standards. They did little harm to the environment, where, I am afraid, our pioneers did a great deal. The braves spent much of their time in hunting, an activity they enjoyed, and in other pleasurable competitions. They did very little work requiring physical strain or that was otherwise distasteful. The squaws did some gardening and tended children, but even then were less burdened with strain and tedium than were those of women settlers who managed home and garden while their husbands were cutting trees and breaking the sod. 94

More than a few white males preferred the Indian life style and became Indians. But, while many Indians came to our villages, almost none were able and willing to adopt our culture. Very few were willing to do farm chores or even to stay on the land long enough to grow a crop. Very few were willing to attend school or even to keep a store for

93. Brackenridge argued against Indian land titles:
   It was the common cant in Paris and Philadelphia that the natives had exclusive title under the laws of nature to this continent. This cannot bear the test of an investigation. On what is it founded? Having had a first foot on the continent? Then one Indian might claim the whole: spend his winter in the torrid zone, his summer in the frigid, and spring and fall in the temperate. Will two Indians have this right? Two tribes? Were there enough? If one less? If two less? There must be a fixed principle from which the right if it exists can be derived. It cannot be by mere hunting, but must be by cultivation of the soil and habitation. By that standard, the Indians owned very little of this continent.

LAW MISCELLANIES, supra note 38, at 265-66.

94. For an account of the life styles of Indians in the upper Ohio area, see Bil Gilbert, GOD GAVE US THIS COUNTRY: TECUMSEH AND THE FIRST AMERICAN CIVIL WAR 46-54 (1989).
regular hours, or do anything else that was by our standards generally regarded as useful. Yet they were always a menace, and many were capable of unspeakable cruelty when aroused. In York County when I was a boy, and in Pittsburgh when I was a man, I had many contacts with victims of savagery.

I also knew Indians in other ways. In 1785, a man I knew took liquor to trade at a Delaware encampment on Killbuck Island in the Ohio River. While he was there, he and a friend were killed by an Indian named Mamachtaga, who acted in a drunken rage without apparent provocation. Mamachtaga was charged and held for murder. His name signified "tree blown across" and was given him by the Delaware because they recognized him as a man of tempestuous inclination. They made no effort to secure his release.

Believing as I did that his victims had gotten him drunk, I thought he might have a defense, and I offered to present it in exchange for a few beaver skins. However, when it became apparent that he thought I was offering to secure his release in exchange for the skins, I thought it best to proceed without fee. (It did not appear to me advisable to relinquish the defense of the Indian,fee or no fee, lest it should be supposed I yielded to the popular impression of hostility to him.) Because Mamachtaga was sitting cold and naked in a root cellar, I arranged to have his skins exchanged for blankets and other comforts in his cell.

At his trial, Mamachtaga was too honest to deny killing the two men, even though he had no recollection of having done so. The court did not allow me to make the defense that he had been sold the liquor by his victims. I would in your time perhaps have had the support of Mothers Against Drunk Driving, but in my time, the defense failed. Mamachtaga said he hoped that it would nevertheless be an excuse with God. When he was sentenced to death, he said he thought the trial had been fair and that he hoped his Delaware nation would not avenge his death or come to war on his account. A child of the jailor was taken sick, and Mamachtaga offered to cure him with certain roots he could find in the woods, and this was done, with Mamachtaga making no effort to escape. When they hung him, he asked to be painted so that he might die as a warrior. The first rope they used broke and Mamachtaga fell to the ground. He rose with a smile and climbed unaided back up the ladder.95 As you see, Mamachtaga was a man of

95. This is a summary of Brackenridge's published account of the case. The Trial of Mamachtaga in Brakenridge Reader, supra note 84, at 355.
many admirable traits, but he had no ambition to become, and could not have been induced to become, a respectable citizen of Pittsburgh.

The federal government knew no more about Indians than a cow knows of Greek. The national policy was made by men who were like young women who have read romances and have as improper an idea of the Indian character in the one case, as the girl's mind has of real life in the other. The philosopher, weary of the vices of refined life, thinks to find perfect virtue in the simplicity of the unimproved state. He sees green fields and meadows in the customs and virtues of the savages. It is only experience that precludes this error. All that is good and great in man results from education; many uncivilized Indians are but a little way removed from beasts. Beasts, when incensed, can only tear and devour, but the savages apply the ingenuity of man to torture and inflict anguish.

It was among the worst features of the British that they exploited the savages and roused them against us. Had the war continued, I would not have been sorry to burn London. Not that I desire to burn anything or kill anyone, but I will acknowledge myself enraged at John Bull on account of the injustice of his claims and the barbarities of his allies. Most of you would be, too, if you were to see a single scalp taken, as I have done. Or if you were to speak, as I have to those, who have seen their friends and relatives tortured and then burned alive. From the time of the Revolution, the British waged undeclared war against us in the West by furnishing the instruments of hatcheting and scalping to the Indian tribes.

Well-meaning people in Philadelphia and in the federal government were forever making treaties with Indians. I do not say that it was unwise or unfair to deal with the Indians. And in these transactions, the utmost fair dealing ought to have been observed, which was not always the case. One such treaty-maker from Washington appears in my book. My treaty-maker is regularly victimized by phony

96. Modern Chivalry, supra note 1, at 56.
98. Brackenridge reported that the English would trade bibles, as well as money and knives, for American scalps. Modern Chivalry, supra note 1, at 626-27. Some young men discovered that a patch of muskrat hide could be passed off in Canada as a vendable American scalp. They were prosecuted for fraud, but they successfully defended on the ground that the British were counterfeiting American money, and, anyway, it was better to sell a phony scalp than a real one. Id. at 671.
99. Law Miscellanies, supra note 38, at 266.
Indians who take wampum to negotiate treaties with non-existent tribes. A man regularly in the business of deceiving this federal officer induced Teague O'Regan to pass himself off as the chief of the Kickapoo in order to receive what was a federal welfare check of its time.\textsuperscript{100}

In the same vein, I proposed that we make treaties with the bears and wolves.\textsuperscript{101} If we gave them beef, perhaps they would lay off our pigs and sheep. I did caution, however, that liquor not be provided to the animals, as a drunken bear would be very dangerous.\textsuperscript{102}

In short, however admirable the Indian chiefs may have been, we could not share power with them any more than with the wolves and bears. If there are not sufficient bonds amongst the diverse factions in a society, one or more of them will seek and obtain advantage by illicit means. Disintegration leads inevitably to despotism; indeed, every republic in history before our own was replaced by the despotism of an unreconciled faction.

Because we could not live with Tecumseh, I would have supported in the main the policy finally pursued by President Jackson to remove the Indians across the Mississippi.\textsuperscript{103} I would, however, have opposed the removal of those Indians, such as many Cherokee, who had in fact become good American citizens. There was no public purpose in moving those people, and it would have been proper for the national courts to protect them from such abuse. But for those incurably given to violence, nothing but separation could produce peace, so great was the cultural divide.

No doubt some people in your time will condemn my views on Indians as Eurocentric. And so they may in part be. Pericles was a European; if to strive to maintain a republic such as he proclaimed is Eurocentric, we on the frontier were guilty of that. If to establish the rule of law such as the jurisconsults of Rome invented in their baths is Eurocentric, we on the frontier were guilty of that, too. So, I might add, are most of the peoples of the world in your own time, of whatever nationality or skin pigmentation. Indeed, it is curious that the complaints about Eurocentrism seem to come chiefly from people employed in universities, and there is no more Eurocentric institution than the modern university wherever on the planet it may be found.

\textsuperscript{100} Modern Chivalry, \textit{supra} note 1, at 55-56.
\textsuperscript{101} \textit{Id.} at 61.
\textsuperscript{102} \textit{Id.} at 62.
\textsuperscript{103} For an account, see Francis P. Prucha, \textit{American Indian Policy in the Formative Years} 213-49 (1962).
Ideas, like wines, are not good or bad according to their nationalities. Would we reject a good coat because it was made by a weaver who was a monarchist? Our law is not worse because it was the law of England, nor are harmonies worse because composed in another country.\(^{104}\) We do not use the English language because it is superior, for the language of the Delaware may be more pleasant, but we could not by an act of volition transfer that language into common use; so it is with most of our culture. To judge the worth of anyone or anything by its place of origin is a false idea of what is right and useful to mankind.

