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# CLAREMONT
## REVIEW OF BOOKS

*A Journal of Political Thought and Statesmanship*

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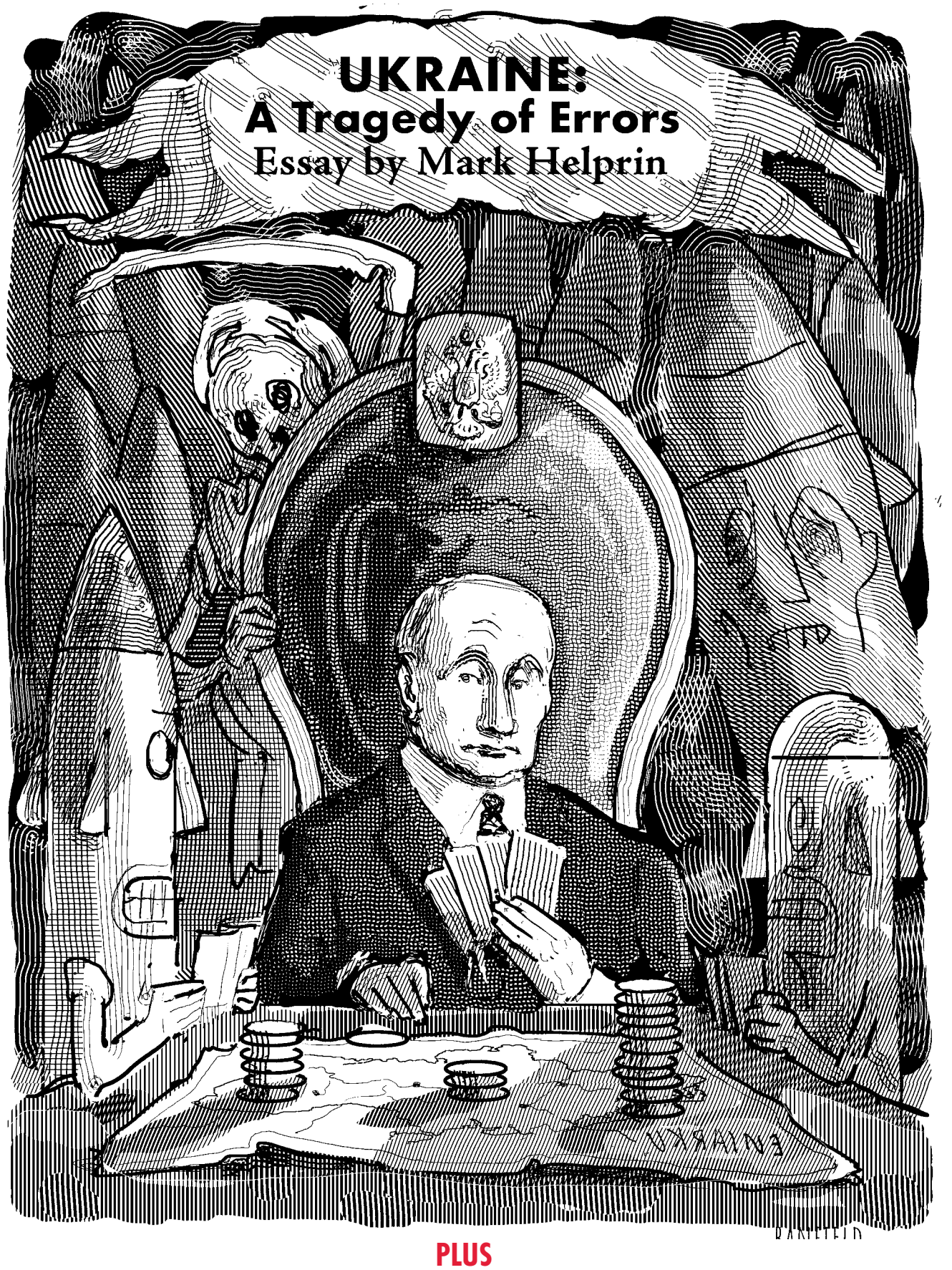


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# CORRESPONDENCE

## Facing Reality About I.Q.

I was disturbed by Charles Murray's book *Facing Reality* and by Amy Wax's review of it ("Inconvenient Truths," Winter 2021/22). They both rightly criticize academics for refusing to recognize that blacks on average have lower I.Q. scores. The establishment must accept this fact. Yet Murray and Wax treat low I.Q. as the principal reason for black inequality more generally. That is not a fact.

