Seven Questions for Professor Jaffa†

George Anastaplo*

We must not expect that liberal education can ever become universal education. It will always remain the obligation and the privilege of a minority. Nor can we expect that the liberally educated will become a political power in their own right. For we cannot expect that liberal education will lead all who benefit from it to understand their civic responsibility in the same way or to agree politically. Karl Marx, the father of communism, and Friedrich Nietzsche, the stepgrandfather of fascism, were liberally educated on a level to which we cannot even hope to aspire. But perhaps one can say that their grandiose failures make it easier for us who have experienced those failures to understand again the old saying that wisdom cannot be separated from moderation and hence to understand that wisdom requires unhesitating loyalty to a decent constitution and even to the cause of constitutionalism. Moderation will protect us against the twin dangers of visionary expectations from politics and unmanly contempt for politics. Thus it may again become true that all liberally educated men will be politically moderate men. It is in this way that the liberally educated may again receive a hearing even in the market place.

— Leo Strauss1

PROLOGUE

The reader who has had the privilege of studying the essays by Harry V. Jaffa collected in this issue of the University of Puget Sound Law Review should be able to appreciate what has long been evident about the work of a scholar whose considerable learning is surpassed only by his dedicated pas-

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sion. It should be evident as well why Professor Jaffa has been able to enlist as he has, for some years now, so many talented young people for an unrelenting crusade to save our country from the deadly follies of liberals and conservatives alike.

My longstanding assessment of Mr. Jaffa's work is indicated in the Introduction I made of him for a "Conversation" at Rosary College on December 4, 1980. That Introduction and the interesting colloquy which followed have been published by Mr. Jaffa in his most recent book. My 1980 Introduction of him went something like this:

It is my privilege to introduce on this occasion a friend of a quarter century and a distinguished political scientist, Harry V. Jaffa, of Claremont Men's College and Claremont Graduate School. Professor Jaffa, whose appearance at Rosary College has been made possible by the support of him by the Intercollegiate Studies Institute, is available this afternoon for an extended conversation with us about matters ancient and modern.

Mr. Jaffa is, to my mind, the most instructive political scientist writing in this country today. The things he writes about range from Socrates and Aristotle to Thomas Aquinas and William Shakespeare, from the Founding Fathers to Abraham Lincoln, from Tom Sawyer and Winston Churchill to contemporary politics and the joys of cycling.

I am reminded, when I encounter Mr. Jaffa, of another provocatively influential American, a great woman who died only this past weekend, Dorothy Day of the Catholic Worker movement (whom I was privileged to see close-up only

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2. All quotations in my text from Mr. Jaffa are, unless otherwise indicated, from his U. PUGET SOUND L. REV. article. For a recent discussion by Mr. Jaffa of related issues, see his article on Abraham Lincoln in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1162-66 (1986). For additional discussion by Mr. Jaffa of these issues, see infra notes 4, 19, & 21.

3. Other assessments by me of Mr. Jaffa's work may be found in Anastaplo, Prophets and Heretics, 23 MODERN AGE 314 (1979) (which I quote from in infra note 30) and in those things of mine cited in infra notes 19, 22, & 27. Mr. Jaffa has spoken kindly, in public, of my article on the Declaration of Independence (see infra note 20), of my article on the Emancipation Proclamation (see infra note 41), and of my essay on the Nixon-impeachment campaign in ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD 160 (1975) [hereinafter HUMAN BEING AND CITIZEN] (see infra note 30).

4. See H. JAFFA, AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING 48 (1984). The transcript of this two-hour conversation at Rosary College had been previously published by Mr. Jaffa in the December 1981 issue of the CLAREMONT REVIEW OF BOOKS.
once). It was true of Miss Day, as it is true of Mr. Jaffa, that it was virtually impossible for her not to be interesting about whatever she wrote. Intelligence, hard work, and a gift for language no doubt contribute to this capacity to invest every discourse with significance. But fundamental to such influence is a certain integrity, even a single-minded moral fervor. Thus, it could be said of Miss Day in her obituary in the New York Times on Monday of this week that she had sought "to work so as to bring about the kind of society where it is easier for people to be good." Much the same can be said about Mr. Jaffa. Indeed, Miss Day, in the way she lived her life, in an unrelenting effort to better the lives of the downtrodden, could be said to have put into practice the much-quoted proposition by Mr. Jaffa which was used by Senator Goldwater in his Acceptance Speech upon being nominated for the Presidency by the Republican Party in 1964, "I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue."

A little more should be said by me about Mr. Jaffa now, if only to suggest matters that we might want to talk about on this occasion. A few differences between us, of which I was reminded when I heard him speak yesterday at Loyola University, could usefully be indicated.

Mr. Jaffa not only makes far more of exercising than I do—I limit myself to walking whenever possible and to the avoidance of elevators for ascents or descents of less than five floors—but he also is a much more vigorous moralist than I am, both in regulating his own conduct and in judging the conduct of others. I believe that I allow more than he does for good-intentioned errors, for inefficiency on the part of people, and for circumstances which account for, sometimes even justify, what seem from the outside to be moral aberrations. Compassion can be almost as important as moral indignation in these matters, particularly with respect to domestic relations, whether the subjects be abortion, divorce, or homosexuality. Perhaps also I make more than he does of the importance—if only out of respect for the sensibilities of others and for the moral tone of the community—of discretion, if not even of good-natured hypocrisy.

We differ as well with respect to the conduct of foreign relations. We do share an abhorrence of tyranny, whether of the Right or of the Left. But we sometimes part company on assessments of how constitutional government and American republicanism can best be defended abroad. Thus, he was much more hopeful than I could ever be that our
involvement in the Vietnam War (however noble in intention that might have been, and that it surely was, in some respects)—he was much more hopeful than I was that our Vietnam involvement could do the American or the Indo-Chinese people some good. Today we differ as to precisely what kind of a threat the Russians pose to us. I see them as much more vulnerable (both politically and militarily) than does he: and I consider all too many calculations about nuclear-war "scenarios" to depend too much on game theories and not enough on political judgment. I believe, for example, that Russian leaders are much more constrained by domestic public opinion (by a pacific, even though patriotic, public opinion) and by other factors than many of us recognize. They have suffered, at home and abroad, a considerable setback in Afghanistan; we can only hope that they, and we, do not suffer an even greater setback by a Russian invasion of Poland. But whatever happens in Poland, it is now evident that the cause of freedom is bound to be in better shape in Eastern Europe than it has been since the Second World War—in part because of what Polish workers have done in showing the world how things really stand there. The only question may be what price the Polish people will have to pay, and this may depend, in part, on their prudence and on ours.

Perhaps at the heart of the differences between Mr. Jaffa and me—whether the differences be as to the status of exercise or as to assessments of the Russians—is with respect to how much one should be concerned with the preservation of one's life. An immoderate cherishing of what happens to be one's own can lead, it seems to me, to psychic paralysis or to undue combative ness: either can undermine that relaxed competence which makes healthy statesmanship more likely. Certainly, Mr. Jaffa responds much more than I do to the apocalyptic as against the comic and somewhat less than I do to "liberty" as against "equality." Obviously, we touch here on questions about the nature of human existence, of virtue, and of happiness.

On the other hand, at the heart of our deep affinities—besides the fact that we were both fortunate enough to share a great teacher in Leo Strauss—is our minority belief that fundamental to sensible political science and to a decent life as a community is a general respect for natural right and what is known as natural law. This means, among other things, that discrimination based on arbitrary racial categories cannot be defended, especially by a people dedicated to the self-evident truth that "all men are created equal." It
also means that the family as an institution should be supported.

I mention in passing that we do differ with respect to the Equal Rights Amendment—but here I believe that Mr. Jaffa, even though he puts what he says in terms of nature in his opposition to that amendment, has allowed himself to be unduly influenced by the antics and "principles" of a minority of the proponents of that largely symbolic grace note for our Constitution.

Be all this as it may, an informed study of nature in human things is perhaps the most pressing demand in education today—and for this Mr. Jaffa, with his profound grasp of the classical writers, of Shakespeare's thought, and of the career of Abraham Lincoln, is an invaluable guide.

Permit me to close these introductory remarks by returning to something else that has been said about Dorothy Day, something which (with appropriate adjustments) can be applied to the tireless dedication Mr. Jaffa devotes to his "conservative" creed and to his graduate students. We are reminded by Dorothy Day's New York Times obituary that Church officials in New York were "often sorely tempted to rebuke Miss Day—her ardent support of Catholic cemetery strikers a number of years ago especially irked Cardinal Spellman—but they never could catch her in any breach of Church regulations." Besides, the editor of Commonweal has observed, one of the bishops she fought with, James Francis McIntyre (who later became a cardinal himself), "was afraid he just might be dealing with a saint." "He was alluding to what has been called Miss Day's 'indiscriminate and uncompromising love of the Mystical Body' as well as to her courage and her care for the poor in hospices she established in New York and elsewhere."

But enough of this canonization of Harry Jaffa, who does remind me in certain ways of St. Augustine. Any effort at canonization, you recall, requires that the devil's advocate have his say also. As you can see, I have had to take on more than one role in introducing to you a gifted colleague whom we are privileged to have with us today.

Some of you must have questions—but first, Mr. Jaffa may have something to say in response to the remarks I have made in an effort to guide the conversation I look forward to in the hours and years ahead.\footnote{5. G. ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE 476 (1983) [hereinafter ARTIST AS THINKER]. Mr. Jaffa's immediate response to my remarks was, "Well, thank you very much, Professor Anastaplo. I must say that that}
Several of the issues touched upon in this 1980 Rosary College Introduction continue to interest me. They are reflected in the questions inspired at this time by the four essays collected here by Mr. Jaffa. I offer, in addition to fresh reflections upon these questions, three appendices of my own which bear upon various of the matters touched upon by Mr. Jaffa. These previously-prepared appendices are entitled,

A. The Founders of Our Founders: Jerusalem, Athens, and the American Constitution;
B. The Ambiguity of Justice in Plato's Republic;

I offer as well, in my Epilogue on this occasion, the informed observations of a scholar who comments upon differences between Mr. Jaffa and myself.

The questions inspired by Mr. Jaffa testify to the instructive challenges he generously lavishes upon those who are fortunate enough to know his work. Wisdom, according to Leo Strauss, consists more in clarifying fundamental problems and alternatives than in providing answers and solutions. My seven questions are accompanied by suggestions about some of their presuppositions and implications. The seven questions, which shall be developed in turn, are the following:

I. What more should be said on behalf of Attorney General Meese with respect to the matters touched upon by Mr. Jaffa?

is the most remarkable introduction I have ever had or that I am ever likely to have.” Two hours later, at the end of the general discussion (see supra note 4), he concluded, “Thank you for your introduction, which certainly inspired me, or gave me a sense of responsibility to live up to.” Mr. Jaffa subsequently spoke well of this introduction to many others.

On Leo Strauss himself, see ARTIST AS THINKER at 250.

6. By “four essays” I mean Mr. Jaffa's introductory article and its three appendices (as found in the 10 U. PUGET SOUND L. REV. 355 (1987)):

What Were the “Original Intentions” of the Framers of the Constitution of the United States?
Appendix A: Attorney General Meese, the Declaration, and the Constitution;
Appendix B: Are These Truths Now, or Have They Ever Been, Self-Evident? The Declaration of Independence and the United States of America on Their 210th Anniversary,
Appendix C: Original Intent and Mr. Justice Rehnquist.

II. Does Mr. Jaffa recognize sufficiently the shortcomings of the equality which he so eloquently extols?

III. Does Mr. Jaffa mean to leave the impression that theory alone determines political practice?

IV. Is there not an inevitable tension, because of the very nature of things, between philosophy and the city?

V. Does Mr. Jaffa mean to leave the impression that "the consent of the governed" is for the Declaration of Independence, as well as for himself, a necessary basis for legitimate government in all circumstances?

VI. Does Mr. Jaffa recognize sufficiently the merits of that freedom which he routinely subordinates to equality?

VII. What more should be said on behalf of Chief Justice Rehnquist and Associate Justice Brennan with respect to the matters touched upon by Mr. Jaffa?