D. Other Antidemocratic Impulses

Vulnerability to foolish ideas is not the only human trait that threatens self-government. There are at least three other impulses of which I wrote that are perpetual threats to democratic governance. These may sometimes be cloaked in a foolish theory, but not always. Each threatens and diminishes the level of trust between citizens, stimulates faction, and so diminishes the possibility of preserving democracy.

1. Fraud

First among these is the human tendency to lie. In democratic politics, the temptations are often great. Fraud in elections is at the root of all wickedness in the government of a republic. If the process of democratic election is touched corruptly, or unskillfully, the movements of the machine are throughout affected. Not only are judicious regulations by positive law are necessary to secure this, but the system of family and scholastic education ought to contemplate it.\(^{105}\)

In regard to political fraud, you today have a grievous problem. Political lying seems to be even greater than in my time. The sound bite and the television commercial are forms of fraud. A man or woman of just pride would scorn the meanness of succeeding in politics by a trick; a man or woman of proper sense would know that, in the nature of things, no good can come of elevation obtained by such means. To win an election by lying to the electorate, perhaps especially when the lie is transmitted by electronic means through films that distance the lying candidate from responsibility for his or her falsehood, is a very serious offense against the common good.

\(^{104}\) Modern Chivalry, supra note 1, at 370.  
\(^{105}\) Id. at 297.
What are we to make of a candidate whose campaign informs the electorate by means of a dramatized film clip that his opponent is responsible for gruesome crimes committed by a person released from prison during the opponent’s term in an executive office? Such savage incivility should be punished by all those who favor democracy. Success by such fraud can never be allowed to prosper. All men despise cheating at cards or other games, at least when others do it. He that is found guilty of it is turned out of polite company. And shall we restrain our indignation, or can we withhold our contempt when an individual is found cheating not at a game of chance or skill among idle men, but in the serious business of real life, and the disposition of our lives, characters, and fortunes?  

2. Intolerance

After the tendency to untruth, the human impulse most dangerous to democracy is intolerance. To hinder conciliation between factions is to prevent democracy. Democrats therefore resist the unreasoning impulses that lead even good Christians to burn each other because the one would say off and the other from. It is not democracy to vilify a person because he or she thinks differently on a measure of government. It is tyranny; and the man or woman who can do this without reason or moderation is a tyrant, and would suppress the right of private judgment if he or she had the power.

I distinguish between stricture and abuse. All depends on the manner, and the toleration. A person is not a deserter from just politics because he or she cannot agree with you. Mutual tolerance and forbearance, in our sentiments, with regard to the legality or expediency of measures, is the soul of democracy. It is that which distinguishes it from despotism, as polite manners the fine gentleman in polished life. When men or women frowned upon me because I have dissented from them in opinion, on a political matter, I discover clearly the grade of their political standing. As another would say of the man, he is no gentleman, I say he is no democrat.  

Thus, I say that he or she who would today denounce those who disagree on a point of law or politics as “racist, sexist, and homophobic,” to name the trinity of thought crimes that constitute

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106. *Id.* at 535.
107. *Modern Chivalry, supra* note 1, at 531-32.
108. To take a celebrated example close at hand, my distinguished friend and colleague, Stanley Fish, in 1990 described those who differ with him on a matter of curriculum in these
political incorrectness, is no democrat. The use of such terms is mani-
festly intended to intimidate others in the exercise of their judgment by 
exposing them to the stringent moral sanctions of ostracism, hatred, 
and contempt. Indeed, political correctness is redolent of Quixote's en-
counter with the traders of Toledo, whom he required at swordspoint to 
acknowledge the unequaled beauty of his own beloved, but never seen, 
Dulcinea. When those traders insisted that they had not seen the lady 
and offered a full confession if only they might first see her to confirm 
Quixote's account of her beauty, the intolerant knight replied:

If I were to show her to you, what merit would you have in confessing a truth so 
manifest? The essential point is that without seeing her you must believe, con-
fess, affirm, swear, and defend it, else ye have to do battle with me.¹⁰⁹

Of course, democratic politics creates great temptations to vilify 
because defamation is the visible path to office. As one of my Governor 
Farrago's adversaries explains:

The fact is, all idea of candor is out of the question—it is your places that 
we want and we care nothing about your measures. The better they are, the 
worse for us; and we are, on that account, the more disposed to find fault.

You will say we are not good citizens. But we are good partisans. There is a 
wheel within a wheel in all governments and it is the inner wheel that those out 
power have to work, and not the outer wheel. You that are in power have to turn 
that; and it is our power to stop it if we can.

Give us time and opportunities, and we [will] produc[e] party writers [capa-
ble] of mammoth . . . defamation. . . . If you wish to avoid [such] artillery, take 
our advice and resign. We have no ill will to you more than we have to a turkey 
buzzard, but because you are in our way.¹¹⁰

Is it too much to expect that at least the most elevated of democratic 
leaders would resist such motives? What are we to make of a person 
holding the highest elective office in the world who says that he will do 
whatever it takes to be re-elected? Do those words not entitle his adver-
saries to do whatever it takes to assure his defeat?

The politics of vilification is perhaps a fashion of the moment; it

¹⁰⁹ Don Quixote, supra note 54, at ch. 4.
¹¹⁰ Modern Chivalry, supra note 1, at 612-14.
was far worse in my time. Indeed, I received more than my share of publicly expressed hatred. When I supported ratification of the Constitution, it was said that I would “bark at the sun and bay at the moon could I thereby secure a smile from my federalist patrons.”111 When I worked with a Jewish editor to establish a paper named The Tree of Liberty, I was called an infidel;112 it was said that I was hankering after Jews; that I had become a Jew; that I was building a synagogue; that I had submitted to circumcision by a rabbi; that I expected every man, woman and child would do the same; that I would require every person in Pittsburgh to be circumcised without benefit of clergy.113 When I was appointed to the Supreme Court of this Commonwealth, it was reported that I was seen drunk and naked. In 1800, one of a political adversary referring to the events surrounding my role as a mediator in the Whiskey Insurrection of 1794 wrote: “[Judge Brackenridge] will oblige a number of his subscribers by stating in his next paper the names of the persons whose heads he cut off and laid like turnips under his Tree of Liberty. We suggest the propriety of adding a Guillotine to the Tree, and a headless trunk or two in the background . . . .”114 Cruellest of all, one of my fellow citizens described me as a Haberdasher of Pronouns.115

Indeed, in 1800, the Pittsburgh Gazette was devoted largely to vituperation against me and my candidate for President, Thomas Jefferson. It seemed to me that I was in the situation of a traveller on the island of Borneo, with a thousand monkeys leaping and chattering amongst the trees, and incommoding the caravan by the fall of excrement. I could not even distinguish them by name. They were all of the Monkey tribe and that is all one could say about it.116

I lived in a time of vituperation. For comparison, I offer you the words of the Federalist President of the University of North Carolina, Joseph Caldwell, who was my fellow Princetonian. When Jeffersonian members of the North Carolina legislature observed that the college had a tendency to direct its students toward aristocracy, Caldwell wrote to the legislature:

Be assured that the stupidity of your politics shall be known. The grave may

111. Newlin, supra note 5, at 104.
112. Id. at 214.
113. Marder, supra note 14, at 56.
114. Newlin, supra note 5, at 216.
115. Marder, supra note 14, at 56.
116. Newlin, supra note 5, at 220.
Such talk deepens the hostility between factions. It can so rend the social fabric that democracy is impossible. It came close to happening in my time.

Alas, in all times there is an industry of vilification that is the press. The health of democracy depends in significant measure on the professional responsibility of journalists. My Captain Farrago, when he was elected Governor, sought to enlist the cooperation of the journalists, not in supporting his own programs, but in promoting healthy discourse on the real issues of the time.

