Forum on Law and the Good Society

What ought to be the character of law in good societies, and what role ought it to play? There are several reasons why good society thinkers might want to take these questions seriously. The rule of law in general constitutes a powerful check on tyranny—be it the tyranny of leaders (elected or otherwise) or of democratic majorities. Constitutionalism, more specifically, plays a crucial role in any liberal regime in that it not only empowers government but also limits it and protects the rights of citizens. But it is not only liberals who should take law seriously. Constitutional law, especially, is the cornerstone in the foundation of the polity, creating a common set of political norms and values and thus the beginnings of a common political identity. Finally, democrats might want to consider the role of law from an Aristotelian perspective: Law not only habituates us to certain types of action (virtuous ones, in the good regime) but, rightly conceived and implemented, law can also encourage us to critically engage it and thus refine the circumstances of our own habituation. Law in liberal democratic polities, then, always entails a tension: It makes certain types of liberty possible by constraining others.

—A.K.

Law's Expressive Function[1]

Cass R. Sunstein

> If I had known that not a single lunch counter would open as a result of my action I could not have done differently than I did. If I had known violence would result, I could not have done differently than I did. I am thankful for the sit-ins if for no other reason than that they provided me with an opportunity for making a slogan into reality, by turning a decision into an action. It seems to me that this is what life is all about.
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> —James Miller. *Democracy is in the Streets: From Port Huron to the Siege of Chicago.* (New York, Simon and Schuster, 1987) p. 52.

> We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions.
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> —Herbert Simon. *Models of My Life.* (New York: Basic Books, 1991), p. 281.

Actions are expressive; they carry meanings. This is true for nearly everything we do, from the most mundane to the most significant. Thus, for example, a lawyer who wears a loud tie to court will be signaling something distinctive about his self-conception and his attitude toward others; so too with a law professor who teaches in blue jeans; so too with a student who comes to class in a business suit. What can be said for nonverbal acts applies to purely verbal statements as well. A bank president who uses the terms "Miss" and "Mrs.," or who refers to African-Americans as "Negroes," will be showing a wide range of things about his attitudes on matters of gender and race. So too with a politician, say in the South, who uses the terms "Ms." and "African-Americans."

In these and other cases, what the agent will be communicating, or be taken to mean, may or may not have a great deal to do with his particular intentions. In this sense, the meanings of actions are not fully within the control of agents. Indeed, some agents may not even be aware of the relevant meanings. Consider a foreigner, whose foreign state is often signaled by obliviousness to the social meanings of his actions. What he says is very different from what he means.

What can be said for actions can also be said for law. Many people support law because of the statement made by law, and disagreements about law are frequently debates over the expressive content of law. For example, much of the debate over school segregation was also a debate about the meaning of laws calling for segregation. *Plessy v. Ferguson*[1] asserted that such laws did not "mean" black inferiority; *Brown v. Board of Education*[2] tried to respond to this assertion with some empirical work suggesting the contrary. Or consider debates over capital punishment. Many people who oppose capital punishment would be unlikely to shift position even if evidence showed that capital punishment does have a deterrent effect; their complaint is mostly about the expressive content of acts of capital punishment, not about the ineffectiveness of deterrence. So too for many people who endorse capital punishment. Such people

would not be—are not—much moved by evidence that capital punishment does not deter. Their primary concern is the symbolic or expressive content of the law, not aggregate murder rates.

Much of the contemporary debate over hate speech regulation is similar. It is above all about the social meaning of such regulations. Do such regulations "mean" that objects of hate speech require special paternalistic protections, are weak, thin-skinned, and unable to take care of themselves? Or do they "mean" that bigotry is utterly unacceptable in a liberal society? Debates of this kind could not plausibly be focused on consequences, for the stakes are relatively low, not justifying the amount of time and energy devoted to them. In this way debates over flagburning and debates over hate speech have a great deal in common; they are expressive in character.

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Or consider the subject of risk regulation. In environmental protection, public debate is often focused on the perceived social meaning of law. Thus the Endangered Species Act has a special salience, as a symbol of a certain conception of the relationship between human beings and their environment, and emissions trading systems are frequently challenged because they are said to "make a statement" that reflects an inappropriate valuation of the environment. In the same way, mandatory recycling (as opposed to curbside charges, which seem far better from the economic standpoint) may well receive public support on expressive grounds. Outside of the environmental context, the same may be true of mandatory pro bono work (as opposed to a compulsory donation from lawyers who refuse to do such work).