Blacks' below-average income and condition result mainly from severe social problems like violent crime and single parenthood, which have worsened dramatically since the 1960s and continue to keep blacks from joining the middle class. How could low I.Q. be the cause when I.Q. scores have *risen* for all groups in this period?

Murray and Wax risk deepening blacks' humiliation and, unwittingly, confirming the Left's belief that minorities have no hope of getting ahead unless good jobs are simply allocated on the basis of race and gender. Let's remember that meritocracy is hard on the losers (including on many whites). Compassion is called for, even if denial is wrong.

**Lawrence M. Mead**
New York University
New York, NY

*Amy L. Wax replies:*

Larry Mead makes valid points that I endorse, although his reasoning is not always on the mark.

I agree with Mead that academics, and presumably others, need to acknowledge that African Americans on average "have lower I.Q. scores" than other racial groups and that race-based preferences represent an attempt to make up for that fact. But Mead's suggestion that African Americans' "below-average income and condition" cannot be ascribed to their lower I.Q. scores because scores have been rising since the 1960s is faulty. Although intelligence scores have been increasing for decades across the board (a phenomenon known as the Flynn effect), they have not gone up enough to elevate more than a small number of African Americans to the level needed to perform the most cognitively demanding jobs. And the Flynn effect has not produced parity among groups. Significant gaps in I.Q. by race have persisted throughout this period, which means that both the percentage and sheer number of European Americans and Asian Americans equipped to fill intellectually intensive, elite positions continues to be much greater.

Apart from the limits I.Q. unavoidably places on the ability to do the most elite jobs, it is not perfectly understood how much African Americans' "below-average income" can be attributed more broadly to lower I.Q. versus other factors. Nonetheless, behavioral choices clearly play a role in life success, including for people with average or below-average cognitive ability—which in all groups is most people! Accordingly, Murray and I both acknowledge that social problems—with an emphasis on criminal behavior—are a significant impediment to African Americans' economic security and social well-being. And as Mead suggests, and I have argued elsewhere, the rapid deterioration of the family over the past few decades has also grievously undermined that group's progress.

Finally, my review makes the point that even though people lacking high intelligence will have a harder time climbing the economic ladder (and thus, as I have noted elsewhere, meritocracy is indeed "hard on the losers"), the right habits, values, choices, and behaviors can enable most people to make a decent life. Moreover, strong social norms and expectations related to work, family, and law-abidingness are critical to regulating and encouraging those choices and behaviors. The bottom line—which Murray's past writings suggest he would agree with—is that people with average or lower I.Q. are not doomed to failure in a society that promotes the right conditions and opportunities for people who try hard, play by the rules, and make the most of their abilities. That applies to people in all groups, including African Americans.

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## Woke Side Story

Although Martha Bayles is correct that Steven Spielberg's *West Side Story* retains the beauty of Leonard Bernstein's music and the poignancy of the original story, she overlooks a subtle, new tilt that infuses the movie and distinguishes it from the original: its contemporary left-wing attack on America as irredeemable ("A Glorious Leveling Up," Winter 2021/22). This ideology infuses the movie—if not every scene, then enough of them, and, in particular, in some of the added dialogue, but also in the general tone and feel, which is dirtier and grimier, with none of the dignity most of the characters in the original exuded, even when they were misbehaving.

For example, in the penultimate scene of the original, when the Jets assault Anita at Doc's store, at the height of the assault the music briefly switches to a speeded up and almost warped instrumental version of the melody from Anita's earlier signature piece, "America." After the death of Bernardo and the cruelty Anita is experiencing, does she still "want to be in America"? The score raises the question but doesn't answer it. The answer isn't relevant to the plot and it's a question with such heavy portent that it needn't be answered at that moment.

In Spielberg's version, Anita herself asks the question as she leaves the store: "You think I want to stay here in a city full of ugly little animals like you?" Then she gives her answer, in Spanish only: "Yo no soy Americana. [Spits on the ground.] Yo soy Puertorriqueña." Thus, she answers the question implicitly raised in the original and has switched to the other side of the debate in the "America" song. If she must "be" in America, she will do so as a Puerto Rican only, separate and apart. An already dark moment is made needlessly drearier, but it summarizes the leftist Zeitgeist of the moment: if given the choice, it is better to choose not to be an American.