"Editor," said he, "your good sense I know, and your patriotism, but I am afraid of your being carried away with the spirit of the times. I should think the greatest freedom may be used regarding the expediency or constitutionality of legislation, [and that] the public conduct of men in office may be canvassed, [but] I should not think the public had any interest in their amours, their costume, as for instance the cut of their pantaloons, or peccadilloes, even in the breach of decorum. In these matters, at least, you should be guided by the poet: nothing extenuate or set down naught in malice. Especially should you be careful in respect of the elementary principles and constitutions of government itself, and the prostration of those establishments on which the security of property, reputation and liberty depends."

Alas, my editor replied to Governor Farrago: "You assign us a very narrow sphere, indeed and you will strike away from us the footstool of all our popularity." Who cares, he asked in the spirit of the National Inquirer of your day, "whether you acquire territory for the republic or lose it, but what is the fashion of the cape of your coat? What is it whether you veto or approve a remedial act, but whether you keep a mistress or ever had one. We must please our subscribers. Everybody can understand scurrility, but it requires one to knit the brow to take up a report on the finances."

The Governor asked: "Can't you fill up your journal with useful information or old love stories and adventures?" No, the Editor explained: "The public would not take half the interest in it. Finding fault is a secret satisfaction and the source of great delight to the human mind. Hence slanders in society. Why not much more in public

117. 1 Kemp P. Battle, History of the University of North Carolina 147 (1907).
life? The fact is a newspaper is a battery and it must have something to batter at.”118 And your press today, for all its transgressions, is less destructive than the press of my day.

3. Vanity

If rage and the urge to vilify is destructive of democracy, so must be that form of vanity that makes citizens take deep offense at trivial slights. It is such vanity that is the third antidemocratic impulse of which I wrote. Overreaction to occasional epithets or profane outbursts harms the social conditions of mutual trust that sustain democracy. It is too much to ask of fellow citizens that they be always obedient to the standards of civility imposed upon them by others. Some so-called “hate speech” is nothing more than intemperate language uttered in moments of loss of control. Democrats do not take such utterances seriously.

We had a notable instance of overreaction to an insult during the Whiskey Insurrection. A Quaker farmer over in Washington County described the standing committee of the rebel group as a “scrub congress.” The committee exploded with rage and seventy armed men marched on his farm for the purpose of burning his house, barn, and mill. I went there to advocate calm. I reminded them of Oliver Cromwell’s response when told that another Puritan leader had said that Cromwell could kiss his ass: Cromwell said, “you may tell him to kiss mine.” Since the Quaker had called them a scrub Congress, I urged that he be sentenced to be known as a scrub himself. Happily, it was decided not to do any burning that night.119

I also tried to laugh off the vituperative attacks on me. Some of the vilification came from a Pittsburgh editor writing under the pseudonym, Peter Porcupine, in a publication he called Porcupine’s Gazette. I wrote that Pittsburgh had been described as Homer described Greece, as a town of beautiful women; but to that might now be added that it is a village of men of refined wit. Their sallies ought not be lost, but should be published under the title Pittsburghiana. Subscriptions might be obtained for a neat Octavo volume by Peter Polecat, gentleman.120 Also, I wrote a poem comparing my experience with another I had as a

118. Modern Chivalry, supra note 1, at 560-61.
120. Id. at 222-23.
child in York County, when I sought to caress and kiss a handsome rabbit only to find that it was a skunk. That poem concluded:

I thought me o' what happen'd early,
When skunkie pish'd upon me fairly
When I had ta'en it for a rabbit,
And did nae think it would grow crabbit.
Sae frae the verra self same things,
Our gude and evil aften springs,
Our pleasure and our pain thegither. . .
[For] still the consolation's ta'en,
Hard words, and language break nae bane.
While I can laugh and take a drink,
I'll be to them that evil think.
Here's to the bardie; fill the cogue,
Or send and get anither jug:
The best way is to laugh at fools:
It is the wisdom of the schools,
For mirth tak's out the sting o' hurt,
And mental wounds are this way cur'd. 121

Many of my contemporaries adhered to a different practice in dealing with insults. Duelling was accepted as the appropriate response to an affront. The practice seemed in part to be a means by which males could secure female approval; the women of my world especially admired duelling.122 My own view of the practice123 was expressed by my Captain Farrago, when he received a challenge. The Captain declined, explaining that it was no good to him to kill the challenger since the challenger was not good to eat. Moreover, Farrago did not like to stand in harm's way. He suggested: "If you want to try your pistols, take some object, a tree or a barn door about my dimensions. If you hit that, send me word, and I shall acknowledge that if I had been in the same place, you might also have hit me."124 I also thought it unfair that men of unequal bulk should use the same weapons: bigger duelists should be given guns of greater length or bore than those provided to smaller duelists.125

It seems that some women in your time are especially quick to find a slight in the utterances of men. I have heard, for example, of women

121. Pittsburgh Gazette, 1801, reprinted in Brackenridge Reader, supra note 84, at 372-73.
122. Pittsburgh Gazette, June 13, 1789, quoted in Marder, supra note 14, at 47.
123. Brackenridge Reader, supra note 84, at 4.
124. Modern Chivalry, supra note 1, at 52.
125. Id. at 54.
taking affront at being addressed as ladies. Such women might wish to consider adopting the practice of dueling as a means to control such insults. It was part of the tradition of chivalry that the smaller the aggravation, the greater the sense of honor manifested by the challenger. Anyone can resent an intentional affront, but to kill a man where there is no affront at all shows great sensibility. It was immaterial whether there was or was not an injury; it mattered only whether the offended person chose to think that there was.126 Because this assessment was entirely “reader- or auditor-centered,” it could now be described as a “post-modern” approach to insults. Perhaps we may expect the advent of some form of post-modern duels.

A problem of your time is group vanity. Not just individuals, but whole groups of people seem prone to take offense where none is intended. Perhaps it is also fashionably post-modern to detect new insults in old and previously inoffensive utterances. Thus, thinking to suppress certain group insults, the Michigan Civil Rights Commission recently asked Eastern Michigan University to forego the use of the word “Hurons” to describe its athletic teams.127 One may be certain that no offense was intended when the name Hurons was selected. I wonder how many real Hurons have been consulted in this matter, and how they might feel. There were in fact almost no Hurons extant in my time because they had been butchered by the Miami in 1649.128 I know what Teague O'Regan would do if he lived in your time: he would bring a class action against the University of Notre Dame to enjoin the use of the disparaging term, “Fighting Irish,” unless of course an appropriate compensation was paid for the pain and suffering of his humiliation from their use of his name.

E. Democratic Leadership

1. Failings of Democratic Legislation

The universal capacity of humans to believe nonsense, fortified by the impulses to lie and to indulge one’s rage and vanity, assures shortfall in the performance of democratic political institutions. An immediate consequence of these traits is that public offices are too often filled by the wrong persons.

126. Id. at 53.
128. The Hurons surviving the slaughter formed the Wyandott tribe and settled in southern Michigan and Ohio. GILBERT, supra note 97, at 40.
Thus, my ignorant and corrupt Teague O'Regan, who was incapable of knowing the public interest had it ever entered his mind to serve it, was forever attracting political support. In 1798, I assisted in the election of Albert Gallatin to Congress, and he was opposed by a man accurately described with Governor McKean's favorite insult, that he was a clodpole. I would tremble to think of a seat in the legislature of the Union not knowing more than Gallatin's opponent. Perhaps from what he knew of Congress, the opponent may have thought it but a game of cudgeling to act a part there, one activity for which he was fit. Indeed, it seemed pretty evident that a bear garden would suit some Congressmen better than a hall of philosophers.

For this reason, democratic legislation is often a farce. For example, in 1779, legislatures from one end of America to the other were regulating the prices of commodities at a standing value while the medium of circulation continued to depreciate. The thing was absurd. Yet Thomas Paine, an uncommon but uninformed man, was an enthusiast for the project. Its result was that neither barley nor flour was brought to market. As there was no reasoning with the belly, the projectors were undeceived within ten days. I note that after over two centuries, matters have not improved; your President proposed last year to limit the credit card interest rate, precisely the same blunder that Thomas Paine led us to attempt in 1779, with the same result: the proponent of such a farce was quickly embarrassed by the reality that credit would be less available at the lower price.