In this essay I explore the expressive function of law—the function of law in "making statements" as opposed to the function of law in directly controlling behavior. I do so by focusing on the particular issue of how legal "statements" might be designed to change social norms. I catalogue a range of possible (and in my view legitimate) efforts to alter norms through legal expressions about appropriate evaluative attitudes. I also urge that the expressive function of law makes most sense in connection with efforts to change norms, and that if legal statements produce bad consequences, they should not be enacted even if they seem reasonable or indeed noble. Empirical questions loom throughout, and I do offer several empirical claims; but my goal is mostly normative rather than descriptive or positive.

I. Definitional Note

At the outset it is important to say that we might understand the expressive function of law in two different ways. First, and most straightforwardly, the law's "statement" may be designed to affect social norms and in that way ultimately to affect both judgments and behavior. On this view, an expressive approach to law is not independent of an assessment of social consequences; certain expressions are favored because they will (ultimately) have good consequences. Here there is a prediction about the facts: An appropriately framed law may influence social norms and push them in the right direction. For example, if the law mandates recycling, perhaps it will affect social norms about the environment in a way that is different from the effects on norms of curbside charges. Or if the law wrongly treats something—let us suppose reproductive capacities—as a commodity, social norms may be affected in a troublesome way.

Sometimes this claim is plausible; prevailing norms, like preferences and beliefs, are not a presocial given, but a product of a complex set of social forces, possibly including law. And law motivated by norm-change will be my focus here. But sometimes people support a law not because of its effects on norms, but because it is believed intrinsically valuable for the relevant "statement" to be made. (See the opening epigraph from a 1960s protester.) And sometimes law will have little or no effect on social norms. Society is filled with legal provisions allowing market exchanges of goods and services—like pets and babysitting, for example—that are not seen as mere commodities and that are valued for reasons other than use. The question therefore remains whether the claimed effect on social norms will occur. It is fully plausible, for example, to say that, although a law that permits prostitution reflects an inappropriate valuation of sexuality, any adverse effect of the law on social norms is so small as to be an implausible basis for objection.

A society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an anti-discrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action after one person has taken the life of another.

The point bears on the cultural role of law, adjudication, and even of Supreme Court decisions. The empirical effects of those decisions are highly disputed. If the Supreme Court says that segregation is unlawful, that certain restrictions on hate speech violate the First Amendment, or that students cannot be asked to pray in school, the real-world consequences may be much smaller than is conventionally thought. But the close attention American society pays to the Court's pronouncements is connected with their expressive or symbolic character.

I do not claim that the expressive effects of law, thus understood, are decisive or that they cannot be countered by a demonstration of more conventional bad consequences. In fact, I believe otherwise and in that way endorse Simon's remark in the epigraph to this essay. But it cannot be doubted that the expressive function is a large part of legal debate. Without understanding the expressive function of law, we will have a hard time in getting an adequate handle on public views with respect to, for example, civil rights, prostitution, the environment, endangered species, capital punishment, and abortion.

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II. The Expressive Function and Collective Action Problems

Many social norms solve collective action problems. Some of these problems involve coordination; others involve prisoner's dilemmas. Norms solve such problems by imposing social sanctions on defectors. When defection violates norms, defectors will probably feel *shame,* an important motivational force. The community may enforce its norms through informal punishment, the most extreme of which is ostracism. But the most effective use of norms is ex ante. The expectation of shame—a kind of social "tax," sometimes a very high one—is usually enough to produce compliance.

But sometimes private efforts fail. When this is so, the law might be enlisted as a corrective. In fact, the least controversial use of the expressive function of law operates in this way. Here the goal is to reconstruct existing norms and to change the social meaning of action through a legal expression, or statement, about appropriate behavior. Insofar as regulatory law is concerned with collective action problems, this is a standard idea, especially in the environmental context, but also in the setting of automobile safety, occupational safety and health, and many other problems as well. What is perhaps less standard is to see the law's role as correcting for inadequate social norms. Law might either do the work of such norms or instead be designed to work directly against existing norms and to push them in new directions. The latter idea is grounded on the view that law will have moral weight and thus convince people that existing norms are bad.

The most conventional example involves legal mandates that take the place of good norms, by requiring certain forms of behavior through statutory requirements accompanied by significant enforcement activity. In the area of control of industrial pollution, this is the usual strategy, as environmental law accompanies legal mandates with a large commitment of enforcement resources.