What more should be said on behalf of Attorney General Meese with respect to the matters touched upon by Mr. Jaffa?

Mr. Meese is given a hard time by Mr. Jaffa because he ventured to suggest (in advocating "original intent") that "the Supreme Court under Chief Justice Roger D. Taney [in the Dred Scott case] read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery." Mr. Jaffa's immediate response is, "Unfortunately for Mr. Meese's argument, no one, on or off the Court, has ever expounded the theory of original intent with greater eloquence or conviction than Chief Justice Taney in the case of Dred Scott." It is difficult for me, however, to acclaim as "eloquent" or to concede as "conviction" an argument which is patently false. Critical to the highly questionable Taney argument is his finding of what the general opinion was as to the status of Africans for the statesmen who had insisted that "all men are created equal."

Indicative of the 1776 opinion with respect to slavery is what had been said by William Blackstone in 1765:

I have formerly observed that pure and proper slavery does not, nay, cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant
to reason, and the principles of natural law, that such a state should subsist any where.\(^8\)

Blackstone then exposes the "false foundations" upon which various arguments for "the right of slavery" are based. Whatever "the necessity of the case" obliged Americans to put up with in 1776 and 1787-1789, the decisive case against slavery was known, and respected, by thinking men in all of the thirteen States.

Mr. Meese is correct in sensing that Chief Justice Taney did not truly believe in "original intent," else he would have approached the slavery question quite differently. The Chief Justice had already been shown by John C. Calhoun that the only way to get around the true original intention of the Declaration of Independence on the issue of the status of slavery was to disavow the Declaration. Taney could not do this in his circumstances; he was reduced instead to trying to reinterpret the Declaration. One can see in Taney, as in Calhoun, how reason can be subverted by passion.

Mr. Jaffa points out (in his criticisms of Mr. Meese) that "Taney's opinion in Dred Scott did not invalidate any attempted action of the Congress," since "the Missouri Compromise restriction of slavery" had been repealed in 1854. But since Dred Scott's owner had taken him before 1854 into jurisdictions presumably covered by Congressional restrictions, it could very much matter whether those restrictions had been valid. The Taney opinion was also important, as Mr. Jaffa recognizes, for what it said about the Republican Party platform.

Nor should one accept as readily as Mr. Jaffa seems to do the Taney proposition that the Constitution is friendly to slavery. Rather, the Constitution of 1787 can be read as reflecting a grudging accommodation to slavery, as may be seen even in the terms of the 1808 Clause in Section 9 of Article I. In addition, it is recognized in the Fugitive Slave Clause that persons claimed as slaves are held thus only by the positive laws of States; they are not spoken of, as other persons on the run are, as fugitives from justice. These are, I believe, readings consis-

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8. W. Blackstone, Commentaries on the Laws of England 411 (1765). See also id. at 123: "And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes eo instante a freeman."
tent with Abraham Lincoln's.\(^9\)

Two other dubious features of the Taney opinion in *Dred Scott*, which Mr. Jaffa seems to acquiesce in, should be noticed. One is that Congress could not act to restrict slavery in the Territories if slaves were regarded as merely property. But due process should not be taken to mean that particular kinds of property cannot be singled out for special legislative treatment (and even complete suppression) in various circumstances. It is hardly likely that the State legislatures that abolished property in slaves from 1776 on violated the due process clauses in their constitutions.

The other dubious feature in the Taney opinion to be noticed here is the assumption that what the Court said in defining the powers of Congress with respect to the Territories was binding upon the Congress, and that the only way to get around the Court's reading was by constitutional amendment. The propriety of judicial review in such matters should not be taken for granted—and I believe there are indications that Lincoln did not do so, however prudent he may have thought it to acquiesce (at least for the time being) in what the Court had done in a particular case.\(^{10}\)

II.

Does Mr. Jaffa recognize sufficiently the shortcomings of the equality which he so eloquently extols?

Mr. Meese can perhaps be chided for not appreciating the full implications of the insistence by the Declaration of Independence that "all men are created equal." Dedication to equality can no doubt contribute to justice and the common good, standing as a bulwark against tyranny. But it can also lead to an emphasis upon self-centeredness and upon private

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10. For my discussions of the Constitution, see Anastaplo, How to Read the Constitution of the United States, 17 Loy. U. of Chic. L.J. 1 (1985); Anastaplo, Political Philosophy of the Constitution, in Encyclopedia of the American Constitution 1417-20 (1986); A Commentary, supra note 9, at 15; those things of mine cited in supra notes 3 & 9, and in infra notes 12, 14, 15, 19, 20, 22, 26 & 27; and infra appendices A & C.
right—and these in turn can promote relativism, if not even nihilism, and hence another kind of tyranny. Certainly, mediocrity can easily become the order of the day when equality is made too much of. Perhaps it is this prospect that moves Mr. Meese and his cohorts to be as apprehensive as they sometimes seem to be about current egalitarian movements. In any event, is it not "freedom," even more than "equality," which appeals to mankind in the noblest opposition to slavery? May not this be seen in Winston Churchill's greatest speeches during the Second World War?

III.

Does Mr. Jaffa mean to leave the impression that theory alone determines political practice?

Not enough seems to be made by Mr. Jaffa of nature (or personal temperament) and of circumstances in everyday political life. If he did make more of these, he would not be as apt as he is to subject political men to the most exacting philosophical scrutiny.

The fact remains that men can be fairminded and effective statesmen without having much in the way of philosophical astuteness. It is imprudent to regard as radically-flawed human beings those political men who hold dubious theoretical opinions. To do so leaves the philosopher without allies—and, even worse perhaps, subverts the ability of decent men to do good. Such an attitude can be discerned to have been critical to the intolerance both of the Inquisition and of Stalinism.

Too much of an emphasis upon the theoretical may even be seen in Mr. Jaffa's insistence upon the natural-right tradition of the Declaration of Independence to the virtual exclusion of the prescriptive rights of the English-speaking peoples. This is to ignore the central place given in the Declaration to the grievances grounded in the British Constitution.

IV.

Is there not an inevitable tension, because of the very nature of things, between philosophy and the city?

Of course, Mr. Jaffa recognizes this tension, but one must wonder whether he gives it sufficient weight. The limitations of the city, and of political life, may be seen in the ambiguity of justice, and of political life itself, in Plato's Republic.

Perhaps the most instructive essay in Mr. Jaffa's collection
here is what he has to say about Leszek Kolakowski. But Professor Kolakowski, as a professional philosopher, can properly be subjected to a degree of theoretical scrutiny which may be inappropriate in dealing as Mr. Jaffa does with such political men as Attorney General Meese, Chief Justice Rehnquist, and Associate Justice Brennan.

Indeed, I dare to venture the opinion that even Mr. Jaffa's beloved Abraham Lincoln is not the great theoretician that he is sometimes taken to be. There is about Mr. Jaffa's passion in these matters the _eros_ of the political man rather than that of the philosopher—of the political man who is driven to consider as the very best whatever happens to be his own.

It may well be that underlying Mr. Jaffa's passion here is his deep concern for the survival of philosophy itself. But both philosophy and the city may be misconceived, and ill-served, if they are brought together in the rationalistic fashion of the Enlightenment. On the limitations, and even perils, of the Enlightenment Mr. Jaffa can be most instructive.

V.

Does Mr. Jaffa mean to leave the impression that "the consent of the governed" is for the Declaration of Independence, as well as for himself, a necessary basis for legitimate government in all circumstances?

Perhaps "the consent of the governed" associated with the Declaration of Independence can be translated into the terms used by Plato and Aristotle, but not without significant distortion. Certainly, Plato and Aristotle, as well as the Bible, recognized the possibility of just regimes without benefit of the consent of the governed. Mr. Jaffa, in his stance here, seems more in the spirit of Rousseau, if not of the Enlightenment, than in the spirit either of the Bible or of Classical Thought, both of which he nevertheless looks up to.

To make too much of the consent of the governed may even run the risk of enthroning positive law (in the form of the will of the people) at the expense both of natural right and of divine revelation. Mr. Jaffa does warn against this substitution—but his polemical thrusts sometimes move in a different direction from his warning.

The Framers of the Constitution spoke again and again of the merits of the British Constitution, a constitution which was not grounded in that sense of "consent of the governed" that
Mr. Jaffa finds to be demanded by the Declaration of Independence. Leo Strauss insisted again and again upon the superiority today of liberal democracy, even as he recognized its critical limitations—and hence its inferiority to certain regimes (not available, as a practical matter, in our time) which do not depend upon consent of the governed.\footnote{11}{"That Leo Strauss and the classics, for all practical purposes, favored the rule of law rather than of men and were averse to arbitrary government is not plain to all. That is because although their support of the rule of law was unhesitating, their approval of it was not unqualified." H. Gildin, Leo Strauss and the Crisis of Liberal Democracy, in The Crisis of Liberal Democracy, supra note 7, at 95. "A Communist society cannot regard anything as more sacred than itself, except perhaps some future condition of itself. The plausibility of the case for liberal democracy depends on the extent to which there are to be found, among the things that it regards as higher in dignity than itself, things that truly are higher than it in dignity. Liberal democracy continues to be the troubled repository of the great western tradition at the same time that it harbors within itself tendencies that undermine it: thoughtless conformism and mass culture are equally inimical to Biblical religion and to genuine philosophical thought. . . . Liberal democracy gives the effort to preserve the western tradition, in a manner worthy of that tradition, a fighting chance. This is another one of the essential differences between it and communism that made Strauss give liberal democracy his unhesitating support even though his approval of it was not and could not be unqualified." Id. at 100; "I [have] tried to explain why, according to Strauss, constitutional democracy comes closer today to what the classics require than does any feasible alternative to it. This is very different from affirming that democracy is the simply just political order, a view that I do not think he held." Id. at 122-123. See infra note 30.}

I myself was obliged to recognize these reservations almost two decades ago, in the opening note of my Constitutionalist: “The tension evident in this study may be inevitable for anyone who tries to ‘live with’ both the Apology of Socrates and the Declaration of Independence—for anyone, that is, who finds himself drawn to two public declarations which are, despite their superficial compatibility, radically divergent in their presuppositions and implications. Thus, an attempt is made herein to see American constitutional law and political thought from the perspective of our ancient teachers.”\footnote{12}{G. Anastaplo, The Constitutionalist: Notes on the First Amendment 420 n.1 (1971). On the limitations of modern egalitarianism, see supra section 11 and the passage quoted from my Prophets and Heretics, supra note 3, at 315-316 and infra note 30. See also infra appendix C (e.g., section XII).}

VI.

Does Mr. Jaffa recognize sufficiently the merits of that freedom which he routinely subordinates to equality?

Of course, it is possible to see “freedom” and “equality” in terms of each other. Even so, freedom tends to look more to
excellence, or virtue (and hence philosophy), while equality naturally tends to make more of private interests (and hence certain kinds of revelation). It is for this reason that Plato and Aristotle can be said to have been more open to claims based on freedom than to those based on equality, something which Leo Strauss himself pointed out on more than one occasion.

This is not to deny that freedom can deteriorate into simply living as one likes. This makes essential that liberal education which helps equip free men to make proper use—and to want to make proper use—of their freedom.13

VII.

What more should be said on behalf of Chief Justice Rehnquist and Associate Justice Brennan with respect to the matters touched upon by Mr. Jaffa?

Justice Brennan does stand for the rule of law.14 The misreadings of the Constitution that Mr. Jaffa laments have the merits of an attempt to look beyond the Constitution to the principles, or aspirations, which breathe life into our constitutional enterprise.