A similar point is made in another added bit of new dialogue spoken by Lieutenant Schrank, who tells the Jets at the start of the Spielberg movie that, unlike other "white guys who grew up in this slum [and] climbed their way out of it," they are poor because "your dads or your granddads

stayed put, drinking and knocking up some local piece who gave birth to you: the last of the Can't-Make-It-Caucasians." In other words, if you are a poor, white male in America, it is because you and your whole family are losers, so easy is it to get ahead in this country if you fit the right demographic. After all, the country was made for you.

In the original, Schrank uses harsh and unjustifiable language when he is trying to determine the location of the rumble, after the Jets stonewall him. As harsh as his language is, it's less gratuitous because it's used in the context of trying to stop a crime before it happens; it's less cutting than telling all of the Jets that they and their families are defective losers; and it isn't a taunt based on race.

Obviously, America is not beyond reproach, and although the original packed an emotional wallop in its criticisms, at bottom it remained art, not politics. With these subtle changes, plus something ethereal added by the Spielberg magic, the new movie becomes politics before art, and it is the anti-American politics of the moment that dominate. This poison cannot kill the effectiveness of Bernstein's score or of the love story, but it does sour and worsen it.

**Paul Snitzer**
Devon, PA

## The 14th's Original Meaning

Michael Zuckert's incisive and generous review of our book, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, nicely distills our account of the Privileges or Immunities Clause ("Coping with the 14th Amendment," Winter 2021/22). We claim that the original meaning of this centrally important, tragically unenforced provision protects both (1) individual civil rights listed in the Constitution's first eight amendments (known today as the Bill of Rights); and (2) unlisted (or "unenumerated") individual civil rights that were widespread, entrenched in the states, and associated with citizenship when the 14th Amendment was ratified. The latter rights, Zuckert correctly notes, appear in "the list of privileges and immunities in Justice Bushrod Washington's opinion in the 1823 Circuit Court case *Corfield v. Coryell*, the most authoritative interpretation of the idea of privileges and immunities of citizenship prior to the 14th Amendment."

Zuckert is also correct that Kurt Lash "strongly disagrees with that conclusion," holding that only enumerated constitutional rights are protected by the Privileges or Immunities Clause. Zuckert rightly claims that Lash "us[es] as important evidence the clear rejection of" unenumerated rights in a speech by Ohio Congressman "John Bingham, the amendment's chief author." And he correctly reports our conclusion that Bingham's speech is "unreliable."

On this key question Zuckert sides with Lash, but does not say why. Presumably it is because Zuckert finds it suspect to doubt "the amendment's chief author." We write to explain why we say this particular speech on which Lash hangs his hat is unreliable evidence of original meaning.

The speech in question was delivered in March 1871, three years after the ratification of the 14th Amendment in 1868. In it, Bingham sharply distinguishes between rights that are protected by the Privileges *and* Immunities Clause of Article IV and the Privileges *or* Immunities Clause of the 14th Amendment.

Article IV, Bingham argues, does indeed protect the *unenumerated* rights listed in *Corfield*. But it only prohibits states from discriminating against citizens of other states with respect to these rights. In contrast, Bingham claims that the 14th Amendment guarantees to all U.S. citizens the enjoyment of the rights *enumerated* in the first eight amendments. States can't take them away from anyone, even if they take them away from everyone.

Why do we pronounce Bingham's account of the Privileges or Immunities Clause "unreliable?" First, because it was delivered well after ratification. Second, because it contradicts widely publicized preratification statements by Republicans about the clause's meaning. Third, because it is in pronounced tension with statements that Bingham himself signed off on just two months previous.

Like most originalists, including Lash, we regard the object or goal of constitutional interpretation to be the identification of the public meaning of constitutional text at the time that it was ratified. The public meaning of a text isn't identical to the understanding held by even its chief author—although that understanding may be strong evidence of original meaning. It's the meaning that most competent users of the English language, familiar with the linguistic conventions operative at the time and the context in which the text was presented for ratification, would have attached to those words. The meaning of a constitutional word or phrase is determined by use in discourse within the community to whom it is addressed, those who must decide whether to ratify it.