But there is a subtler and more interesting class of cases, of special importance for understanding the expressive function of law. These cases arise when the relevant law is a signal or statement *unaccompanied by much in the way of enforcement activity.* There is a large set of instances in which laws that (a) aspire to announce or signal a change in social norms are nonetheless (b) accompanied by little enforcement activity. Consider, for example, laws that forbid littering and laws that require people to clean up after their dogs. In many localities such laws are rarely enforced through the criminal law. But they have an important effect in signaling appropriate behavior and in inculcating the expectation of social opprobrium and hence shame in those who deviate from the norm. With or without enforcement activity, such laws can help reconstruct norms and the social meaning of action. Hence someone who fails to clean up after his dog may be showing disrespect or even contempt for others; many, most, or all people may see things this way; and the result can be large changes in behavior. Eventually there can be *norm cascades,* as reputational incentives shift behavior in new directions. It should be unsurprising to find that in many places, people clean up after their dogs even though this is not especially pleasant and even though the laws are rarely enforced.

When legally-induced shifts in norms help solve collective action problems, there should be no objection in principle. Here, then, is the least controversial case for the expressive function of law.

III. Norms Involving Dangerous Behavior

Often the expressive function of law is brought to bear on dangerous behavior, including behavior that is dangerous only or principally to self. Of course all behavior creates risks—driving a car, walking on city streets, volunteering for military service. When government is trying to change norms that "subsidize" risk-taking behavior, it must do so because of a judgment that well-being will thereby be promoted. This judgment might be rooted in an understanding that the intrinsic value or utility of the act is relatively low and that reputational incentives are the real source of the behavior. We are dealing, then, with classes of cases in which the danger accompanying choice means that intrinsic value is not high but risk-taking behavior persists because of social norms.

Here as elsewhere, private efforts may be unsuccessful. In this light, law might attempt to express a judgment about the underlying activity and do so in such a way as to alter social norms. If we see norms as a tax or a subsidy to choice, the law might attempt to change a subsidy into a tax, or vice-versa. In fact, this is a central, if implicit, goal behind much risk regulation. Educational campaigns often have the goal of changing the social meaning of risk-taking activity. Going beyond provision of information, coercion might be defended as a way of increasing social sanctions on certain behavior. Through time, place, and manner restrictions or flat bans, for example, the law might attempt to make it seem weak to smoke, or to use drugs, or to engage in unsafe sex.

Are such efforts illiberal or unacceptably paternalistic? They should not be so regarded. Choices are a function of norms for which individual agents are not responsible and which, on reflection, many or most agents may not endorse. This is conspicuously so in the context of risk-taking activity involving cigarettes, drugs, unsafe sex, and firearms. Much discussion of whether law should respect "preferences" or "choices" is confused by virtue of its silence on the matter of social norms. People may follow such norms despite the fact that they deplore them.

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Because information is the least intrusive regulatory strategy, it should be the preferred option. Whether more aggressive strategies make sense depends on the details.

IV. Norms Involving the Use of Money

A complex network of social norms governs the acceptable uses of money. This is so in two different respects. First: Some social norms impose sanctions on using money as a reason for action. Here people are not supposed to engage in certain acts if their reason for doing so is financial gain. Second: Some social norms make different kinds of money nonfungible; the prevailing norms require different kinds of money to be used for different purposes. These sets of norms raise many complexities. They are also entangled with the expressive function of law. They suggest, finally, that it is sometimes inappropriate to infer general valuations from particular choices, since those choices are a function of norms that are limited to the context in which they govern.

There is often a connection between norms that block exchanges and ideas about equal citizenship. The exchange can be barred by social norms because of a perception that while there may be disparities in social wealth, the spheres in which people are very unequal ought not to invade realms of social life in which equality is a social norm or goal. The prohibition on vote-trading is an example. So too with certain complex social bans on the use of wealth to buy services or goods from other people. Some part of the intricate web of norms covering the exchange of money among both friends and strangers are connected with the principle of civic equality. Monetary exchange would reflect forms of inequality that are not legitimate in certain spheres. Familiar objections to "commodification" are part and parcel of social norms banning the use of money. The claim is that people ought not to trade (for example) sexuality or reproductive capacities on markets because market exchange of these "things" is inconsistent with social norms identifying their appropriate valuation. The claim is not that markets value sexuality "too much" or "too little"; it is that markets value these activities in the wrong way.