The Chief Justice, on the other hand, exhibited (as Associate Justice) respect for the primary purpose of the free-speech guarantee of the First Amendment. Indeed, I have had occasion to say of him that "he can well become, among the members of the Court during the next decade, perhaps the closest on First Amendment issues (except on the issue of obscenity) to Hugo L. Black, the first (and probably the greatest) of the New Deal Justices."15

13. On liberal education, see the passage from Leo Strauss used as the epigraph to this article and the passage from Laurence Berns used in the epilogue to this article. For my discussions of liberal education, see the essays on Plato's Apology, on Plato's Meno and on Plato's Crito in G. ANASTAPLO, HUMAN BEING AND CITIZEN, supra note 3, at 8; What Is a Classic? in THE ARTIST AS THINKER, supra note 5; Notes Toward an 'Apologia pro vita sua,' 10 INTERPRETATION 319 (1982); Aristotle on Law and Morality, in 3 WINDSOR, YEARBOOK OF ACCESS TO JUSTICE 458 (1983); The Teacher as Learner: On Discussion, CLAREMONT REVIEW OF BOOKS 22 (Summer 1985); On How Eric Vogelin Has Read Plato and Aristotle, INDEPENDENT J. PHILOSOPHY — (1986-87); and infra appendices A & B. See also the Bibliography appended to Anastaplo, Commentary on the Constitution, supra note 9, at 225. G. ANASTAPLO, ARTIST AS THINKER, supra note 5 includes discussions of Shakespeare, Milton and Bunyan. See infra appendix A, section I.


15. Anastaplo, William H. Rehnquist and the First Amendment,
In any event, it is difficult to see what practical differences there are likely to be, in terms of how cases should be decided, between Mr. Jaffa and the Chief Justice, whatever theoretical shortcomings Mr. Jaffa may discern in the Chief Justice. It is to be hoped that the Chief Justice will not so forget himself, and his high calling, as to subvert the teaching function of his office by proclaiming from the Bench what one of his predecessors did (in order to justify packing some Communist Party leaders off to jail in 1951),

Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. . . . To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket, we must reply that all concepts are relative.\(^{16}\)

It is politically salutary to acknowledge what is good about both the Chief Justice and Justice Brennan. Thus, Justice Brennan could say, upon the recent elevation of Justice Rehnquist, “He’s going to be a splendid Chief Justice.” Decent conservatives and decent liberals do have much in common. Our regime depends upon the constant recognition by political men of their affinities, despite their respective theoretical shortcomings.\(^{17}\)

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\(^{16}\) Dennis v. United States, 341 U.S. 494, 508 (1951) (Vinson, C.J.). Such sentiments are regarded as respectable today among sophisticated people. See, e.g., Antoine, Integrity and Circumspection: The Labor Law Vision of Bernard D. Meltzer, 53 UNIV. CHI. L. REV. 78 (1986) (opening paragraph); Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693, 704-706 (1976). Mr. Jaffa is properly concerned lest the moral underpinnings of the American regime be undermined by the thoughtlessness of people who should know better and who do “feel” better than they (in their sophistication) say. In any event, it is salutary that “sophisticated” jurisprudential speculations (if to be indulged in at all) should be interred in the law review articles that judges write.

\(^{17}\) For the Brennan quotation, see Eisasser, Senate Groups Cram for Rehnquist Quiz, Chicago Tribune, July 27, 1986, at 5, col. 3. See also Justice Brennan, Due Process, supra note 14, at n.8.

Much is to be said for magnanimity if there is to be a healthy polity. The most eloquent (and encouraging) recognition of the longstanding grievances of American racial minorities that I heard during the recent mayoral contest in Chicago was made (at the University of Chicago, on February 27, 1987) by an “ethnic” candidate (Edward
I confess, that is, that I am not in these matters the purist that Mr. Jaffa is. This is I suppose, another way of saying that I may yet have a great deal to learn from him.

**EPILOGUE**

The reader may better grasp the questions I have posed for Mr. Jaffa (as well as for myself) if he should be reminded of how differences between us have developed heretofore. Those differences are hinted at in the Introduction of Mr. Jaffa reprinted in the Prologue to this article.

Our differences (and, of course, our affinities) are further spelled out in a recent article by a scholar who has know Mr. Jaffa and me for decades and who was also privileged to study with Leo Strauss.¹⁸ Consider his instructive survey of our situation:

>The most impressive attempt known to me to combine classical thought with the principles of the American polity is to be found in the work of Harry V. Jaffa. I will for the most part confine myself here to his discussion of the Declaration of Independence in the essay, 'What is Equality? The Declaration of Independence Revisited.'¹⁹ Jaffa builds on Vrdolyak) who has been in recent years the bitterest opponent of the incumbent mayor (Harold Washington). Mr. Vrdolyak's testimonial to the enduring claims among us of equality can easily be dismissed as mere politics. It can even be said that these stated convictions do not come from the heart. But however that may be, the passions are not all that count: such a public recognition as I heard from Mr. Vrdolyak, if "only" in words, of the plight of minorities in this country reflects an informed awareness even as it appeals to the passions (including the speaker's passions) through the reason. Thus, we have come a long way in these matters from John C. Calhoun and Roger D. Taney. In short, a useful magnanimity requires that one's opponents' merits (apparent as well as genuine) be acknowledged and thereby reinforced. See the text at infra note 27.

¹⁸ This scholar drawn upon here is Laurence Berns, a senior member of the faculty of St. John's College, Annapolis, Md. His publications include L. Berns, Aristotle's Poetics, in Ancients and Moderns: Essays on the Tradition of Political Philosophy in Honor of Leo Strauss 70 (1964); L. Berns, Rational Animal-Political Animal: Nature and Convention in Human Speech and Politics, in Essays in Honor of Jacob Klein 29 (1976); L. Berns, Francis Bacon and the Conquest of Nature, 8 Interpretation 1 (1978); Berns, Speculations on Liberal and Illiberal Politics, 40 The Rev. of Politics 231 (1978); Berns, Book Review, 10 Interpretation 322 (1982) 322. See also G. Anastaplo, The Constitutionalist 362 (1971); Berns, Two Old Conservatives Discuss the Anastaplo Case, 54 Cornell L. Rev. 920 (1969) (this is the last article cited to by Professor Berns in the article from which I quote at length here in my epilogue).

My notes 19 through 29 in this article are taken from notes 33 through 43, in Professor Berns's article, infra note 30.

¹⁹ [This is note 33 in the Berns article, see infra note 30, from which I am quoting...
George Anastaplo's own observation that the references to
God in the Declaration of Independence portray him in
terms of the three powers of constitutional government.20
'All men are created equal' is interpreted by Jaffa in an
Aristotelian mode placing man between beasts and God. The
respects in which men are equal or the same is understood
'as much by understanding what he is not, as by understand-
ing what he is. . . . Man is not either beast or God.' The
three powers of government are properly united in God, but
never in human hands; that is, they are properly united in a
being that is the perfection of reason, justice, and mercy. It
is the very definition of tyranny to unite them in fallible
creatures like men, whose partial perfections are subject to
corruption by passionate self-love and other such influences.
'The equality of mankind is an equality of defect, as well as
an equality of rights.' The qualitative distinction between
animals that possess reason and beasts that do not is more
fundamental than any distinction of quantity or intensity of
possession between the possessors of reason. Just govern-
ment presupposes sufficient enlightenment among human
beings to recognize that no rational animal is the proper sub-
ject of despotic rule, and no man is sufficiently godlike to be
entrusted with despotic rule. Reciprocal with these equali-
ties of superiority and defect is the notion that consent is the
only justice basis of government. Jaffa anticipates the objection
that consent is not an adequate replacement for wisdom as
the ground upon which rule can be legitimated. The claims
of wisdom have dubious political value because of 'the fact
that it is not the wise who advance under the banners of wis-
dom but rather pretenders to wisdom.' Leo Strauss's
account of the classical position in a way admits this last
point. The classics favored the rule of gentlemen, that ele-
ment of society that through its wealth and leisure had the
greatest opportunities to acquire a liberal education, which
means an education that among other things fosters civil
responsibility. This points to the ultimate justification of the
rule of gentlemen: the rule of gentlemen is the political

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20. [This is note 34 in the Berns article, infra note 30, from which I am quoting
here.] George Anastaplo, The Declaration of Independence, 9 St. Louis Univ. L. J. 390
(Spring 1965). [See also infra note 30.]
reflection on the, for almost all political purposes, impossible rule of the philosophers, the rule of 'the men best by nature and best by education.' Jaffa is aware of the impoverishment that would attend the removal of such political reflections.

An interesting contrast to the classicism of Harry Jaffa is to be found in the classicism of George Anastaplo. While Jaffa emphasizes the natural equities of superiority and defect upon which the moral principles governing the American polity are based, the central consideration for Anastaplo's 'Constitutionalist' are the blessings of liberty. He reviews Jaffa's Equality and Liberty in an article entitled 'Liberty and Equality.' Civil liberties, in contrast to civil rights, make for popular influence over, as well as protection against, government. But most importantly during 'a time of effective popular rule,' they provide for the protection of minorities from the encroachment of majorities, for the protection within democratic government for natural aristocracy. While Jaffa's rhetoric emphasizes the transformation of self-evident truth into 'living faith,' the sacramental character of our moral and political principles, Anastaplo recurs to the distinctions between human being and citizen, politician and scholar, thoughtful man and partisan, and nature and circumstance. The inevitable partiality and relativity of any effective political statement point to prudence and moderation as indispensable political virtues—even in the pursuit of justice.

The most useful way of beginning to account for these


23. [This is note 37 in the Berns article, infra note 30, from which I am quoting here.] See G. Anastaplo, The Constitutionalist, ch. 8, Sec. ix, and Thomas Jefferson's letter to John Adams, October 28, 1813.

24. [This is note 38 in the Berns article, infra note 30, from which I am quoting here.] H. Jaffa, Equality and Liberty, 139 (1965); H. Jaffa, Crisis of the House Divided 227, 232, and 239 (1959).

25. [This is note 39 in the Berns article, infra note 30, from which I am quoting here.] G. Anastaplo, Human Being and Citizen, essays III, X, and XVI.

26. [This is note 40 in the Berns article from which I am quoting here.] See G. Anastaplo, Citizenship, Prudence and Classics, The Artist as Thinker 279-83 (1983); see also L. Strauss, Natural Right and History ch. 4 (1953) [See as well infra appendix B].
differences may well be in terms of different judgments about the needs of our situation, about 'the crisis of liberal democracy,' about the political conditions for philosophizing on the one hand and the reliability of nature on the other.

The moral fervor of the political savior is not usually associated with the cool deliberation of the man of prudence. And yet both Jaffa and Anastaplo find their paradigms in Abraham Lincoln. After a careful line-by-line analysis of the Emancipation Proclamations, 'recreating' the complex of problems Lincoln had to deal with, Anastaplo reflects on prudence in general:

We see, of course, what prudence can mean in a particular situation—and hence what prudence itself means. One must adjust to one's materials, including the prejudices and limitations of one's community. Such adjustment often includes settling for less than the best. But the most useful adjustment is not possible unless one does know what the very best would be. We can also sense, upon the study of the doings of prudent men, how important chance is in human affairs—and hence how limited we often are in what we can do, even when we know what should be done.

We should notice as well, and guard against, that fashionable opinion which dismisses what is reasonable and deliberate as cold-blooded and calculating. It is also important, however, if one is to be most effective as a reasonable, deliberate and deliberating human being, to seem other than cold-blooded and calculating—that is, it is important to be a good politician. Once again we are reminded of the importance in political things of appearances, of a healthy respect for the opinions (and hence the errors as well as the sound intuitions) of mankind. Certainly, self-righteousness should always be held in check, but not always a show of indignation. Still, indignation even in a good cause should be carefully watched. Consider, for example, the famous Abolitionist William Lloyd Garrison's 1831 promise, 'I will be as harsh as truth, and as uncompromising as justice. On this subject I do not wish to think, or to speak, or write, with moderation.' Such passion may be useful, even necessary, if great evils are to be corrected, but only if a Lincoln should become available to supervise what finally happens and to deal prudently with others (zealous
friends and sincere enemies alike) with a remarkable, even godlike, magnanimity.  