How shall we account for the eternal babbling in our public bodies? Some have thought it was proof of a hypothesis of Darwin that men have once been magpies or parrots. I am of the opinion that it resolves itself into one of two natural causes, want of self-denial or want of sense. I know there are babbling schools. I would commend brevity and truth, not the diffuse harangue, with sophisms and errors.

Perhaps the answer is to reduce the ratio of representation; fewer to speak, there would be less said. Many hands make a light work. Or could we not give a power to the chair to knock down a member who has trespassed on the patience of the house? Alas, there are some tongues, according to the poet, that are like a stream "Which runs, and runs, and ever will run on."

129. Newlin, supra note 5, at 268.
130. The Aurora, July 28, 1798.
131. Modern Chivalry, supra note 1, at 544.
132. Id. at 801-02.
In legislation, there is no difference between good sense and public virtue. Knaves and fools differ only in intent: the fool is a knave without meaning to be so.\textsuperscript{133} It is the part of the faithful representative to respect the rights, but to distrust the impulses of the people. A man of talents often has no prospect in a public body but to make himself unpopular. It was on this ground that my Captain Farrago sought to dissuade O'Regan from politics:

When a man becomes a member of a public body, he is like a raccoon or other beast that climbs up the fork of a tree; the boys pushing at him with pitchforks or throwing stones or shooting at him, the dogs barking in the meantime. One will find fault with your not speaking; another with your speaking if you speak at all. They will have you in the newspapers, and ridicule you as a perfect beast.\textsuperscript{134}

A representative in the deliberative assemblies is too often a slave sent forward to serve a party founded at home.\textsuperscript{135}

2. \textit{Limits of Political Equality: Qualifications for Leadership}

For all these reasons, wise leadership is essential. I said that all must have a voice in democracy. But I did not say an equal voice. Some men and women have stronger lungs than others, and can express more forcibly their opinions of public affairs. Others, though they may not speak very loud, yet have a faculty of saying more in a short time; and even in the case of others, who speak little or none at all, yet what they do say containing good sense, comes with greater weight. But their rights being equal, what great harm if they are unequally exercised? Is it necessary that every man or woman should become a statesman? No more than that every man or woman should be a poet or painter.\textsuperscript{136}

People are more disposed to trust one of their own class than those who may affect to be superior. There is indeed in every government a patrician class against whom the multitude naturally militates; and hence a perpetual war: the aristocrats endeavoring to detrude the people and the people contending to obtrude themselves. As one of Teague O'Regan's supporters put it: it is a very strange thing that after having conquered Burgoyne and Cornwallis, and got a government of our own,

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} at 667.
\item \textsuperscript{134} \textit{Modern Chivalry}, \textit{supra} note 1, at 17.
\item \textsuperscript{135} \textit{Id.} at 668.
\item \textsuperscript{136} \textit{Id.} at 20.
\end{itemize}
we cannot put in it whom we please.137 In my own time, members of
the Cincinnati Society pretended to special status based on their rank
in General Washington's army and sought to advance one another's
interests against those of lesser status. My Captain Farrago noted that
the Society's individual members did not stand on their own merit, nor
did they share any humane or charitable purpose. As might be said to a
lodge or a sorority of your own time, the Captain said to the Cincin-
nati: "I have not heard of any bridges you have built, or canals dug, . . .
. I do not see what use your institution is . . ."138

Also in my time, Alexander Hamilton initiated a system of finance
that introduced the love of unequal wealth, destroyed the spirit of com-
mon industry, and planted that of lottery in the human heart.139 This
was not good for democracy because it created a class of selfish persons
who do not see that their own welfare and happiness, and especially
that of their children, is linked to that of those less fortunate than
themselves. The possession of wealth is neither good or evil in itself,140
but great disparities diminish the bonds of common interest that enable
us to preserve democracy.

Because Hamiltonism abides, there is often wealth without taste or
talent. I have no idea that because a man lives in a great house and has
a cluster of bricks or stones about his backside that he is therefore fit to
be a democratic legislator. Men associate with their own persons the
adventitious circumstances of birth and fortune, so that a fellow blow-
ing with fat and repletion conceives himself superior to the poor lean
man that lodges in an inferior mansion.

Must not such feelings of arrogance animate those of your represen-
tatives who spend a seemingly infinite amount of public money on
elaborate health care for elderly men, who are of little value to others,
while there is nothing left to care for the infants of the poor who are
the nation's future? Or who if not "blowing with fat and repletion"
committed a trillion public dollars to insure large private deposits in
banks that were permitted to speculate on high returns earned at risk
only to the public treasury?

There need not be government by ignorance or by wealth. There
is, as in all cases, a medium. Genius and virtue are independent of rank
and fortune, and it is neither the opulent nor the indigent, but rather

137. Id. at 16.
138. Id. at 71.
139. Id. at 281.
140. LAW MISCELLANIES, supra note 38, at xxv.
the man or woman of ability and integrity that ought to be called forth to serve their country. And, while on one hand the aristocratic part of the government arrogates a right to represent; on the other hand, the democratic contends the point; and from this conjunction and opposition of forces there is produced compound resolution, which carries the object in an intermediate direction. When we see therefore a Teague O'Regan lifted up, the philosopher will reflect that it is to balance some purse-proud fellow, equally as ignorant that comes down from the sphere of aristocratic interest. And it is right it should be so, for by this fermentation, the spirit of democracy is kept alive.\textsuperscript{141}

I do not say that those put forward to lead democratic government should be philosophers. A mere philosopher is often but a fool in matters of business. Even in speculation, he sometimes imagines nonsense. Sir Thomas More's \textit{Utopia} has become proverbial; Harrington's \textit{Oceana} has become a model for no government. Locke's Project was tried in South Carolina. It was found wanting. There is such a thing as practical sense, and it is this that is needed in democratic governance.\textsuperscript{142} Thomas Paine in my time was an ardent and admirable democrat and philanthropist, but he had insufficiently considered man's nature, before he began to write \textit{Common Sense}. It is easier to destroy than to substitute. Imagination and experiment are distinct things.\textsuperscript{143} Was there ever a greater knight-errant than Karl Marx? The philosopher-kings of your time seem oftentimes even to be lacking in a discernible program of governance. Although these philosophers cannot be taken seriously as democratic leaders, I acknowledge that there is a natural alliance between liberty and letters. Men of letters are seldom men of wealth and those naturally ally themselves with the democratic interest in a commonwealth.\textsuperscript{144}

Thankfully, there are individuals in society who prefer honor to wealth; who cultivate political studies as a branch of literary pursuits; who are persons of sound judgment; and who offer themselves to serve in public bodies in order to have an opportunity of discovering their knowledge and exercising their judgment.\textsuperscript{145} Practical political studies ought to be the great object with the generous youth of a republic; not for the sake of place or profit; but for the sake of judging right, and

\textsuperscript{141} \textit{Modern Chivalry}, supra note 1, at 19.
\textsuperscript{142} \textit{Id.} at 414.
\textsuperscript{143} \textit{Id.} at 573.
\textsuperscript{144} \textit{Id.} at 401.
\textsuperscript{145} \textit{Id.} at 21.
preserving the constitution inviolate.\textsuperscript{146} That indeed was the purpose of the law teachers of my generation, George Wythe, James Wilson, James Kent, St. George Tucker, and others.\textsuperscript{147} Wilson a great lawyer and a Justice, as well as a greater orator\textsuperscript{148} said to his students at the University of Pennsylvania in 1790:

[I]t is the science of . . . law should in some measure be the study of every free citizen, and of every free man. Every free citizen . . . has duties to perform and rights to claim. . . . On the public mind one great truth can never be too deeply impressed, that the weight of the government of the United States, and of each state . . . rests on the shoulders of the people.\textsuperscript{149}

I do not suppose, however, that education alone can make one fit to be a democratic leader, although some young men seem to think so. There is nothing so fleeting as sublunary joys; and of all these, popularity is the most evanescent.\textsuperscript{150} It is to young men, chiefly, that the glare of eminence in political life is at all captivating, and from the fire and passion of that age and gender, they are the least fit for it. Those who confine themselves to a profession until they have arrived at the calm of years are most likely to consult their own happiness and at the same time the interests of the public in deciding to enter politics. Before that time, a person cannot possess that self-denial and humility of spirit which experience in life gives, so as to render him or her a useful democratic leader.\textsuperscript{151}

I note that a candidate for President in 1992 boasts that, at forty three, he is a veteran of seventeen political campaigns. How can a person who has stood for election sixteen times have acquired or retained any sense of his own dimensions and limitations? That he would boast of such experience is itself proof of a deep unawareness of the nature of public responsibility and the duty of self-restraint.