The point very much bears on law. In many ways, law tries to fortify norms regulating the use of money and to prevent new social practices from eroding those norms. This is an important domain for the expressive use of law. It is connected with the effort to create separate social spheres—some in which money is appropriately a basis for action, some in which money cannot be used.

The law bans a wide range of uses of money. Votes cannot be traded for cash; the same is true of body parts. Prostitution is outlawed. There is of course a sharp social debate about surrogate motherhood, and those who seek legal proscriptions are thinking in expressive terms. One of their goals may be to fortify existing social norms that insulate reproduction from the sphere of exchange. Or their argument may be less instrumental: They may seek to make a "statement" about reproduction without also seeking to affect social norms.

Often decisions about money can be made through private mechanisms that do not require special legal help. These mechanisms may be as simple as a mental notation. They may be more complex, taking the form of different bank accounts understood to be used for different purposes. Social norms in families and small communities often fortify these efforts, with certain forms of money being seen as "for a rainy day" or as basically untouchable.

Law can also play a role. Some measures that might be seen as puzzling, or as objectionable paternalism, make more sense if they are understood as precommitment strategies reflecting diverse "kinds" of money or as efforts to facilitate people's efforts to place their money in different categories. As a facilitative strategy, consider the Individual Retirement Account (IRA). IRAs, created by a complex set of legal provisions, allow people more easily to separate their money into different "kinds." The Social Security system

is mandatory, not optional, but it becomes more intelligible if we understand that people often like to have help in putting their money into different accounts with different uses.

V. Equality, Social Norms, and Social Change

Norms of partiality are an important part of social inequality. Social norms may require women to engage in most of domestic labor; in many places, women who refuse to do so incur social sanctions and may even feel ashamed. The social meaning of a woman's refusal may be a rejection of her appropriate role. Hence it may signal a range of undesirable traits. In the areas of both race and gender, prevailing norms help constitute inequality. And here as elsewhere, collective action is necessary to reconstitute existing norms.

On one view, any effort at norm management is illegitimate; this is a project that is off limits to government. But it is hard to see how this argument might be made persuasive. Effects on social norms are not easily avoided; any system of government is likely to affect norms, including creation of the basic systems of contract, tort, and private property.

Of course private norm entrepreneurs may be able to accomplish a great deal. With respect to the division of domestic labor between men and women, private efforts at norm management have played an important role. Individual acts that are expressive in character—a refusal to make dinner, for example—are an important part of modern feminism. But the expressive function of law is often especially important here, and it can move to the fore in public debates. If a discriminatory act is consistent with prevailing norms, there will be more in the way of discriminatory behavior. If discriminators are ashamed of themselves, there is likely to be less discrimination. The social meaning of an act of sexual harassment will have a great deal to do with the amount of sexual harassment. A large point of law may be to shift social norms and social meaning. Consider in this connection the fact that many restaurant owners and inn-keepers actually supported the Civil Rights Act of 1964, which would have prevented them from discriminating. How could people want the state to act against them? The answer lies in the fact that the law helped shift social norms and the social meaning of nondiscrimination. Whereas nondiscrimination would formerly signal a willingness to act on a race-neutral basis—and hence would trigger social norms that call for discrimination against blacks—it would henceforth signal a willingness to obey the law, and hence fail to trigger adverse social norms.

In Part IV, I dealt with cases in which social norms discourage cash payments. But social norms help constitute a wide range of qualitatively different kinds of valuation, and these diverse kinds much affect behavior and the social meaning of behavior. These norms are omnipresent and are usually taken for granted. Imagine, for example, that John treats a beautiful diamond in the same way that most people treat friends, or that Jane values a plant in the same way that most people value their children, or that Sandy values her car like most people value art or literature. Antidiscrimination law is often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behavior seems to deny.

The point is not limited to race and sex equality. Consider, as an especially interesting example, the movement for animal rights. Some people think that animals should be treated with dignity and respect, and not as if they existed solely for human consumption and use. This view is very much about social norms; it need not entail the further claim that animal life is infinitely valuable. It is best taken as a recommendation of a shift in norms governing the treatment of animals, accompanied by a judgment that the new mode will have consequences for what human beings do. The recommendation may be based on the view that if we see animals (and nature) in this way, we will solve collective action problems faced by human beings in preserving animal life important for human lives; it may be based on a noninstrumental effort to extend ideals of basic dignity to all living things.