That's why we attach so much weight to Michigan Senator Jacob Howard's 1866 introduction to the Senate as the principal sponsor of what would become the 14th Amendment. In that

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speech, Howard identified two categories of rights protected by the Privileges or Immunities Clause. In the first category were "the privileges and immunities spoken of in the second section of the fourth article of the Constitution." Howard was referring here to the Privileges *and* Immunities Clause in Article IV. To provide examples of these rights, Howard read a very lengthy passage from *Corfield*.

Howard then identified a *second* category of fundamental rights: "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution."

Finally, referring to *both* categories, Howard explained that "[t]he great object of the first section of this amendment"—the Privileges *or* Immunities Clause—"is…to restrain the power of the States and compel them at all times to respect *these* fundamental guarantees." Howard gave no hint that rights in the first category would only receive federal protection from discrimination when U.S. citizens are sojourning in other states.

Howard's statement was published in leading newspapers and was sufficiently well known that the 14th Amendment was sometimes referred to simply as the Howard Amendment. There is no reason to doubt its reliability as an expression of a broad Republican consensus, an understanding expressed to the wider public on the ratification campaign trail.

The fact that Bingham's speech was delivered several years after ratification would be reason enough to prefer Howard's account. But there is still another reason to doubt the reliability of Bingham's March 1871 speech.

Bingham was chair of the House Judiciary Committee, which was considering suffragist Victoria Woodhull's argument that the Privileges or Immunities Clause extended the right to vote to women. In January 1871, the Committee issued a report in which it rejected Woodhull's argument. Compare the language of this January 1871 report to Bingham's speech given two months later.

> *Woodhull Report, January 1871:*
> The clause of the fourteenth amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not…refer to privileges or immunities of citizens of the United States other than those privileges embraced in the original text of the Constitution, article 4, section 2.
>
> *Bingham, March 1871:*
> Is it not clear that other and different privileges than those to which a citizen of a State was entitled are secured by the provision of the fourteenth amendment, that no state shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment?

Bingham's speech directly contradicts the report he had signed onto just two months before.

John Bingham deserves our enormous respect and appreciation for his efforts to give us the 14th Amendment. But both this contradiction and the passage of time render his speech "unreliable" evidence of the amendment's original public meaning three years earlier in 1868.

We don't mean to turn this into a battle of Bingham versus Howard. There has been enough unwarranted Bingham-bashing in 14th Amendment literature. Harvard researcher Raoul Berger, in particular, inflicted lasting damage on originalist scholarship by calling Bingham's reliability and even intelligence into question.

Still, in these two speeches Bingham and Howard offered two quite different readings of the Privileges or Immunities Clause. One supports Lash's reading; the other supports ours. One must decide which is correct. In this contest, we conclude that Howard's preratification statement to the Senate bears more indications of reliability than Bingham's post-ratification commentary.

Of course, we present much more evidence of original meaning than Howard's speech and encourage interested readers to read our book and judge the evidence for themselves.

**Randy E. Barnett**
Georgetown University
Law Center
Washington, DC

**Evan D. Bernick**
Northern Illinois University
College of Law
DeKalb, IL

I was pleased to read Michael Zuckert's review of my book, *The Second Founding: An Introduction to the Fourteenth Amendment*, which he reviewed alongside Kurt Lash's book on the Privileges or Immunities Clause and Randy Barnett and Evan Bernick's new book on the 14th Amendment. I found his review of the three books to be largely fair and objective. I have only a few quibbles. For example, the Amendment's key advocates, including John Bingham, explicitly relied on the legal meanings of important phrases that appear in the Amendment, so it is not accurate to say that the "public meaning" diverged from the "legal meaning." And although Bingham explicitly distinguished between the rights of national citizenship and state citizenship, he did so only on March 31, 1871—five years after he drafted the Amendment. (And, incidentally, Bingham contradicted that very position a few weeks earlier on January 30, 1871, proving the wisdom of my methodological choice to rely on legal history rather than legislative history. Admittedly, I do not discuss the January 30 statement anywhere in my short volume, which was intended to be introductory, and which, as noted, focused on the legal history.)