Last but not least, the classical emphasis on the ethical implications of all political arrangements reminds us conversely that every political arrangement presupposes certain qualities in the populace that is to live under that arrangement. Free government based on enlightened consent is not going to survive if its citizens are regarded as unworthy of such government and if they are incapable of making it work. The cultivation of excellence, or, more euphemistically, liberal education for leadership, may be indispensable for the survival of such government. If it should be that capacities for liberal education are not created equal in all men, religious education for all the people must supplement liberal education. Did the Founding Fathers rely on the virtues of a religiously trained populace without making provision for the continuance of that training? However that may be, although they did concentrate more on the structures of government, they did not forget the character of the people. 'As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.' Classical and American thought seem to come together most in their reliance on 'moral principles grounded in thoughtfulness,' political prudence (that is, the avoidance of unreasonable expectations)

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27. [This is note 41 in the Berns article, infra note 30, from which I am quoting here.] G. Anastaplo, _Abraham Lincoln's Emancipation Proclamation_, IN _CONSTITUTIONAL GOVERNMENT IN AMERICA_ 439 (1980). In the context of a discussion of the right and the wrong way to argue against censorship, Anastaplo gives voice to what has become a growing concern in his recent writings: "Indeed, we may have more to fear from a lack of concern about abuses of our considerable liberties than we have from threats of immediate restrictions upon them." Anastaplo, _Human Nature and the First Amendment_, 1979 UNIV. PITT. L. REV. 746. Cf. 15 ENCYCLOPEDIA BRITANNICA CENSORSHIP, 634 (15th ed. 1986).

28. [This is note 42 in the Berns article, infra note 30, from which I am quoting here.] "Heaven grant that it may be the glory of the United States to have established two great truths, of the highest importance to the whole human race: first, that an enlightened community is capable of self-government; and, second, that the toleration of all sects does not necessarily produce indifference to religion." Daniel Webster, speech, reception at Pittsburgh, 8 July 1833. _Cf._ II A. TOCQUEVILLE, _DEMOCRACY IN AMERICA_ ch. 15; XENOPHON, _MEMORABILIA_, IV, ch. 3.1, 3.2. _See also_ the remarkable biologist's account of "the distress of the modern soul" by J. MONOD, _CHANCE AND NECESSITY_ 164-73 (1972).

29. [This is note 43 in the Berns article, infra note 30, from which I am quoting here.] _The Federalist_, no.55.
and the concern for enlightenment (that is, liberal education) . . .

[I have dealt here] with two thinkers who have, with the aid of Leo Strauss and others, liberated themselves from the powerful dogma that a return to classical thought is impossible and devoted themselves to studies in depth of American thought and institutions. In interesting and complementary ways the principles, problems, and virtues of the modern American polity have been shown to require for their clarification not only modern philosophy but also the 'premodern thought of our western tradition.' We note that when Strauss speaks of our western tradition, he refers not only to classical philosophy but also to the Bible. This side of the tradition is more conspicuous in the work of Jaffa, but it is not ignored by Anastaplo.30

30. L. Berns, Aristotle and the Moderns on Freedom and Equality, in The Crisis of Liberal Democracy, supra note 7, at 156-59. I have incorporated in the long passage quoted here recent corrections made by Mr. Berns. My notes 19 through 29 in this article have been taken in their entirety (except for the bracketed material) from notes 33 through 43 in the Berns article.

Mr. Berns notices (at infra note 20 in my text, which is at note 34 in his text) my 1965 observations about the references to God in the Declaration of Independence. I have recently developed further those observations in my Commentary on the Constitution, supra note 9, at 38-39:

The affinity between the Declaration of Independence and the Constitution of 1787 is further suggested by certain implications of the separation-of-powers approach in the Constitution, a principle which had been considerably compromised in the Articles of Confederation.

Various of the grievances in the Declaration of Independence, and the way government itself is spoken of there, presuppose a separation-of-powers approach much like that made explicit in the Constitution. We can even see in the references to deity in the Declaration of Independence an oblique anticipation of the qualified separation of powers found in the Constitution itself. There are four references to deity in the Declaration. The first reference, and perhaps the second as well, regarded God as legislator; it is He that orders things, ordaining what is to be. That is, He first comes to view as lawgiver. Next, God is seen as judge. Finally, He is revealed as executive, as One Who extends protection, enforcing the laws that have been laid down (with a suggestion as well of the dispensing power of the executive). Thus, the authors of the Declaration portrayed even the government of the world in the light of their political principles.

In this way, at least, it can be argued that a republican regime is implied by the Declaration of Independence, such a regime as may be seen in various of the State constitutions of that period, in the Constitution of 1787, and even (however distorted in some respects) in the British constitution. Among the features of the republicanism endorsed by the Declaration are the consent of the governed, a qualified separation of powers, and a proper respect for the inalienable rights of mankind.

I referred in my first lecture to the natural constitutionalism of the Declaration of Independence. Is it not appropriate, therefore, that the deference in the Declaration to ‘the Laws of Nature and of Nature’s God'
Is it not evident from this survey by Laurence Berns why we should all be grateful to Professor Jaffa? He does oblige us to think about the most important things, and to try to do so in a way worthy of our greatest teachers.

should be reflected in the understanding that the best ordering of human things should take as its model the divine ordering of the world?

The Constitution of 1787 can plausibly be taken, then, as an incarnation of the principles revealed in the Declaration of Independence. It may even be the form of government most appropriate for the people of the Declaration—that is, for a people who could produce such a declaration. It is also a form of government which, in this manifestation, had to defer to circumstances (particularly the long-established institution of slavery) which left it deeply flawed, but not without hope of eventual redemption.

*Id.*

These observations can be taken to provide qualified support for one aspect of the position taken by Mr. Jaffa during the past decade against Walter Berns, Martin Diamond and Irving Kristol. This aspect of Mr. Jaffa's position, with respect to the relation between the Declaration of Independence and the Constitution, is glanced at by me in the third paragraph of the following comment upon his work some years ago:

Whatever differences I may have with Mr. Jaffa can, it seems to me, be reconciled, especially since we do share certain critical opinions about the dominant relativism and historicism among political scientists today. But, then, his differences with Mr. Diamond and Mr. Kristol... also seem to me to be less serious than he likes to make them out to be.

Consider, for instance, the concern expressed by Mr. Diamond and Mr. Kristol about the tendencies of egalitarianism toward utopianism, levelling and populism. An equality hedged in as Mr. Jaffa hedges it need not arouse their concern—except as to whether such hedges can be maintained in these times. Mr. Jaffa does tacitly recognize their concerns, in the way he places his hedges—concerns which go back to at least Tocqueville.

Or consider Mr. Jaffa's extended critique of Mr. Diamond for presuming to say that the Declaration of Independence "is devoid of guidance" for the institutions of government under the Constitution. Is it not evident that Mr. Diamond meant that considerable leeway was left by the Declaration, that the institutions to be established by a people depend to a considerable extent on circumstances? There may have been something careless in Mr. Diamond's rhetorical flourish here. But is it not evident that Mr. Diamond agreed with the substance of what his tougher-minded critic has said on this score? And, indeed, has not Mr. Jaffa himself said things, in his *Conditions of Freedom* (e.g., pp. 114, 154-55, 158-59), which sound very much like what Mr. Diamond has now been so vigorously rebuked for saying on this point?


On the relation of religion and politics, see Anastaplo, *The Religion Clauses of the First Amendment,* 11 MEM. ST. U. L. REV. 151 (1981); Anastaplo, *On Speaking to and for Mankind: The Laborem Exercens Encyclical of Pope John Paul II,* 42 CATHOLICISM IN CRISIS 6 (No. 10 1983); infra appendix A. I anticipate, in my Notes Toward an *Apoloagia pro vita sua*, supra note 13, at 341-42, "a series of inquiries into the divine based upon a recognition of that question which is fundamental to much of philosophy as well as to theology—the question *quid sit deus.*"
APPENDIX A

THE FOUNDERS OF OUR FOUNDERS: JERUSALEM, ATHENS AND THE AMERICAN CONSTITUTION

Behold, I have taught you statutes and judgments, even as the Lord my God commanded me, that ye should do so in the land whither ye go to possess it.

Keep therefore and do them; for this is your wisdom and your understanding in the sight of the nations, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people.

—Deuteronomy 4: 5-6

I.

The Bicentenary of the Founding of these United States as an independent community has stimulated interest in our fundamental constitutional documents. This stimulation of interest has not been limited to American constitutional documents. The dependence of the Founding Fathers upon British constitutional experience has been noticed, with special attention having been paid by the Congress of the United States to Magna Carta, an original copy of which has been lent us by the British Parliament.

But in order to understand what we have come to be and how, one should look beneath, if not beyond, both American and British constitutional statements to what can be considered the underpinnings not only of the Anglo-American development but of Western civilization itself. That is, one must look to those influences, rooted in Jerusalem and in Athens, which appeal to the human being in us all, to human beings who find themselves allocated to one of the political subdivisions of what we know as the West. Those influences find authoritative expression in the books of the Bible and in the dialogues of Plato. These divergent influences have found literary expression in such works as John Bunyan's Pilgrim's Pro-

31. A talk given by George Anastaplo at Wake Forest University, Winston-Salem, North Carolina, October 8, 1976. The quotations from PARADISE REGAINED (cited as P.R. in the text) are taken from J. Milton, COMPLETE POEMS AND MAJOR PROSE, (Hughes, ed. 1957). This talk is dedicated to the memory of James A. Steintrager of the University of Chicago and Wake Forest University. [At the author's request, the footnotes are contained in the text and hence cannot conform to "Blue Book" style. — The Editors]
gress and William Shakespeare's plays, helping to shape thereby American opinion.

To regard the Bible and the Platonic dialogues as contributors to our constitutional development is to recognize that any analysis one might attempt of that development must be anything but comprehensive: it is to say that one must attempt to plumb the depths of Western Civilization. But however inaccessible those depths may ultimately be, a preliminary survey of our great heritage should be of some use.

II.

When one looks at Jerusalem, one confronts two principal sets of doctrines—the Judaic and the Christian—with the latter claiming to be the destined fulfillment of the former. (A third set, that of Islam, proclaims itself the true completion of the other two.) It is the Christian set of doctrines which has had, and continues to have, the more immediate influence upon the West, and it is with this that we will primarily concern ourselves on this occasion in thinking about Jerusalem and its relation to Athens.

When one looks at Athens, one confronts several sets of doctrines, the various schools of thought which all trace their origins to Socrates as somehow the founder of a way of life rooted in moral philosophy. There has been in the West, for almost two thousand years now, an uneasy, yet often fruitful, relation between Athens and Jerusalem (or its pagan counterparts). Indeed, this tension may have been in large part responsible for the remarkable accomplishments of the West—as well as for its curious psychic vulnerability. Of course, there have been minds in whom thoughtful accommodations between philosophy and religion have been made. One thinks of Xenophon, Maimonides, Averroes, Alfarabi and, at times, Thomas Aquinas. But even in those cases, there did remain the question as to which is ultimately sovereign, philosophy or religion.

In men of ordinary understanding—mere mortals like the rest of us—thoughtful accommodations are much harder to come by. Thus, we are familiar with free-thinking intellectuals who call into question the religious traditions (or, as they might even call them, the superstitions) of their time—so much so in our own time as to threaten the continued appeal and influence of organized religion. Thus, also, we are familiar
with men of faith who confidently put pretenders to worldly wisdom in their place. A professor of church history (he happens to be in a Greek Orthodox college, but it could be the college of any standard Christian sect) is asked, "Are there any fundamental differences between Jesus and the great Greek philosophers like Socrates, Plato and Aristotle?" The following answer is given,

> There are many fundamental differences. Socrates and others taught the uncertain philosophical conclusions of their own limited and finite minds. Jesus taught infallible and divine truth. The fruit of the teachings of these philosophers is a temporary proficiency in an imperfect human knowledge. The fruit of the knowledge of Jesus Christ is eternal happiness. In themselves these great Greek philosophers were men, but Jesus was God. His words are infallible and eternal and have their value in all climates and centuries.