VI. Constraints, Liberal and Otherwise

What barriers should there be to the expressive function of law? The simplest answer is: The same barriers as there are to any other kind of governmental action. There is nothing distinctive to norm management that requires a special set of constraints.

Thus, for example, government should not be permitted to invade rights, whatever may be our understanding of rights. The rights constraints that apply to government action generally are applicable here as well. If government tried to change social norms so as to ensure that everyone is a Christian, it would violate the right to religious liberty; if government tried to change social norms so as to ensure that women occupy domestic roles, and men do not, it would violate the equal protection clause.

Quite apart from the question of rights, there is always a risk that efforts at norm management will be futile or counterproductive. We can imagine, for example, that when government attempts to move social norms in a particular direction, it may fail miserably. Nancy Reagan's "Just Say No" policy with respect to drugs may well be an example. It is necessary to ensure that those who engage in norm

management are trusted by the people whose norms are at issue. For this reason it may be best for government to attempt to enlist intermediate organizations, so as to ensure that people with authority in relevant communities are participating in the process.

Some people would go further than this. On one view, any effort at norm management is illegitimate; this is a project that is off limits to government. But it is hard to see how this argument might be made persuasive. Effects on social norms are not easily avoided; any system of government is likely to affect norms, including creation of the basic systems of contract, tort, and private property. Moreover, intentional norm management is a conventional and time-honored part of government. Of course we could imagine abuses, even unspeakable ones. But the proper response is to insist on a wide range of rights-based constraints on the management of social norms through law.

Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.

There is a final point. The social meaning of law will constrain the permissible content of law. The meaning, set as it is by social norms, may make government efforts unsuccessful. Debates over criminal sanctions are strongly affected by this problem. So-called intermediate sanctions for criminal violations are often unpopular because they are taken to "mean" something other than public opprobrium. When a violator is told to engage in community service, he appears have "gotten off," even if the service is, to him, worse than a short period in jail. Hence the social meaning of the law makes the law unacceptable to the community at large. If intermediate sanctions are to be feasible, the norms that accompany them must shift as well.

The point is a general one. The meaning of legal statements is a function of social norms, not of speaker's intentions. The government may take a range of steps to discourage teenagers from smoking, but if those steps make smoking seem like a delicious forbidden fruit, they may be counterproductive. Measures designed to discourage unwed parenthood may actually encourage unwed parenthood. This is simply a special case of the general phenomenon of unintended consequences. Of course, unintended effects—realized because of existing norms, or in the form of unanticipated changes in existing norms—may be good as well as bad.

Conclusion

There can be no doubt that law, like action in general, has an expressive function. Some people do what they do mostly because of the statement the act makes; the same is true for those who seek changes in law. Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences. I have suggested that the expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law's "statement" is designed to move norms in fresh directions.

Least controversially, law may attempt to generate norms that will solve collective action problems. The central point here is that from the standpoint of individual agents, norms are given rather than chosen, and agents would sometimes like norms to be other than what they are. Often shifts in norms are a low-cost method of achieving widely or universally held social goals—as the intrinsic value of choice stays constant while the reputational consequences of choice begin to shift. Far more controversial is the use of law to fortify social norms involving the permissible use of money. A liberal society ensures a measure of sphere differentiation, in which the realm of markets and market thinking is not coextensive with the realms of politics and family life. Hence social norms regulating the use of money are an important part of a well-functioning liberal society. Sometimes law is used to fortify those norms or to prevent them from becoming atrophied. Bans on the sale of sexual and reproductive capacities are an important illustration.

For purposes of legal policy, some of the most interesting cases of norm management through law involve the control of risky behavior and the promotion of social equality. Risky behavior is often a product of social norms that people would very much like, on reflection, to change. And with respect to risk, American society has witnessed dramatic changes in prevailing norms in the last decades. Cigarette smoking is the most dramatic example, but similar shifts can be seen in the areas of alcohol use, drug use, seatbelt use, carrying guns, and diet and exercise. If government sees prevailing norms as a tax on or a subsidy to choice, it might seek to change norms as a way of changing choices. Certainly the point helps account for antidiscrimination policy, where a goal is to alter norms associated with both taste-based discrimination and rational stereotyping.