Education for democratic leadership will not, however, assure opportunity for public service. It must be chagrining to these and hurtful to the public to see those who have no talent this way, and ought to have no taste, preposterously obtrude themselves upon the government as my Teague O'Regan was prone to do. It is the same as if a brick

\textsuperscript{146} Id. at 433.
\textsuperscript{148} \textbf{LAW MISCELLANIES}, supra note 38, at 27.
\textsuperscript{149} \textbf{LAW MISCELLANIES}, supra note 38, at 33.
\textsuperscript{150} \textbf{MODERN CHIVALRY}, supra note 1, at 779.
\textsuperscript{151} \textbf{LAW MISCELLANIES}, supra note 38, at viii.
layer should usurp the office of tailor and come with his square and perpendicular to take the measure of a pair of breeches. Given the nature of things, let no man who means well to the commonwealth and offers to serve it be hurt in his mind when some one of meaner talents is preferred. The people are a sovereign, and greatly despotic, but in the main just.

F. Law in a Democracy

1. The Need for a Constitution

Recognizing the limits of democratic leadership, we in my time ratified the Constitution of the United States. In linking the future of our own Commonwealth to others and in establishing the means to assure to each a republican form of government, we created the balance wheels that kept our democracy from running loose.

Of course, there were many antifederalists who opposed the Constitution, especially in the West. I attempted to restate their views thus:

Who is it that drives a shuttle or keeps a school, can expect to be elected president of the United States? This government is made for men of property, and those who have nothing to lose have no business with it. Nay, it will prevent those revolutions where men have an opportunity of scrambling for a living. It is a hard thing to be obliged to drudge on from day to day, and make a fortune by the common means of industry. I should like to live in the same state with the children of Israel, before the time of the judges, “where every man did what was right in his own eyes.” If this should come to be the case amongst us, I know what I shall do. I will make a grab on the stores at Greensburgh.

Perhaps the most elevated moments of my life were on June 20, 1788, the day we received the news that Virginia had ratified the Constitution, thereby assuring its success. Everyone in Pittsburgh and in the surrounding area went that night up Grant Hill to celebrate. There were well over a thousand persons there. Because I had been the legislator from Pittsburgh who had supported ratification, I was asked to speak on that occasion. I concluded my speech with these words:

... [Y]ou are now citizens of a new empire: an empire not the effect of chance, nor hewn out by the sword; but formed by the skill of sages, and the design of wise men. You are to become a great people.
But who growls? O, ignorance, where is thy cave? O, frogs of the marsh, local

152. Modern Chivalry, supra note 1, at 20.
153. Id. at 21.
154. Pittsburgh Gazette, Mar. 15, 1788.
demagogues, insidious declaimers, your pond is about to be dried up, no more amongst the weeds and in the muddy fluid, shall you lift your hoarse voice. The marsh is drained, the dome aspires, and the bright tinges of the rising day, gild its summits.\textsuperscript{158}

The people cheered. Hats were thrown in the air. Nine bonfires were lit, one for each state that had ratified. Then four more fires for the states now expected to ratify. The youths danced on the green. And the Indian chiefs assembled nearby concluded that this must indeed be a great council.\textsuperscript{156}

2. \textit{Antilegalism Abides}

And so in America, as Tom Paine said, law became the king!\textsuperscript{157} But the federal Constitution was not alone sufficient to protect democracy in Pennsylvania. It very nearly ran amuck in the first years after ratification as the people of Pennsylvania sought to destroy their institutions. I wrote about the events of that time in the last part of \textit{Modern Chivalry}. At one time, incendiaries in my village decided to burn the college because, they said, all learning is a nuisance. When Captain Farrago, to forestall destruction, persuaded them that the school had been reduced to insignificance and its building would soon be available for other uses, they burned the church instead.\textsuperscript{158} One villager at the time complained to the Captain of a cruel defamation: "Here I am an honest republican, a good citizen, and yet it is reported of me that I read books. I am ruined; I am undone; I shall lose my election; and the good will of all my neighbors; and the confidence of posterity."\textsuperscript{159}

So hostile had the environment become that a man butted by a ram while walking home in the evening called out for help: "is there none of the down county boys here?" In the villages, lawyers were half starved. Many of the small controversies that had yet arisen were determined by arbitration. A lawyer, or at least one calling himself such, was applied to by his client, being of strong body, who had no money, but offered to do all the lawyer's fighting for him. That will not do, said the wary advocate, for you may not always be at hand when I need protection from insults and assaults. Better that you permit me to overpower and beat yourself and, as your power is incontestible, it will se-

\textsuperscript{155.} \textit{Pittsburgh Gazette}, June 28, 1788.  
\textsuperscript{156.} \textit{Newlin, supra note 5, at 105-06.}  
\textsuperscript{157.} \textit{The Life and Major Writings of Thomas Paine} 29 (P. Foner ed., 1948).  
\textsuperscript{158.} \textit{Modern Chivalry, supra note 1, at 252.}  
\textsuperscript{159.} \textit{Id.} at 254.
cure me, for no one will molest me ever after. But when it appeared to
the public that the battle was a sham, the bruise sued the lawyer for
assault. He, however, failed to recover damages, on the principle of
assumed risk.\footnote{160}

However, it was found that in a situation of things so approaching
to a state of nature, the weak were a prey to the strong and oftentimes
among the strong, there was much wrong done. Much maiming had
prevailed. When the people had discovered these costs of allowing
themselves to be governed by the Teagues O'Regan of the world, Capt-
ain Farrago was elected Governor and the blind lawyer was made
Chief Justice. The people began to wish to have fixed principles and
permanent tribunals, to govern and guard life, reputation, and prop-
erty. They had the idea that courts of justice were the best preserva-
tives of a republic and barriers against despotism. They had got in their
heads a Latin maxim: it is the worst slavery where the law is uncertain.
They had found arbitration to decide like the oscillation of a pendulum
and all began to call out for something more stable.\footnote{161}

I was not opposed to alternative dispute resolution, as you now call
arbitration, in its proper sphere. A professional man thinks himself
learned, because he is technical and knows the terms of his art, as a
workman his tools, but he has become shackled in forms, and a slave to
precedents, and has no horizon of original thought and comprehension.
He oft times cannot recur to reason, the source of improvement of the
law and nation.\footnote{162} Nevertheless, I argued in Modern Chivalry that pro-
fessional judges are a necessity in a constitutional democracy.

3. Indeterminacy

There is of course much uncertainty or indeterminacy in the law,
perhaps especially in Constitutional Law. Law depends on the spirit in
the mind of the person construing it. No two judges or two lawyers will
agree precisely even in their statements of two reported cases. Some
particulars omitted or added make the variance. What informs the le-
gal text is reason. Hence the maxim that nothing which is against rea-
son can be law.