And yet, as I have indicated, thoughtful men have worked out responsible accommodations between these contending approaches. But however smooth and enduring an accommodation may be, it cannot help but regard one or the other of the two approaches as ultimately authoritative.

III.

The most interesting—that is to say, the most dramatic—times are those in which religion and "philosophy" struggle for supremacy, in which whatever longstanding accommodation there has been between them has (for one reason or another) broken down. One such period was that in which Socrates lived, especially in the closing years of his life, a time very much unsettled by the trials and ultimate defeat of Athens during the Peloponnesian War. This time of stress culminated, for Socrates, in his prosecution, conviction, and execution on charges which turned around his supposed refusal to acknowledge the gods of the city. Plato's Apology of Socrates remains the most instructive account of what happened to Socrates on that occasion.

Indeed, the Apology (or, rather, the combination of the Apology, which reports the trial of Socrates, and the Crito, which reports his refusal to accept the escape plan offered him)—this combination of the Apology and the Crito is the public document among the dialogues of Plato. It is this pair of
dialogues which is most widely known and which has had the
greatest direct influence upon public opinion with respect to
the Socratic (or philosophic) way of life. This is as it should be,
since this pair of dialogues—perhaps more than any others in
the Platonic corpus—is directed to the general public. One dia-
logue shows Socrates speaking to the Athenian people, the
other shows him providing Crito arguments that he, Crito, can
make in explaining to others in Athens why he had not been
able to use his money to secure his friend's escape.

It is instructive to notice just how the dialogues can be
seen by the public-spirited man of Christian inclinations. It is
instructive, that is, to notice just how the Socratic experience,
as related by Plato, can appear to pious men in the West. The
bearing of all this on Anglo-American constitutional develop-
ments can be somewhat more immediate if we consider what is
made of Socrates by the great English-speaking champion of
ordered liberty, John Milton (the author of, among other
things, the Areopagitica). Particularly instructive is the ambi-
guous status of Socrates in Milton's epic poem, Paradise
Regained. This ambiguity reflects not only the natural tension
between religion and philosophy but also the related tension
between the citizen and the human being.

Most of Paradise Regained—the sequel to Paradise Lost,
in which Adam and Eve had been tempted by Satan to their
mortal doom—is devoted to the temptations of Jesus by Satan,
temptations which are stoutly resisted by Jesus to the ultimate
salvation of mankind. We see, in Book III, the efforts by Satan
"to awaken in Jesus a passion for glory, by particularizing vari-
ous instances of conquests achieved, and great actions per-
formed, by persons at an early period of life." Jesus replies by
showing the vanity of worldly fame, and the improper means
by which it is generally attained; and contrasts with it the true
glory of religious patience and virtuous wisdom, as exemplified
in the character of Job. Thus, he says (P.R., III, 88-95),

But if there be in glory aught of good,
It may by means far different be attain'd,
Without ambition, war, or violence;
By deeds of peace, by wisdom eminent,
By patience, temperance; I mention still
Him, whom thy wrongs with faintly patience borne,
Made famous in a Land and times obscure;
Who names not now with honor patient Job?
Jesus then adds, in this reply by him to Satan's temptation (P.R., III, 96-99):

Poor Socrates (who next more memorable?)
By what he taught and suffer'd for so doing,
For truth's sake suffering death unjust, lives now
Equal in fame to proudest Conquerors.

In Book IV, the Tempter, proposing to Jesus the intellectual gratifications of wisdom and knowledge, points out to him the celebrated seat of ancient learning, Athens, with its musicians, poets, orators, and philosophers of the different sects. Satan's tempting description of philosophy hearkens back to, and tries to exploit, what Jesus had said about Socrates in Book III (P.R., IV, 272-280):

To sage Philosophy next lend thine ear,
From Heaven descended to the low-rooft house
Of Socrates, see there his Tenement,
Whom well inspir'd the Oracle pronounc'd
Wisest of men; from whose mouth issued forth
Mellifluous streams that water'd all the schools
Of Academics old and new, with those
Surnam'd Peripatetics, and the sect
Epicurean, and the Stoic severe . . .

Thus, Satan is displayed as aware not only of the Socratic source for the various schools of philosophy but also of what those various schools consist of. (One must wonder how much Satan can truly be aware of, especially anyone who holds with Socrates that vice is the result of ignorance.) There then follows, upon Satan's display of the intellectual treasures of ancient Athens, this "sage" reply by Jesus (P.R., IV, 286-292):

Think not but that I know these things, or think
I know them not; not therefore am I short
Of knowing what I ought: he who receives
Light from above, from the fountain of light,
No other doctrine needs, though granted true;
But these are false, or little else but dreams,
Conjectures, fancies, built on nothing firm.

Notice that whoever "receives/Light from above, from the fountain of light,/No other doctrine needs." That is a sufficient reply to Satan. But there follows upon this a critique by Jesus of the various schools of philosophy, a critique which is
preceded by a tacit exemption for the Socrates who had earlier been extolled by Jesus (P.R., IV, 293-294):

The first and wisest of them all profess'd
To know this only, that he nothing knew . . .

Presumably, it is Socrates' insistence upon this truth—that he recognized the limits of his, and consequently other men's knowledge—which led to his fate as one who "For truth's sake suffer[ed] death" (P.R., III, 98).

The Socratic insistence is taken to repudiate worldly wisdom, thereby pointing up the need in men, even in the wisest of men, for "Light from above, from the fountain of light" (P.R., IV, 289). Indeed, one might add, what makes Socrates particularly noteworthy from the perspective of the Christian writer may be that he suffered for the sake of the truth, more than the truth for which he happened to suffer. Certainly, there seems a tension in Milton's poem between respect for Socrates, the sufferer for the sake of truth, and suspicion of the philosophers emanating from Socrates, philosophers who consider natural reason sufficient, to say nothing of those who more directly threaten the faith men have in illumination "from above." Such threateners, it would seem, are as vulnerable to the armed guardians of received doctrines as the Socratic way of life itself was before it came to be invested with the respect for divinity provided it by Plato. (Plutarch's Nicias is instructive here.) Thus, there seems to have been both in pagan times and in Christian times tension, if not even a necessary conflict, between philosophy and an established religious life.

Jesus is presented in Paradise Regained as decisively repudiating the schools derived from Socrates. These successive repudiations, which themselves draw upon perceptive characterizations of each school, address themselves, in turn, to Socrates himself (as we have seen), to Plato, to the Skeptics, to the Aristotelians, to Epicurus, and to the Stoics (P.R., IV, 293-308):

The first and wisest of them all profess'd
To know this only, that he nothing knew;
The next to fabling fell, and smooth conceits;
A third sort doubted all things, though plain sense;
Others in virtue plac'd felicity,
But virtue join'd with riches and long life;
In corporal pleasure he, and careless ease;
The Stoic last in Philosophic pride,
By him call'd virtue; and his virtuous man,
Wise, perfect in himself, and all possessing
Equal to God, oft shames not to prefer,
As fearing God nor man, contemning all
Wealth, pleasure, pain or torment, death and life,
Which when he lists, he leaves, or boasts he can,
For all his tedious talk is but vain boast,
Or subtle shifts conviction to evade.

It might be noted in passing that the Stoics are considered at
greater length than the others, perhaps because they resem-
bled in some ways the Christians themselves.

Jesus is then shown dismissing all the philosophers with
criticisms that the philosophers' more pious-patriotic critics in
Athens (and later, in Rome) might also have applied to them
(P.R., IV, 309-330):

Alas! what can they teach, and not mislead;
Ignorant of themselves, of God much more,
And how the world began, and how man fell
Degraded by himself, on grace depending?
Much of the Soul they talk, but all awry,
And in themselves seek virtue, and to themselves
All glory arrogate, to God give none,
Rather accuse him under usual names,
Fortune and Fate, as one regardless quite
Of mortal things. Who therefore seeks in these
True wisdom, finds her not, or by delusion
Far worse, her false resemblance only meets,
An empty cloud. However, many books
Wise men have said are wearisome; who reads
Incessantly, and to his reading brings not
A spirit and judgment equal or superior
(And what he brings, what needs he elsewhere seek)
Uncertain and unsettl'd still remains,
Deep verst in books and shallow in himself,
Crude or intoxicate, collecting toys,
And trifles for choice matters, worth a sponge;
As Children gathering pebbles on the shore.

Notice the question that is posed about the advisability of
any reading at all in the books of these worldly men. The
reader remains "uncertain and unsettl'd," no matter how much
he reads, unless he brings to that reading a "spirit and judg-
ment equal or superior"—and, it is asked, if he already has
that spirit and judgment to bring to his reading of the philosophers, "what needs he elsewhere seek"? Thus, the self-sufficiency, both for understanding and for a virtuous life, of the doctrines of true religion, is insisted upon. On the other hand, the philosopher, who cannot help but be somewhat skeptical even when he is not something of a materialist, poses a constant threat to the good order of the community. That is to say, we again see that the civic vulnerability of Socrates was not accidental.

Of course, Socrates himself can be understood to have tried to refine and otherwise to correct religious opinions which had become all too questionable and which, consequently, were doomed to fall before the criticisms of others who would not be as responsible as he was in reforming them. On the other hand, Jesus is presented as rooted in religious doctrines and institutions which provide men all they need, thereby making superfluous for them the arts and sciences of ancient Athens. Thus, Jesus says to the Tempter (P.R., IV, 331-364),

Or if I would delight my private hours  
With Music or with Poem, where so soon  
As in our native Language can I find  
That solace? All our Law and Story strewd  
With Hymns, our Psalms with artful terms inscrib'd  
Our Hebrew Songs and Harps in Babylon,  
That pleas'd so well our Victor's ear, declare  
That rather Greece from us these arts deriv'd;  
Ill imitated, while they loudest sing  
The vices of their Deities, and their own  
In Fable, Hymn, or Song, so personating  
Their Gods ridiculous, and themselves past shame.  
Remove their swelling Epithets thick laid  
As varnish on a Harlot's cheek, the rest,  
Thin sown with aught of profit or delight,  
Will far be found unworthy to compare  
With Sion's songs, to all true tastes excelling  
Where God is prais'd aright, and Godlike men,  
The Holiest of Holies, and his Saints;  
Such are from God inspir'd, not such from thee;  
Unless where moral virtue is express'd  
By light of Nature, not in all quite lost.  
Their Orators thou then extoll'st, as those  
The top of Eloquence; Statists indeed,  
And lovers of their Country, as may seem;
But herein to our Prophets far beneath,
As men divinely taught, and better teaching
The solid rules of Civil Government
In their majestic unaffected style
Than all the Oratory of Greece and Rome.
In them is plainest taught, and easiest learnt,
What makes a Nation happy, and keeps it so,
What ruins Kingdoms, and lays Cities flat;
These only, with our Law, best form a King.

A double claim seems to be made here, that the stories told
among the Jews (and, it would seem, among the Christians-to-be) about the divine are sounder than those told by the Greeks;
also, that “our law” provides a better basis for statecraft and
hence for the happiness of nations than what came out of
Greece and Rome. That is to say, “our” way is held out as
being both more true and more salutary.

Certain of the philosophers might have been inclined to
ask whether that which is not true may nevertheless be
employed by conscientious men in the promotion of that which
is salutary. Indeed, they might even have been inclined to sug-
gest (in language later used by George Washington) that
whatever may be conceded to the influence of refined educa-
tion on minds of peculiar structure, reason and experience
both forbid us to expect most people to be moved with respect
to matters divine by anything more reliable than noble fables,
so much so that even when the truth is presented to them
about such matters, they can receive them with no other or
with no more assurance than that which others like them in
other times have received what is now recognized to have been
error. Or, put another way, did not Plato himself know that he
“to fabling fell, and smooth conceits”? (P.R., IV, 295) And if so,
how did he justify it?