All of that can be put aside for now. I have but one more important quibble. Zuckert claims that Lash's incorporation-only view of the Privileges or Immunities Clause—by which the Clause incorporates the Bill of Rights against the states and does nothing else—is the most "constrained" reading and best reflects the Amendment's "moderation with respect to federalism" among the three competing interpretations offered by our books. I cannot agree. The consequence of Lash's view is that the federal Bill of Rights applies against the states, including the Supreme Court's interpretations of those rights. To take just the First Amendment as an example, that means no state today may prohibit the advertising of violent video games to minors; prohibit the viewing of animal crush videos; prohibit flag burning; prohibit protesting at a dead soldier's funeral; criminalize "stolen valor"; nor experiment with student speech rights on school campuses. The Supreme Court has ruled on all of these issues, and the Supreme Court's interpretations of the First Amendment in these contexts now bind all 50 states. How, exactly, is that moderation with respect to federalism?

Under my reading of the Privileges or Immunities Clause, the clause does not incorporate the Bill of Rights. It allows the states to define and regulate the content of civil rights, including not only property and contract rights, but also speech rights and gun rights and other rights traditionally associated with the federal Bill of Rights. The only requirement is that the states not *discriminate* in the provision of those rights. Under this reading, a state would be free to prohibit flag burning, the advertising of violent video

games to minors, and the viewing of animal crush videos—because there would be reasonable, non-arbitrary, and non-discriminatory reasons to regulate speech in this way. Under this reading, California could experiment with gun regulations and campaign finance reform and Texas could experiment with the exclusionary rule and *Miranda* warnings. This view is far more solicitous of federalism than the competing accounts of the 14th Amendment.

Perhaps Zuckert is troubled by my tentative constitutional argument in favor of same-sex marriage, which might appear to put me in the same camp with judicial activists. But I don't think that is a fair assessment. The antidiscrimination reading of the Privileges or Immunities Clause requires judges to determine what is a mere regulation of the content of a right, and what is an abridgment (that is, a discrimination in the provision of that right). The answer has to do with whether the purported regulation is reasonably related to the purpose of the right. Hence, race discriminations are always unconstitutional because race has nothing to do with contract or property rights (or any other right), but imposing maximum hours restrictions on bakers is nondiscriminatory and a valid regulation of the content of the right to pursue that occupation.

What about same-sex marriage? Is limiting marriage to opposite-sex couples defining and regulating the content of the right, or discriminating in the provision of that right? That strikes me as a hard question. But it is the question the Privileges or Immunities Clause requires us to ask. In my book, I make an argument for why we might think limiting marriage to opposite-sex couples is a discrimination in a world of no-fault divorce, where marriage is principally about love and social welfare, both qualities in which gay couples can participate. That hardly makes me a judicial activist, and it hardly makes my reading less solicitous of federalism and less constrained than the alternatives propounded by Lash or by Barnett and Bernick.

**Ilan Wurman**
Sandra Day O'Connor
College of Law
Arizona State University
Tempe, AZ

## Reason and Politics

James Stoner says a number of things in his review of my book *Reason and Politics* that are worth discussing ("The Whole Way of Life," Winter 2021/22). But he also misunderstands the intention and several central points in the book, and I should point out some of these mistakes. He seems to believe that I am attempting to marry "classical virtue and Heideggerian authenticity." But in fact, as I put it in the book, I am (among other things) trying to see "whether we can successfully understand *in other ways* [emphasis added] the substance of what Heidegger brings forward in his view of human being and what is meaningful."

Stoner suggests that I believe that the "dross of scientism and historicism" has been washed away. On the contrary, I explore at length the limits of historicism and scientism and try to offer alternatives to what they appear to understand well.

He also misunderstands my presentation of the relation between classical excellence and liberal democracy. What I suggest is that "if the standard [for what is good] is the excellent use of our powers and the relevant pleasures, together with respect for our pride and inviolability—equal rights—we must teach the proper ground for recognizing both rights and excellence." I go on to say that "the disappointments, distortions, and difficulties in communities that attempt to combine the aristocratic and democratic are inevitable but controllable." He asserts that my discussion ignores war, destruction, partisanship, and similar phenomena. To make this claim, however, he must, among other matters, overlook my accounts of spiritedness and citizenship and much of what I say about power.

Stoner also wishes that I would get "down to brass tacks." In the book's second sentence, however, I say that I do not "intend this effort to lead directly to practical results." For discussions more of this sort he and other readers are invited to consider my earlier books, *Conserving Liberty* and *Duty Bound*.

**Mark Blitz**
Claremont McKenna College
Claremont, CA