Are efforts at norm management unacceptably paternalistic or illiberal? In many cases they are not. As I have emphasized, norms are generally given rather than chosen. Sometimes people would like norms to be changed; often they do not have a considered view about which norms are best, but they would, if they reflected a bit, wish norms to be something other than what they are. When this is so, it is entirely legitimate to use law to alter norms that (for example) encourage people to shorten their own lives, at least when they do so in order to avoid reputational cost and without much in the way of increased intrinsic value. Certainly efforts at norm management are more legitimate if they have a democratic pedigree. More generally, attention to the effects of social norms helps show that "choices" should not be taken as sacrosanct.

All this leaves open a number of questions. Among the most pressing are empirical ones. To what extent have shifts in norms been a function of law? How can law be made effective in shifting norms? What variables account for effective norm-change? There are also important theoretical issues about constraints on norm management. It is particularly important to decide how to handle situations in which laws motivated by expressive goals have mixed or bad consequences. I have suggested that legal "statements" producing bad consequences should not be endorsed. But my simplest suggestion here is that we begin to make sense of law's expressive function if we attend to the role of law in the management of social norms. No system of law can entirely avoid that role; even markets themselves—very much a creation of law—are exercises in norm management. In these circumstances it is best for government to proceed pragmatically and contextually, seeing which norms are obstacles to well-being, and using law when law is effective in providing correctives.

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Endnotes

1. 163 US 537 (1896).

2. 347 US 483 (1954). On law and social meaning, see Lawrence Lessig, "The Regulation of Social Meaning," 61 *University of Chicago Law Review* 943 (1995), to which I am much indebted.

This essay draws on Cass R. Sunstein, "On the Expressive Function of the Law," 144 V. *Pennsylvania Law Review* 2021 (1988) and Cass R. Sunstein, *Free Markets and Social Justice,* Chapter 2.

Constitutionalism and Constitutional Failure*

Mark E. Brandon

I. The Necessity of Failure

We are accustomed to thinking of constitutions as devices for creating and holding together a political world. That customary mode of thought makes a certain sense. After all, making and maintaining a politics are central objectives of constitutionalism. They are not only part of what a constitution ostensibly does, but also part of what it should do, or must do, if it is to succeed. But this sensible notion has taken on perverse forms, especially after the Civil War of the United States, where constitutional success has sometimes come to be viewed strictly in terms of the *perpetuation* of a constitution or a regime.[1] It is almost as if longevity itself were sufficient evidence of constitutional success.

Such a view of things is unsatisfactory, however, for reasons other than the simple fact that constitutions can and do fail. Constitutional failure is more than an empirical reality. It is also a theoretical necessity. But the theoretical necessity arises from empirical fact. Constitutions are "made" things. The very facts that they appear on the scene at a particular time and displace existing forms of politics—perhaps even existing constitutions—subvert most claims to perpetuity as a constituent element of any constitutional regime. Of course, those facts need not prohibit a constitution or constitutional order from *aiming* at perpetuity. But they do mean that the manner in which constitutions are born and justified leaves them normatively defenseless against some forms of fundamental alteration or even displacement. Just as a constitution displaces a prior constitution or order, it too may be displaced under the certain circumstances.

But constitutional failure is not always so grand as the breakdown of an order or a constitution. Constitutional failure can occur in subtler, smaller ways. These subtle forms of failure arise from the very character of constitutionalism, which is insensible without a theory or set of standards that give the political world form and limits. Of course, the "character of constitutionalism" is a tricky matter, for constitutionalism is multifaceted. For example, constitutionalism may aim at any of several basic objectives. It may take as its purpose the making of a people, sustaining ways of life, or creating or authorizing political power. But constitutionalism arises in history primarily as an attempt to solve a persistent problem in human experience: how to constrain and direct political power.[2] That is, it is fundamentally, though not exclusively, concerned with the problem of limits.

The problem of limits presents itself to Western thought (as we have inherited it) in the form of a dialogue between Socrates and Thrasymachus in Plato's *Republic.* There Thrasymachus claimed that justice is nothing more than the rule of the stronger. The significance of such a claim is not simply that its logical ethical corollary is that might makes right, but also that it empties the very idea of justice of any normative force in the ordering and operation of political societies. Much of Western political thought from Plato to Nietzsche has represented an attempt to meet the challenge of Thrasymachus. (It is not clear that Socrates succeeded in doing so.) One reason for the persistence and normative power of constitutionalism is that it has represented an especially useful strategy for dealing with the problem of limiting political power. Its strategy is encapsulated in the notion "higher law," a law binding not only subjects and citizens, but even the ruler (eventually, the state).