We are warned, as we have seen, against “Philosophic
pride” (P.R., IV, 300). This seems to be something that philoso-
phers are easily believed to indulge themselves in, Socrates not
the least in this respect (despite the characterization of him in
Milton’s poem as “Poor Socrates,” as one who had “for truth’s
sake suffer[ed] death,” as one who knew only “that he nothing
knew.” (P.R., III, 96-97, IV, 294. See, also, the opening pages of
Halevi’s Kuzari.) One truth that Socrates did know, and for
which he suffered, was that he was markedly superior to most
people he had come to know. His unwillingness, or inability, to
conceal this truth from others finally contributed to his death
at the hands of his fellow-citizens. But in thus arriving at that truth, and at other truths upon which this fatal truth rested and to which it leads, Socrates did achieve that fulfillment as a human being—that profound moral and intellectual development of embodied reason—to which all citizens, whether they know it or not, can be understood to have dedicated their communal life. Indeed, it may well be that it is because citizens have such an implicit dedication that they can act as they do against anyone who is perceived to be threatening the received and cherished opinions (religious and otherwise) upon which virtue and the meaningfulness of things depend.

IV.

Socrates, we have noticed, does not seem to have been of the opinion that what he happened to be capable of, many others would be likely to achieve as well. What the community is and is not capable of is suggested by the *Apology* and the *Crito*, that pair of dialogues provided by Plato for the training of the general public.

What, then, is the teaching of these dialogues which can be said to bear on our constitutional development? That teaching takes men much as they are: it points to the best possible regime (which *is* transitory), not to an "ideal" regime. An ideal regime may be seen in the Christian Paradise. The ideal may be realized there, with a redeemed or transformed human nature: from *that* something permanent or eternal can be expected. Consider how that transformation is celebrated, as Jesus is honored by angels after his triumph over the Tempter (*P.R.*, IV, 606-617):

[N]ow thou hast aveng'd
Supplanted *Adam*, and by vanquishing
Temptation, hast regain'd lost Paradise,
And frustrated the conquest fraudulent:
He never more henceforth will dare set foot
in Paradise to tempt; his snares are broke:
For, though that seat of earthly bliss be fail'd,
A fairer Paradise is founded now
For *Adam* and his chosen Sons, whom thou
A Savior art come down to reinstall,
Where they shall dwell secure, when time shall be
Of Tempter and Temptation without fear.

The devout Christian is transformed, it would seem, in antici-
pation of his Heavenly condition—and this is transformation into a state far superior to anything mere reason can provide man. It is available, furthermore, for anyone who will believe.

Socrates, on the other hand, assumes that most people will continue to be much as they are. How are they? They are susceptible to prejudice and envy; they are incapable of understanding much, which makes the reputations assigned to men rather suspect; they are much more interested in survival and self-gratification than they are in virtue. One consequence of all this is that it is dangerous for the thoughtful man, at least in the ordinary regime, to go into political life: he is not apt to last long, thereby being of little use either to himself or to others.

There is also a certain inevitable folly to political life, if only because would-be leaders (who must try, as they become more and more "successful," to anticipate and regulate the doings of more and more people) find it difficult really to know what is going on. Consider a prosaic illustration I draw from an occasion in April 1973 when a half dozen of us, of different political inclinations and of considerable interest in politics (including several political scientists), predicted who would be the Presidential candidates of the major parties in 1976. Although this was only three years ago, none of us happened upon any man who was nominated this past summer for either President or Vice-President by any political party! It is difficult to lead a meaningful life in politics partly because it is all too often next to impossible to plan sensibly for oneself even in "the short run."

The role of chance in politics is all too evident to the thoughtful man—and this cannot help but curtail his interest in it. This is not to say, however, that there are no enduring standards which apply to what one should or should not do, either in public life or in response to the demands of politicians. It is evident that Socrates believed there are such standards—and that they very much bear on what the best possible regime is like. There are standards which make far less of the threat or possibility of death than most people are apt to do. Thus, Socrates is shown in both the Apology and the Crito as relatively unaffected by the prospect of death. Indeed, he can even wonder whether life is better than death. Certainly, according to him, a vicious life is worse than death. Certainly, also, there is not in him the concern about death that is evi-
dent in the designation, by God Himself, of Sin and Death as "the two grand foes" (P.R., I, 159).

Socrates may well see sin—or rather, the ignorance from which vice follows—as the grand foe of mankind. The typical city, on the other hand, sees death as the evil especially to be guarded against—and much of what it does and says takes that for granted (including its usual alliance with religion). But then, the typical city—and hence the typical citizen—is a prisoner of unexamined habits and distorted opinions.

Even in the best possible city, there would be a necessity to distinguish between the few who understand and the many who have no more than sound opinions. For these many, poetry (including religious prophecy) is necessary for a decent life. That is to say, the limitations of human nature must be taken into account; the distribution of talents and differences in temperament, however mitigated by efforts to control both breeding and nurture, very much affect what can be done to develop and preserve a just order, especially an order which permits that philosophic life to which the city is somehow dedicated and in which all can be said somehow to participate.

The philosopher, on the other hand, recognizes his need for the city and the duties consequent upon that need. He recognizes also that there are better cities and worse, useful institutions and harmful ones.

V.

No doubt, chance developments (including the emergence of gifted men as founders) can determine whether a city is blessed with institutions that promote moral virtue and permit intellectual virtue. We can see in the Apology and the Crito various duties, standards and institutions deemed by Socrates to contribute to the perpetuation of decent cities. Some I have already touched upon. We need to do little more, in this effort to indicate how the Platonic dialogues bear on our constitutional development, than notice a few of the suggestions Socrates made. Many of these suggestions, which affect our notions of what a humane regime is like, we now take for granted—even though there are many peoples in the world today who have never enjoyed them. One major objective of these suggestions is to develop a city which, even while it insists upon its necessary prerogatives, is aware of its limitations—and con-
ducts itself accordingly. Some Socratic suggestions, as evident in the *Apology* and the *Crito*, follow:

There is no question, first of all, but that the city should be concerned with those opinions of citizens which bear upon morality and citizenship, and these include opinions about the divine and about the condition of the soul after death. Thus, the education of the young and some lifelong supervision of all citizens with respect to these matters are called for, as are efforts to suppress corrupting influences and to promote those influences which make or keep men good. For this nurture and care, something is due in return.

So, next (in this list of Socratic suggestions about the proper ordering of cities), the citizen has a variety of duties, including military service in distant lands and civic service at home. This does not mean, however, that one is obliged, as a soldier or as a civilian, to do everything one is ordered to do. Thus, we learn of Socrates' refusal to comply with orders which would have had him perform unjust acts in Athens. Would he not have responded the same way to a clearly unjust war abroad? But whatever one's duties with respect to military or civic service, there are all too often moral ambiguities which may keep a sensible man from volunteering for either.

Next, we can see that the city, too, has duties which can be translated into various rights of citizens. That is, the city should conduct itself in certain ways in exercising the considerable power with which it is entrusted. Thus, orderly procedure is called for in trials; time for careful deliberation should be provided; cross-examination of accusers and witnesses is taken for granted. It also seems to be taken for granted in much of what Socrates says in the *Apology* and the *Crito* that the rule of law should be relied upon—and this means that laws should be clear and known in advance, that citizens should have an opportunity to criticize them, and that there should be means for having them changed. (Something of what we know as freedom of speech is implied.) That is to say, the laws which call upon citizens to respect them should themselves measure up to reasonable standards of conduct.

Central to the constitutional arrangements and laws that any city may have are those which attempt to deal with the opinions of citizens and others about how the whole of things is to be understood. That is, there should be authoritative customs with respect to impiety (and disloyalty); but these cus-
toms and laws should not, in their application, destroy the occasional Socrates. Certainly, considerable tolerance for conscientious, even though sometimes mistaken, dissent, is sensible. But a city does need to stand for something, even as it allows people such as Socrates to challenge an often mistaken public opinion.

Next, the city must permit those who are not under indictment to leave whenever they wish to do so. Those who remain, when they have the privilege of emigration, imply that they are willing to abide by the laws of the city—and that they are willing to be judged and punished according to those laws. On the other hand, the city which recognizes that dissatisfied citizens may leave is much more likely to restrain itself than is one which erects a Berlin Wall. Of course, tyrannies will arise from time to time (including those which do not allow free movement in or out)—and these, it would seem, may be overthrown. Indeed, the standards of justice which exist independently of regimes provide a basis for judging all regimes—and may be seen in the right of revolution, rooted in nature, found in the Declaration of Independence. This can usefully be understood as a natural-right legacy of the Socratic assessment of the regimes of his day; it complements his salutary stand for law-abidingness even in the face of death.

Next, private property is taken for granted. Should it not be understood to extend not only to physical possessions but also to family associations? The importance of property is reflected in the privilege of emigration, for that privilege includes the right to take with one whatever is one's own. Of course, what is one's own—whether possessions or relatives—does depend in large part upon what the laws have provided for, such laws as those regulating various marriages, estates and burials. Of course, also, there are in Socrates' opinion things more important than property, as property is ordinarily understood. Even so, property does reaffirm the importance of one's own—and may even move the thoughtful man to consider what should truly be one's own. Certainly, there is something reassuring about private associations and about the useful friendships that property make possible: people can vouch for, and protect (and in the best cases elevate), one another. Certainly, also, property means leisure—and that can mean the proper cultivation of one's soul. Or, as Milton's Jesus says of the Aristotelians, "[They] in virtue plac'd felic-
But virtue join'd with riches and long life.” (P.R., IV, 297-298)

Finally, in this catalogue of suggestions drawn from the Apology and Crito about the ordering of cities, there are the implications of Socrates' modest proposal that the most fitting "punishment" for him, as one who has neglected his own fortunes in his tireless advancement of the common good, would be to be maintained in the Prytanean for the rest of his life at public expense. A well-ordered city, he seems to say, is one which has been able to work its way to sound judgments in these matters: it is somehow aware of what cities are really for and how someone such as Socrates contributes to the very best a city can aspire to.

In the well-ordered city, names (as well as property and honors) are distributed properly; for example, those who judge justly are truly called "judges." That is, in such a city, those who shape the authoritative opinions of the community know what they are talking about. In such a city, it is recognized (if only tacitly) that a certain flowering of the human spirit, even though it can be manifested in only a few at a time, is the city's ultimate reason for being—and this flowering includes a constant effort to determine the truth about things, including about what divinity is like and what happens to the soul upon death.

This effort, it should at once be added, is consistent with "fabling . . . and smooth conceits" (P.R., IV, 295), lest the discoveries that a few are privileged to make should be harmful to the many who provide the social support for such discoveries and who (for one reason or another) may not be able to understand them properly. Indeed, the two dialogues we have had under consideration contributed to Plato's deliberate efforts to make "Philosophic pride" (P.R., IV, 300) socially acceptable thereafter—to establish a place in the community for the occasional man who, for good reason, may be more a human being than a citizen.

VI.

We return now, after this survey of some of the influences upon our constitutional development which can be traced back to dialogues such as the Apology and the Crito, to that other great set of influences—to the Biblical, and specifically to the Christian, influences—on our way of life. Those influences,
which have been evident in what I have said about Jesus' response to philosophy in *Paradise Regained*, are apparent even in skeptical times. Some of those influences are of the sort that other religions would exert also, since all serious religions dictate moral conduct and provide social restraints. Various Biblical influences may be seen among us in the Mayflower Compact, in the Gettysburg Address and even in that noble product of a somewhat rationalistic age, the Declaration of Independence.

The religion of a people provides the "philosophical" setting for that people's political and legal arrangements. It looks beyond (or provides a foundation for) the life of the city (even when the "separation of Church and State" is religiously insisted upon). Thus, a moral influence is exerted, both with instruction in what is right and wrong and with forecasts of what rewards and punishments can be expected and when. For these purposes, there can be quite specific rules of conduct about such matters as diet, marriage and worship. Thus, also, a sense of purpose for the community, and for human life itself, is provided. Things are made meaningful; life is depicted as rich, or at least as significant, not as sterile, empty, hopeless.

Limits to temporal authority are suggested whenever a concern for the soul is put before a concern for the body with the body's natural appetite for mere survival and for sensual gratification. Indeed, concern for the soul—for the proper ordering of the soul—can be taken in some circumstances to authorize resistance to temporal authority; and it can, for better as well as for worse, inhibit political activity.