Even unwritten law can, however, provide a higher degree of cer-
tainty and hence of freedom than where there are no institutions or

\footnote{160}{Id. at 635-36.}
\footnote{161}{Id. at 541.}
\footnote{162}{Id. at 543.}
rules at all, as where reliance is placed upon lay arbitrators. As usage and custom based on reason are acknowledged as moral claims on those who apply the lash of power, a measure of certainty is secured, as are the liberty, property and reputations of citizens. Lay arbitrators are inferior to men and women who have devoted their lives to the study of law and to the perfect knowledge of which they do not find a lifetime sufficient. The imperfection of their human judgment produces uncertainty, but it is the aim of administration of the law to guard their consciences, and that is the buoy by which to steer. 163

Some of those who opposed the Constitution complained that it was insufficient in detail, that too much was left unwritten. They fretted that the Constitution as proposed had no bill of rights. There was no occasion for a bill of wrongs, for we all knew that there would be wrongs enough. But a bill of rights is a schedule of powers that Congress, a body with limited power, does not have. It is like the minister who, having completed the presentation of all that was in the text of his sermon undertook then to present all that was not in it. Thus, there was not the least provision in the Constitution for the privilege of shaving a beard. This is not to say that the Bill of Rights was undesirable, only that it was unnecessary.

You have in your time men and women who deny the efficacy of legal texts and traditions. We knew such men in my time as well. Rousseau and Godwin, for examples, seldom had more in view than to support paradoxes. Godwin in his Political Justice with great brilliancy supports the idea of deciding every case on its own peculiar circumstances according to the notions of equity which may be found in the breast of the judge. But that is what was done by the Sultans in Constantinople. It is to avoid this that laws are enacted, and professional morality is invoked to secure uniformity of construction in a free country in which citizens are not subject to ukase.

The Constitution has now stood for two centuries. In my later years, I could foresee its early dissolution, 164 but I was wrong. How much is owed to the Constitution will, of course, never be known, but surely without it, the history of people on this continent and in the world would be different than it has been. May it last forever would be my wish.

163. Id. at 543.
164. Id. at 576.
4. *The Judiciary*

The durability of Constitutions must depend heavily on the efficacy and wisdom of the judicial institutions that enforce them. It was the first and major error of President Jefferson to make his attack upon the federal judiciary, which was the belt of Protagoras to keep together the bundle of sticks which had been so well arranged by the Constitution.\(^{165}\)

Any animal of the human species, with a mediocrity of talents, may come to be a judge, and may appear pretty well in a book of reports, provided he or she cites precedents. The knowledge of all law goes but a little way to discerning the justice of the cause. Because the application of the rule to the case is the province of judgment. Hence it is that if my cause is good and I am to have my choice of two judges, the one of great legal science, but deficient in natural judgment; the other of good natural judgment but of no legal knowledge, I would take the one that had what we call common sense.\(^{166}\)

Although judging in a democracy does not require exceptional intellect, it does in addition to sound judgment require a willingness and ability to silence personal and factious considerations that may seek to influence one’s decision.\(^{167}\) I once participated in breaking a judge. Judge Addison, while on the bench, remained a partisan. He was given to summoning grand juries to hear his harangues, and even used his office to harass political adversaries.\(^{168}\) Because I complained about

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165. *Id.* at 786.
166. *Id.* at 616-17.
167. Breckenridge gave O'Regan a brief judicial career. He, however, decided only one case. Perhaps I might provide you the report of *Slouch v. Crouch*. This was an action for assault and battery. The evidence was that upon some ill words by Crouch, Grouch made a blow at him with a cudgel. Crouch crouching let the blow slip over him and it struck Slouch, breaking open his head. Slouch brought suit against Crouch. The lawyer for the defendant moved for a nonsuit, urging that the action should have been against Grouch who swung the stick. The lawyer for the plaintiff contended that Crouch who gave the ill words that occasioned the outrage was responsible for all the consequences and had no right to take his head out of the way, but that it ought to have remained at its post so that no blow would have fallen on Slouch. As the lawyers so contended, Judge O'Regan became inflamed: “By my showl," said he, “I will be after bating de whole o’d you togeder. A parcel of spalpeens and bog-trotters, to be coming here bodering me wid your quarrels and your explanations, better fight it out like men of honour wid a shilelah, and not come here to trouble de court about it.” In the resulting mayhem, Judge O'Regan was unbenched. *Id.* at 546.
168. *Newlin*, supra note 5, at 224-35. Addison was not alone among Federalist judges in this propensity. Tapping Reeve, a Federalist judge in Connecticut so harangued a grand jury in a sedition prosecution against Mr. Jefferson that the grand jury returned an indictment against the judge. Reeve accused Jefferson of “corrupting and subverting the liberties of the people by de-
Judge Addison, leading the legislature to unbench him, the Federalists later sought my removal from the Supreme Court of Pennsylvania. Partisanship is the original sin of judging. There is such a thing as patriotism on the bench and it is a form of self-restraint. I moved to Carlisle after becoming a judge, and thereafter shunned social occasions lest some companion might some day be a suitor in court.

There is no doubt that in my time judging and politics were too closely linked and the linkage caused mistrust, a problem that abides in your time. Your President now makes ideology the paramount qualification for judicial office. Despite the provision we made in the Constitution to require the consent of the Senate, your Senate allows the President to do this. The Senate fails to insist that the President nominate persons whom all would agree are well-qualified for judicial appointments. Instead of performing its assigned role, your Senate creates a circus for television. Was there ever in any democratic legislative body any more senseless babble than was heard and witnessed in the most recent nomination to the Supreme Court? I offer it as a good rule that there be no hearings on the confirmation of judges; if ever a hearing seems needed, the wrong nomination was made and it should be returned to the President without confirmation.

I do not, however, suggest that judicial appointments or conduct can ever be separated wholly from political considerations. We assured that the linkage would remain by establishing in the Constitution the power of the Court to review legislation. There was Athenian precedent for this; there, any citizen could appeal even from a judgment of the whole people when a new decree was contrary to the law already established. Law was said to be “an invisible sovereign” to “maintain the ancient and permanent decisions of the people against their present and transient inclinations.” But judicial review is antidemocratic. And because it is antidemocratic, any judicial decision invalidating legislation should be made only in a plain and broad case clearly justifying the decision. A legislature will not and should not be asked to yield to anything but that which will carry the sense of the community with it. If a court makes the construction of the constitution too tight, the

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169. Newlin, supra note 5, at 242-46.
170. Id. at 280.
171. Modern Chivalry, supra note 1, at 566-67.
172. Law Miscellancies, supra note 38, at 67.
public mind will revolt against it. Driven to a contention, much that is
valuable in the constitution might be lost in that torrent which an over-
strained construction had produced, like waters in a dam without a
flood-gate. Democracy must move in the groove of our Constitution;
like one of the heavenly bodies preserving its orbit, and bidding fair for
perpetuity.173

An overreaching of the Court seems indeed to be an important
cause of your present distress over the appointments to the Supreme
Court. If the President is making inappropriate nominations, the Court
itself must bear some part of the responsibility, for much of the politics
is a reaction to the excessive opinion of the Court in Roe v. Wade.174 I
do not say that the result in that case was wrong, but the opinion was
so broad that it purported to take all power away from the legislatures
to deal with a range of issues on which reasonable democrats might
differ.

That was unwise, as we now can plainly see. Its effect was to call
into being as an adversary of the Supreme Court a whole political
movement not previously known in this country. The Right to Life has
become a new chivalry, a cause with an aim as undefined and forlorn
as that of Quixote himself. It is a reaction against a Constitution
screwed too tight, one that was too much a dam, with too small a
floodgate.

I do not say that the Right to Life is necessarily an irrational
claim. Indeed, in my time I opposed capital punishment as a slovenly
way of reforming a man,175 a position that I presume to be shared by
anyone committed to the saving of human life. Indeed, matrimony was
in my time suggested as an obligation of every citizen for the sake of
peopling a new country. It behooved every man and woman to see to it
that they multiplied themselves. To abort was therefore shocking to
18th Century consciences.

But I was frankly never convinced. When I saw nature using
means to put people out of the world by pestilence, and earthquake, I
could not be certain that it was the will of Providence there should be
yet more brought into it. And as it is of no consequence to such as have
not yet come into life whether they are come at all, I did not see that
those who did not come had reason to complain of their non-exis-

173. Modern Chivalry, supra note 1, at 545.
175. Modern Chivalry, supra note 1, at 731.
Hence, I regard the claims of those knights-errant for Life as excessive.