Those bound to particular religious sects are citizens of those "principalities or republics." They are different in their citizenships, one from another, according to the particular sects they are associated with. On the other hand, educated human beings, insofar as they are not bound by such allegiances, tend to be like one another. But it should be recognized that most men do need particular associations, religious as well as political. One can even say that religion (or certain kinds of patriotism) can do for the many something of what philosophy does for a few.

But there is a critical distinction between religion and philosophy which should be of enduring significance for us: the salutary moral concerns of citizenship (religious as well as political) do tend to be pressed at the expense of genuine
inquiry. And that is, as we have seen, why Socrates was inevitably vulnerable. True, he was not prosecuted until his old age; but he had been placed under clouds for decades, by public opinion, as someone who had gone his own way, a threat to the associations which most men naturally hold dear.

VII.

But whatever the ancient quarrel between the Socratic way of life and the religious-political way of life—between, that is, the human being and the city, between (in a different form) philosophy and poetry—both ways of life are vulnerable today. These two ways of life have, in the face of certain modern developments, more in common than they have dividing them. Indeed, one can argue that only within the social context provided by a decent religious faith is a thoughtful philosophical effort likely to maintain itself. Perhaps this has always been true—but it seems particularly apparent today.

Religious faiths are peculiarly vulnerable at the hands of intellectuals—that is, at the hands of those who have inherited from the philosophers an openness to inquiry but not a recognition of the need for self-restraint. Openness usually sounds more alluring than self-restraint. Self-restraint—a salutary restraint which takes account not only of one's vulnerability but also of the needs of others—may be seen in the deeper meanings of the *Apology* and the *Crito*, and I suspect in the deeper reaches of Milton's great religious poems as well. Explicit examinations of such further teachings must be reserved for an appropriate occasion.

I have been concerned on this occasion with the landscape (or surface meanings) of these works, with a view to indicating some of the influences of Jerusalem and of Athens upon American constitutional developments. These have been, I have suggested, sometimes conflicting influences.

One set of influences, associated more with the interests of the citizen, makes for piety and hence stability; the other, associated more with the interests of the human being, makes for speculation and hence change. One can degenerate into either stultification or harshness, the other into either irrelevance or irresponsibility. How to combine properly these divergent influences is the work of either the truly inspired prophet or the inspiringly prudent statesman.

In any event, it should be noticed that both Jerusalem and
Athens stress something which is critical to American constitutionalism, the necessity of returning again and again to authoritative texts for guidance.
APPENDIX B

THE AMBIGUITY OF JUSTICE IN PLATO'S REPUBLIC

That which gives to human Actions the relish of Justice is a certain Noblenesse or Gallantnesse of courage, (rarely found,) by which a man scorns to be beholding for the contentment of his life to fraud or breach of promise.

—Thomas Hobbes, Leviathan, Chap. 15

I.

The oddness of the passage in Book IV of Plato's Republic where the virtue of justice is hunted down (Rep. 432B sq.) has been noticed in this fashion by Leo Strauss in his City and Man (at pp. 105-106):

After the founding of the good city is completed, Socrates and his friends turn to seeking where in it are justice and injustice and whether the man who is to be happy must possess justice or injustice. They surely succeed in stating what justice is. This is perhaps the strangest happening in the whole Republic. That Platonic dialogue which is devoted to the subject of justice answers the question of what justice is long before the first half of the work is finished, long before the most important facts without the consideration of which the essense of justice cannot be possibly determined in an adequate manner, have come to light, let alone have been duly considered. No wonder that the definition of justice at which the Republic arrives determines at most the genus to which justice belongs but not its specific difference (cf. 433a3). One cannot help contrasting the Republic with the other dialogues which raise the question of what a given virtue is; those other dialogues do not answer the question with which they deal; they are aporetic dialogues. The Republic appears to be a dialogue in which the truth is declared, a dogmatic dialogue. But since that truth is set forth on the basis of strikingly deficient evidence, one is compelled to say that the Republic is in fact as aporetic as the so-called aporetic dialogues. Why did Plato proceed in this manner in

32. A talk given by George Anastaplo at a staff meeting of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, February 22, 1987. The quotations from PLATO'S REPUBLIC (cited as Rep. in the text) are taken from the Allan Bloom translation (in the Basic Books edition). [At the author's request, the footnotes are contained in the text and hence cannot conform to "Blue Book" style. —The Editors]
the dialogue treating justice as distinguished from the dialogues treating the other virtues? Justice, we may say, is the universal virtue, the virtue most obviously related to the city. The theme of the Republic is political in more than one sense, and the political questions of great urgency do not permit delay: the question of justice must be answered by all means even if all the evidence needed for an adequate answer is not yet in.

I am particularly interested on this occasion in the description of the hunting down of justice, with the discovery of this virtue as lurking "from the beginning" in obscurity underfoot. How is this to be understood? The passage begins this way (Rep. 432B-433D):

"All right," I [Socrates] said. "Three [forms of virtue—courage, prudence and moderation] have been spied out in our city, at least sufficiently to form some opinion. Now what would be the remaining form thanks to which the city would further partake in virtue? For, plainly, this is justice."

"Plainly."

"So then, Glaucon, we must, like hunters, now station ourselves in a circle around the thicket and pay attention so that justice doesn't slip through somewhere and disappear into obscurity. Clearly, it's somewhere hereabouts. Look to it and make every effort to catch sight of it; you might somehow see it before me and could tell me."

"If only I could," he said. "However, if you use me as a follower and a man able to see what's shown him, you'll be making quite sensible use of me."

"Follow," I said, "and pray with me."

"I'll do that," he said, "just lead."

"The place really appears to be hard going and steeped in shadows," I said. "At least it's dark and hard to search out. But, all the same, we've got to go on."

"Yes," he said, "we've got to go on."

And I caught sight of it and said, "Here! Here! Glaucon. Maybe we've come upon a track; and, in my opinion, it will hardly get away from us."

"That's good news you report," he said.

"My, my," I said, "that was a stupid state we were in."

"How's that?"

"It appears, you blessed man, that it's been rolling around at our feet from the beginning and we couldn't see it after all, but were quite ridiculous. As men holding some-
thing in their hand sometimes seek what they're holding, we too didn't look at it but turned our gaze somewhere far off, which is also perhaps just the reason it escaped our notice."

"How do you mean?" he said.

"It's this way," I said. "In my opinion, we have been saying and hearing it all along without learning from ourselves that we were in a way saying it."

"A long prelude," he said, "for one who desires to hear."

"Listen whether after all I make any sense," I said. "That rule we set down at the beginning as to what must be done in everything when we were founding the city—this, or a certain form of it, is, in my opinion, justice. Surely we set down and often said, if you remember, that each one must practice one of the functions in the city, that one for which his nature made him naturally most fit."

"Yes, we were saying that."

"And further, that justice is the minding of one's own business and not being a busybody, this we have both heard from many others and have often said ourselves."

"Yes, we have."

"Well, then, my friend," I said, "this—the practice of minding one's own business—when it comes into being a certain way, is probably justice. Do you know how I infer this?"

"No," he said, "tell me."

"In my opinion," I said, "after having considered moderation, courage, and prudence, this is what's left over in the city; it provided the power by which all these others came into being; and, once having come into being, it provides them with preservation as long as it's in the city. And yet we were saying that justice would be what's left over from the three if we found them."

"Yes, we did," he said, "and it's necessarily so."

"Moreover," I said, "if one had to judge which of them by coming to be will do our city the most good, it would be a difficult judgment. Is it the unity of opinion among rulers and ruled? [Moderation] Or is it the coming into being in the soldiers of that preserving of the lawful opinion as to which things are terrible and which are not? [Courage] Or is it the prudence and guardianship present in the rulers? [Wisdom] Or is the city done the most good by the fact that—in the case of child, woman, slave, freeman, craftsman, ruler and ruled—each one minded his own business and wasn't a busybody? [Justice]"

"It would, of course," he said, "be a difficult judgment."
"Then, as it seems, with respect to a city's virtue, this power that consists in each man's minding his own business in the city is a rival to wisdom, moderation and courage."

"Very much so," he said.

I have long wondered about this passage, especially about the condition and location of justice. I now attempt to suggest how one might begin to think about the place of justice in the Republic.

II.

One massive fact about the Republic should be noticed at the outset—and that is that hundreds of pages of dialogue are required to establish that justice is choiceworthy for its own sake. (Serious questions remain, of course, whether this is truly established.) Justice, it is evident, is quite different in this respect from "wisdom, moderation, and courage," each of which can be fairly easily shown to be worth having for itself alone, aside from considerations either of reputation or of the responses by others.

It is said in the dialogue that the intrinsic choiceworthiness of justice had never been established before (See Rep. 358C-D, 366D-E.) The problem with justice is reflected in the fact that, first, Thrasymachus, and then Glaucon and Adeimantus, can make the powerful arguments they do against justice (as commonly understood) being desirable for its own sake, aside from the opinions of others.

Everyone knows that justice is intimately related to the uses and effects of laws. (The Laws of Plato, too, has to be a quite long dialogue.) Laws, we also know, vary from place to place, from time to time; it is not difficult to see that they often serve the interests of rulers. (See, e.g., Rep. 338C, 339A.) We know as well that laws very much depend upon force and that fact can be troublesome. The prospect of the use of force in the organization of a community may even be seen in the "argument" resorted to in the opening lines of the Republic, when Polemarchus "threatens" to compel Socrates and an all-too-willing Glaucon to remain in Piraeus for the evening's festivities. Thus, there is something compulsory in the "found- ing" of the community from which this great conversation emerges. It is hard to deny that this threatened recourse to violence was most salutary and, in more than one way, in the interest of justice.
I count some seven hundred uses of one form or another of the term *dikaiosyne* in the *Republic*. There are three principal clusters in the uses of words of this family (which include, in almost one-half of the instances, references in the dialogue to "injustice" and "unjust"). The first, and by far the largest, cluster is in Book I and the first part of Book II (with two-thirds of the total uses in the first seventh of the dialogue). The second cluster (about one-tenth of the total uses) is in Book IV, part of which I have quoted. The third cluster (another one-tenth) is at the end of the dialogue, in the closing pages of Book X. I draw upon each of these clusters in my remarks on this occasion.

We have seen that when justice is hunted down, in Book IV, it turns out to have been there all along: in fact, it had been used in the very construction of the city from the outset. Such use is reflected in the routine division of labor, which is obviously advantageous in everyday life. (This suggests that the utility of "justice" is apparent to common sense.)

It is said that the city has its origins in need. (*Rep.* 369B) At the inception of Socrates’ city-building, the allocation of tasks and duties according to people’s natural capacities is made explicit. (*Rep.* 369A sq.) This mode of allocation is again and again referred to thereafter. (*See, e.g., Rep.* 433A, 443B-C.) This principle had been anticipated during Socrates’ exchange with Polemarchus, when the specialized virtue of the pruning knife had been recognized. (*Rep.* 333D)

Thus, justice is natural for men to rely upon. And yet it can be obscure, or difficult to locate and to justify, with its questionableness indicated in the fact that justice can be called another’s good. (*Rep.* 343C, 367C)

IV.

We have noticed that the other three principal virtues are much more readily identified and justified. Why is justice so hard to come by?

Although justice is naturally useful for a community, it can still be said of this virtue that it was providential that it had been relied upon in the founding of Socrates’ city. (*Rep.* 443B: “through some god”) Where some might say “providence,” others might say “nature” or “chance.” Certainly, there is something accidental (at least in appearance) in the
way justice comes into this conversation, for it is introduced not by Socrates but by Cephalos. (Rep. 330D)

There are four uses of “unjust” by Cephalos before he makes his single use of “just”—and his single use comes only when he draws upon lines from Pindar. Cephalos, it can be said, is primarily concerned to avoid the consequences (particularly the personal consequences after death) of one’s injustice; he is not moved primarily by justice itself. That is, he is not drawn to justice for its own sake. His repeated sacrifices to the gods are designed to serve him in that hereafter which he, as a “very old” man, recognizes is for him near at hand. (See Rep. 328C, 331D.)