On the whole, I therefore think that the competing knights who champion the cause of Choice have a more solid claim. Yet, Choice, although a glib slogan, justifies no absolute. Certainly people of either gender should control their bodies, but not always. Many men have been required, and will be required, to risk their bodies and lives for a public purpose, or even for private ones of their employers. In almost every instance of abortion, the woman exercised a choice that led to the pregnancy; what is complained of is any requirement that she bear the consequences of a choice she has already made. What is wanted is not privacy but the right to sexual gratification without responsibility. Perhaps she should have it, but can this be a fundamental right immune to any qualification to take account of other interests? Even in a society that has too many babies, it may be important that parenthood be thought to be an important duty and not merely a right; mothers perhaps ought not be encouraged to think they have babies merely to please themselves. Moreover, parenthood being the primary purpose of marriage, is it not fraud for a married woman to abort without disclosing her action to the husband with whom she resides? Is that not a justification for divorce that he is entitled to know?

These are questions that are proper ones for a legislature, not primarily for a court. "Choice," as the reaction to Roe v. Wade has proved, is not an absolute that commands the general community acceptance necessary to enable a court to embrace it as a matter of constitutional law. However given to farce, legislatures remain the one mechanism by which a democratic people can compose their differences on such issues.

5. The Legal Profession

Whether the judiciary will exercise the wisdom to maintain its place in the constitutional scheme amidst all the travail of democratic politics depends in turn on the legal profession of which the judiciary is a part. There was in my time at least as much hostility to lawyers as there is in yours. The Quakers oft repeated: "Woe unto you also, ye lawyers; for ye load men with burthens grievous to be borne; and ye yourselves touch not the burthen with one of your fingers." 177 Even my

176. Id. at 795-96.
177. LAW MISCELLANIES, supra note 38, at xix.
Captain Farrago was sympathetic to the Quaker view when he told his villagers:

"In the mid-land settlements, they are going to burn the lawyers, as they did the witches in New England; and as to judges, it is as much as a man's life is worth to resemble one: . . . A lawyer indeed! . . . The hurricane which carries away the haystack is nothing to the breath of . . . [a lawyer] . . . that bears away people's property by the fees which he exacts."\(^{178}\)

Nevertheless, in a republic, law must be a respectable profession. The French Revolution, which many of us for a time admired greatly, eliminated French lawyers.\(^ {179}\) Without lawyers, France had no stabilizing legal institutions. And what then could you expect but that the excess of democracy would produce first chaos and then despotism?\(^ {180}\)

The radical *Aurora* of Philadelphia wrote in 1804:

"We have been more fortunate than France. The military conspirators, the mercantile body, the clergy, the speculators have all failed to reduce us to the condition of vassals and vilians; we continue free citizens in spite of their reiterated attacks but we have yet to bring to a due sense of their equality with the rest of their fellow citizens a corps, which from its peculiar character is at this time both formidable and dangerous to the public prosperity—I mean the lawyer's corps."\(^ {181}\)

The *Aurora* was not all wrong. Then as now, many lawyers charged too much for their services and some citizens could secure no representation for just claims. Yet I have no vulgar prejudice against lawyers as some people have; there are good and bad of them as of other professions.\(^ {182}\) They are necessary to instruct the people, including the judges, on their duties as well as their rights. They bring reason where unreason otherwise prevails.

The profession of the law in a republic not only leads to emoluments, but qualifies for political eminence.\(^ {183}\) Hence, it is too much coveted; parents design their children for it whose particular genius they have not been able to ascertain, and many so encouraged find it against their natures and cannot succeed in it.\(^ {184}\)

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178. Modern Chivalry, supra note 1, at 540.
180. Modern Chivalry, supra note 1, at 564.
182. Modern Chivalry, supra note 1, at 699.
183. Law Miscellaneies, supra note 38, at viii.
184. *Id.* at xxi.
The essence of being a good lawyer is sound judgment. For this reason, I have found those of the highest reputation of legal knowledge were not always the most successful in particular causes. Though they had a knowledge of rules, they failed in the application of them, and had not given good advice in bringing or defending the action in which they had been consulted. Or whether the cause was good or bad, they had wanted judgment in conducting it. The attempting to maintain untenable ground, or the points upon which they put the cause, showed a want of judgment.\textsuperscript{185}

Integrity is also a primary qualification.\textsuperscript{186} The study and practice of law leads most to discern the value of honesty. The nature of law is liberal and gives understanding, and wherever there is sound sense, there will be honesty.\textsuperscript{187} No man can be said to have common sense who is a knave. For of all things, to be a knave is the strongest proof of a want of judgment on an extensive scale. Had I the world to begin again, with all the experience that years have given me, and were to think myself at liberty from all considerations of duty or obligation, nevertheless, on principles of self-interest, I would be honest, and exceed rather than come short, in giving to all their due. Indeed, all the rules of morality are but maxims of prudence.\textsuperscript{188}

For this reason, I would be careful what briefs I take, for the indiscriminate defense of right and wrong depraves the mind.\textsuperscript{189} There is a duty to decline the representation of an unjust claim or defense. I grant, of course, that it is not safe for a lawyer to say what is the justice of a contested claim. In presenting a contention to the best advantage before a proper court, counsel does not and should not identify with the cause. It is always the duty of counsel to discourage litigation, and a lawyer should in his or her personal affairs forbear litigation as a prize fighter forgoes street brawls.\textsuperscript{190}

I disclaim as lawyers those who avail themselves of the slips of counsel and would take advantage of a mistake. These may be said to carry on the legal war not according to civilized practice, but in the manner of savages who make their attacks unseen. They are not lawyers, but rather assassins of other peoples' rights.

\begin{itemize}
\item \textsuperscript{185} Modern Chivalry, supra note 1, at 616.
\item \textsuperscript{186} Law Miscellanies, supra note 38, at ix.
\item \textsuperscript{187} Modern Chivalry, supra note 1, at 699.
\item \textsuperscript{188} Id. at 618.
\item \textsuperscript{189} Law Miscellanies, supra note 38, at x.
\item \textsuperscript{190} This was Brackenridge's personal coda according to his son. Recollections of Persons, supra note 7, at 54-5.
\end{itemize}
Mere genius goes but a little way in making the lawyer; there must be a plodding and often the plodding student will reach the goal when a more lively talent will not. A court, and even a jury, will rather hear him who has some depth of judgment but without volubility or grace of diction than all that elegant vociferation where the knowledge is pretense.  

In order to qualify for the profession of the law, a liberal education is necessary. Although there are instances of strong minds that are but little indebted to such education making tolerable lawyers, yet they are disadvantaged. In order to command one’s own language, the shortest course is the mastery of Latin and Greek. The prevailing idea that the study of dead languages is unnecessary merely favors the indolent. History, ethics, and politics—law is built upon these. The object is to acquire a habit of virtuous action. Perhaps the best book for a lawyer to read is Plutarch’s Lives.

In law, as in politics, there is no warranty that professional integrity will reap the worldly rewards of fame and money. Fame is but a youthful aspiration, and wealth a cause of self-indulgence. These considerations ought to be a check on the cupidity of lawyers; the pleasure of a gainful accumulation is all that a rich lawyer ever got, and pride and sloth the sum of what he or she acquired for his or her descendants. When I analyze my own professional aspiration, I find it to be at bottom the same principle that induced me when a child to build a dam across a small stream and to place water wheels of thin boards to receive the fall. This kind of pleasure in seeing the work of one’s hands is an emanation of the divine mind implanted in man and distinguishes us from the brutal world; it is the foundation of our happiness.

G. Democratic Nationhood and International Relations

However durable the Constitution may seem, however professional may be the judges and lawyers, and however wise and well-prepared may be the political leadership, there will always be leaders of factions

192. *Id.* at xii.
193. *Id.* at xiii.
194. *Id.* at xiv.
195. *Id.* at xvi.
196. *Modern Chivalry*, supra note 1, at 433; *Newlin*, supra note 5, at 257.
198. *Id.* at iii.
awaiting the opportunity to seize an unjust advantage over other factions, at the risk of producing chaos and despotism. In addition to all the factors I have thus far identified, there is at least one more element necessary to maintain democracy against the enduring threat. All that I have mentioned depend on one pervasive condition that, if present, will give rise to all the others. It is the moral self-regard of the people.

A people with sufficient self-regard will include all its members in the requisite social conditions of democracy and cohesion. It will produce political leaders resistant to the universal traits that threaten the people's capacity to govern. It will produce legal institutions that work well enough to constrain abuses by those leaders. But a people having too little self-regard will produce none of these. For this reason, democracy in America is inextricably related to the nation's sense of international responsibility. Americans can be good citizens of America only if America is a good citizen of the world.

We understood this in my time. American democracy signalled the end of monarchy in much of the world. In its early stages, the French Revolution was a stirring event for us. The light kindled here was reflected in France. Even the beheading of the king seemed to be a necessary step in the movement of France toward constitutional democracy. On April 1, I published an article entitled "Louis Capet has lost his caput." My point was that those so shocked by the execution seldom expressed similar feelings when more obscure rogues were taken to the gallows. That article also expressed my conviction that this country had a duty to perform in supporting the French Revolution.

In the later stages of that Revolution, I confess that I became horrified. Not merely were thousands executed on the guillotine on the flimsiest of suspicions, but genocide was practiced by poisoning wells in Catholic areas of France. By the time of our Whiskey Insurrection, the moral influenza had spread from France to America. There was a time when I could scarcely bear to read the news from France. France showed us what we should not forget, that democracy is fragile and surrounded by incivility, mayhem, and destruction. But it also

199. For an account of the relations between France and the United States in Brackenridge's time, see Bernard Fay, THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA (1927).
202. Newlin, supra note 5, at 152.
showed us that constitutional democracy in America is linked to democracy elsewhere.

This lesson was learned in my time and it was not forgotten. It has been the cause of this nation's proudest moment, when it undertook to nurture constitutional democracy in nations that were its defeated adversaries less than a half century ago. The Marshall Plan cost a lot of money. That money was spent although the postwar national economy was in 1946 in very poor condition, much poorer than it is in 1992. And it was spent contrary to the popular preferences of the American people, who, thinking like Teague O'Regan, merely wanted to bring their boys home and leave others to take care of themselves. Had the leaders of this country then obeyed the voice of the people, there would today be little constitutional democracy anywhere in the world.

Plainly this day presents an opportunity very similar to that presented in 1946. People in many places are groping for constitutional democracy. They are, however, riven and almost immobilized with mistrust and factionalism. The storm clouds of new despotisms already gather. By whatever means, this is a time to see that the sprouts of constitutional democracy are nurtured. For what a glorious achievement it will be for your generation of Americans if you are able to deliver to your children a world that has become genuinely safe for democracy, the promise with which our nation began this bloody century! This is our national destiny, and it is your generation that have been called to achieve it.

Yet, alas, what I hear on all sides is whimpering impotence. It is said by everyone that America is too poor to help. Humbug! A nation can impoverish itself by helping others only if it mismeasures human happiness. We did not make a nation to pursue gross national product. If a people were to assist in bringing constitutional democracy to all those in the world who seek it, could they be impoverished by their achievement? Would not such a people be forever blessed with a knowledge of their collective moral worth? What has held America together these two centuries has been the shared conviction that we are important to others, and not only to ourselves.

I have no particular program of aid to advance. I do not believe that Americans blowing with fat and repletion can go to foreign lands and make others conform to our notions of constitutional democracy. But there must be many ways in which the American people can signal their concern and lend their support to those who are struggling to achieve what we have achieved. I say now what I said on July 4, 1793,
when I was speaking only of France.\textsuperscript{203} The heart of America must feel the cause of the new republics. She takes part in all their councils, approves their wisdom, blames their excesses. She is moved, impelled, elevated and depressed with all the changes of their good and bad fortune. We feel the same fury in our veins. We are tossed and shaken with all the variety of hopes and fears attending their situation. Why not? Can we be indifferent? Is not our fate interlaced with theirs? For if these republics perish, where is the honor due to ours? From whom will we have respect? Not from the new despots who will arise, for they will know that the evils befalling the last despots took their rise here. Can American democracy and American law be secure in a world populated by such persons?

We are not born for ourselves, nor did we achieve the revolution for ourselves only. We fought the cause of all mankind; and the good and great of all mankind wished well to us in the contest. With what anxiety did we look to Europe for assistance. We derived assistance even from the goodwill of nations. It is an advantage to have a popular cause in war. Have we a right to shut ourselves up in our shell and call the society we have formed our own exclusively?\textsuperscript{204}

Can we assist all or any of the new republics by force of arms? I do not say we should. But if we were asked, if they should expect our arms to join with theirs to protect constitutional democracy, who would not say: It shall be so. Our oaks shall descend from the mountains, our vessels launched upon the stream, and the voice of our war shall be heard with theirs. Indeed, suppose some fragile republic needing our help should be so considerate as to say: “If I perish, I perish, but let not the mother of democracy draw in a hapless child to suffer with herself.” Do I not hear America reply, in the language of Ruth to Naomi: “Entreat me not to leave thee, or return from following thee, for whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God, my God; where thou diest, I will die; and there I will be buried?”\textsuperscript{205}

You may think me as romantic as Quixote himself. Perhaps, yet my romance is not with an airborne theory, but with an idea that has worked. Mine is not a florid description of worlds that never were or could be. Despite the skeptics (and I was for a time one of them) America has in two centuries proved that constitutional democracy can

\textsuperscript{203} The speech is reprinted in Brackenridge Reader, supra note 84, at 147-50.
\textsuperscript{204} Law Miscellany, supra note 38, at 114.
\textsuperscript{205} Ruth 1:17-18.
put an end to despotism. There can be peace. I therefore summon you to constitutional evangelism, to a renewal of our national mission, and not merely out of charity for others in other lands, but to save the respect we have had for ourselves.

CONCLUSION

I conclude with a few stanzas of a youthful poem I wrote about America over two hundred and twenty years ago. I read them at my graduation in 1771, five years before the beginning of our Revolution, when I was the age of persons who are now second year law students:

'Tis but the morning of the world with us
And science yet sheds her orient rays.
I see the age, but the happy age, roll on
Bright with the splendors of her mid-day beams,
I see a Homer and a Milton rise
In all the pomp and majesty of song,
Which gives immortal vigor to the deeds
Achiev'd by heroes in the fields of fame. . . .
They sing the final destiny of things,
The great result of all our labors here
The last day's glory, and the world renew'd.
Such are their themes, for in these happier days . . .
Fair science smiling and full truth revealed,
The world at peace, and all her tumults o'er,
The blissful prelude to Emanuel's reign. . . .
This is thy praise, America, thy pow'r,
Thou best of climes, by science visited,
By freedom blest and richly stor'd with all
The luxuries of life. Hail, happy land, . . .
Which not the ravages of time shall waste
Till he himself has run his long career;
Till all those glorious orbs of light on high,
Drop from their spheres extinguish'd and consum'd;
When final ruin with her fiery car
Rides o'er creation and all nature's works
Are lost in chaos and the womb of night. 207

206. It must be noted that at the end of his life, Brackenridge's thoughts are decidedly more dour than at the beginning. Some critics have read him as despairing of a future that would belong to Teague O'Regan. E.g., Robert A. Ferguson, Law and Letters in American Culture 124 (1984). There is strong evidence to support this view in the final pages of the book, when Governor Farrago abdicates in disgust. Modern Chivalry, supra note 1, at 784. Possibly they mistake dyspepsia for genuine pessimism. In any case, I have chosen to present the ghost of a more youthful Brackenridge, as I suspect Brackenridge, on reflection, might have wished.

207. The Rising Glory of America (1772) reprinted in Brackenridge Reader, supra note 84, at 58-60.