Socrates, too, draws five times upon some form of “justice” in his exchange with Cephalos: but Socrates reverses Cephalos’ distribution, using “just” (or “justice”) four times to one use of “unjust.” Socrates, we come to see, is more interested than is Cephalos in justice itself, singling out that term from the speeches of Cephalos—and the great conversation we do have can thereafter be generated. (Polemarchus [War Lord] is not altogether his father’s son: he never uses “unjust” in his five uses of some form of “justice.” There are in the Socrates-Polemarchus exchanges two dozen uses of “just” before the first use of “unjust.” Should not the military-minded be exposed mostly to justice if they are to be reliable?) But however interested Socrates may appear to be in justice on this occasion, we also come to see that neither justice nor the political life dedicated to justice is ultimately what moves him.

V.

Scoundrels, we are reminded, are obliged to observe some semblance of justice among them if they are to maintain a profitable association. (See Rep. 351C-D, 352C.) Since they want to avoid the disruptive consequences of injustice, they are obliged to be, or at least to appear to be, not unjust to one another. Instinct, or a kind of shrewdness, seems to be at work here. Is there not something of this, also, in Cephalos’ pious respect for justice?

Even the bold Thrasymachus shrinks from calling justice a vice; rather, he concedes, it is high-minded innocence. (Rep. 348C. See Rep. 409A-B.) This reflects the fact that justice is invoked all the time, that the appearance of it is powerful, that people somehow respect it (even though they might personally
subvert it clandestinely when they believe they can safely do so). *(See, e.g., Rep. 361A.)*

**VI.**

All this points up the problem put by Glaucon, a problem that we now tend to associate with Immanuel Kant: is justice choiceworthy for its own sake? *(See, e.g., Rep. 361B-C.)* What would be needed truly to establish that? Or is this too much to ask for, especially since this is the most social of the principal virtues? Is an emphasis upon justice only for its own sake likely to distort justice itself, partly because it discourages use of that prudential judgment which helps determine what should be done in varying circumstances?

In any event, we know that Kant wants justice to be aboveboard and splendid, not something underfoot and obscure. Certainly, any reliance upon deception and subterfuge is condemned by him. Compare the necessary recourse to noble lies that Socrates takes for granted. *(See, e.g., Rep. 414B-415D.)*

Less prosaic than justice is the moderation that Socrates describes: moderation manifests, in its harmonizing aspect, the elevated features we commonly associate with justice. *(See Rep. 431E-432B.)* Perhaps this helps explain why Socrates wanted to skip dealing with moderation (430D); it can make justice (at least as defined in the *Republic*) seem rather drab by comparison.

**VII.**

Something of the Kantian splendor of justice may be seen in the closing references to justice in the *Republic*, both in the Myth of Er (at the very end of the dialogue) and in the passage just before that Myth is resorted to.

Socrates (in an exchange with Glaucon) describes what happens, or at least what is most likely to happen, to both the just man and the unjust man toward the end of their respective lives, however much each of them had been long misjudged by the community *(Rep. 613B-614A)*:

"... Don't the clever unjust men do exactly as do all those in a race who run well from the lower end of the course but not from the upper? At the start they leap sharply away but end up by becoming ridiculous and, with their ears on their shoulders, run off uncrowned? But those
who are truly runners come to the end, take the prizes, and are crowned. Doesn't it also for the most part turn out that way with the just? Toward the end of every action, association, and life they get a good reputation and bear off the prizes from human beings."

"Quite so."

"Will you, then, stand for my saying about them what you yourself have said about the unjust? For I shall say that it's precisely the just, when they get older, who rule in their city if they wish ruling offices, and marry wherever they wish and give in marriage to whomever they want. And everything you said about the unjust, I now say about these men. And, again, about the unjust, I shall say that most of them, even if they get away unnoticed when they are young, are caught at the end of the race and ridiculed; and when they get old, they are insulted in their wretchedness by foreigners and townsmen. As for being whipped and the things that you, speaking truly, said are rustic—that they will be racked and burned—suppose that you have also heard from me that they suffer all these things. But, as I say, see if you'll stand for it."

"Very much so," he said. "For what you say is just."

"Well, then," I said, "such would be the prizes, wages, and gifts coming to the just man while alive from gods and human beings, in addition to those good things that justice itself procured."

"And they are," he said, "quite fair and sure ones."

Thus, the just man is shown as finally vindicated, even here on earth. But are we not meant to remember the fate of Socrates? Does not what is supposed to happen eventually to the unjust man sound distressingly like what did happen to Socrates at the end of his own life? Socrates, in talking at the outset of the Republic to Cephalos, had said that perhaps he too would take the road Cephalos had. (Rep. 328C) But the reader knows that Socrates does not become "very old," something which is further anticipated by Socrates' use of "for the most part" in the passage I have just quoted.

Of course, the truly philosophical man may not be concerned about such an "accident" as Socrates' earthly fate. (See, as indicative of what philosophers are like, Rep. 476A, 480A, 494B, 500C. See, on something greater than justice and the three other virtues, Rep. 504D.) but such lack of concern is hardly likely to lend much support to a popular argument for justice as praiseworthy for its own sake.
Thus, the Myth of Er may be crucial for the general effect of the dialogue. Mankind is thereby told of the divergent fates of the unjust and of the just in the afterlife, which fates seem to compensate for the things that go wrong here (that is, for the misallocations of rewards and punishments on earth). Adeimantus' instinct may have been sound in these matters: he had insisted upon considering as well the significance of the afterlife in any proper assessment of justice. The central uses of "justice" in the dialogue are in the course of his elaboration (in Book II) of that significance (around Rep. 363D). Even so, Socrates at the end of the Apology remains uncertain about whether there is life after death which suggests how he personally regards such things as the Myth of Er.

The Myth of Er is also of use in that it reflects the need to account for the apparent role of chance in the shaping of men's lives (as seen in the natural capacities one may have, or in the circumstances in which one is born, or in the training and other experiences that happen to be available to one. This Myth suggests that one's life is truly of one's choosing, leaving in obscurity the ultimate origins of one's "personal" sequence of lives and afterlives.

Both of these uses of, if not needs for, the Myth of Er remain to trouble us about justice, however noble or gallant it may be for a man to be open to justice without regard for its demonstrable consequences.
APPENDIX C
PRIVATE RIGHTS AND PUBLIC LAW:
THE FOUNDERS' PERSPECTIVE

He came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this [Federal] Convention. He wished gentlemen to extend their views beyond the present moment of time, beyond the narrow limits of place from which they derive their political origin.

—Gouverneur Morris, July 5, 1787

I.

Private rights—which may be a refined way of saying, "self-interest"—private rights are said by some to be at the heart of the American regime. If this should be so, how does having private rights at its core affect the American way of life? Does it mean that a concern for private rights is critical to the ends and doings of government and hence to the public law that is developed? Does it mean that the public, as public, has no independent status or dignity but only as something derivative from, and ultimately limited by, private rights and that looking-inwardness which an emphasis upon private rights suggests?

The importance of private rights—of the rights of men prior to or otherwise independent of government—may be seen in our founding document, the Declaration of Independence. You must all recall those famous sentences in the Declaration of Independence upon which Abraham Lincoln, here on the plains of Illinois and later in his First Inaugural Address, grounded his decisive policies some one hundred and twenty-five years ago:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, that whenever any

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33. A talk given by George Anastaplo at Illinois State University, Normal, Illinois, April 17, 1983. [At the author's request, the footnotes are contained in the text and hence cannot conform with "Blue Book" style. —The Editors]
form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

It is, we are told, to secure these rights—such rights as those to life, liberty and the pursuit of happiness—it is to secure these rights that "Governments are instituted among Men." All are somehow equal: either all are equal and hence have such rights, or they all have such rights and hence are equal.

Men, it seems, have such rights prior to, or otherwise independent of, government: for, we are told, governments are instituted among men in order to secure these rights. No other reason, it seems, is as important as this for instituting governments, for judging them once instituted, and for replacing them when the securing of such rights fails.

We must notice that other reasons have been given by mankind (including by many Americans) for instituting government: thus it has been said that social relations, and hence government to order such relations, are natural to mankind; or it has been said that virtue (whether for one's own personal good, temporal or eternal, or for the good of all, or for virtue's own sake)—that the promotion of virtue is why governments are instituted; or it has been said that it is for the common good (whether the good of some community or of mankind) that governments are instituted.

But the Declaration of Independence seems to take for granted—finds to be self-evident—that governments are instituted to secure the rights that all men have inasmuch as they are created equal. It is with this relation—the relation of private rights to public law—that I am primarily concerned on this occasion.

II.

The rights with which men are endowed seem quite varied, even if one limits oneself to those which are listed in the Declaration of Independence. (Others are indicated, since the ones listed are introduced, "that among these . . . ") Is there not likely to be conflict (as well as diversity) among these rights? Thus, for example, those measures which secure one's right to life may interfere with the exercise of liberty.
Is there a natural hierarchy among the inalienable rights of men? Is there a principle of ordering them which permits us to see and to say that one is to be preferred to the others? (What is the bearing on this question of the right of revolution? I will return to this at the end of this talk.)

Is the variety among the rights such, and is the evan-handedness with which they are asserted such, that it is difficult to insist on any hierarchy among them? (Is there any indication, in the ways that violations of various rights are spoken of in the list of grievances in the Declaration of Independence, what kind of rights is taken most seriously?) One people may prefer one right to all the others; another people may prefer another right to all the others.

If preferences differ from one people to another, if not even from one man to another, would it not make sense to provide for a variety of ways (or forms of government) for securing these rights? The more variety, the greater the opportunity people have to gather with those who are likeminded, thereby securing in the way they prefer the rights that matter most to them.

If a premium is placed upon such variety—and does not this make sense if the securing of rights, variously arranged in order of personal preference, is the principal end of government?—if a premium is placed upon variety, then local governments become more important, those governments which are tailored to diverse ways in various localities within a large union. A union may be large in part because it alone can provide the protection needed against foreign interference with being allowed to live as people desire from one locality to the other.

And so it was recognized by the Founding Fathers that the States reflected different manners, preferences, indeed ways of life. Experiments of one kind and another had led to some diversity among the regions of the United States. Governments dedicated to those regions could be expected to be more respectful of, and more intimately related to, the diversity to be found there, including diversity with respect to which of the inalienable rights one cared most for. (Thus, one community could care more than another for property in preference to liberty.)

A government for all of the United States, on the other hand, tends to reflect, perhaps even to impose, one set of pref-
ferences over another for the Union as a whole. Is it apt to do so on the basis of a more elevated opinion as to which is truly to be preferred? Or is it apt to settle upon those preferences which can most easily be made to have a general appeal, irrespective of their intrinsic merits?

With these observations about the importance of the States because of their sensitivity to local manners and opinions, we move into the Federal Convention, that remarkable assembly which met in 1787. One of the issues which divided the Convention during that hot Philadelphia summer was what the status of the States should be under the constitution that was being written. This was, at least in part, the issue of which private rights were to be made most of in devising the fundamental public law of the United States.

III.

It is again and again evident, whenever one studies the accounts we have of the proceedings of the Federal Convention of 1787, that there is a significant relation between the private and the public. Respect for the private, or a restraint upon the public, may be seen in the very way the Convention was conducted: it was a closed (a closed, not a clandestine) convention. But, it should at once be added, this was done more for the sake of the public than for the sake of the private. That is, it was decided by those experienced men of 1787 that the public interest was best served by permitting conscientious delegates to explore fully the issues before them, to make trial runs, and to back off when persuaded (all which manuevers are much harder to execute when everything one says immediately becomes a matter of public record and when constituents line up behind this or that position). (Is this, one might well wonder, as near as one can hope to get to "philosophy" in practical discourse on public matters?)

Furthermore, is a proper respect for the private vital to a healthy public life? If things are made public prematurely, or improperly, does not the private become perverted by public considerations? I mention in passing that these questions may be at the heart of the obscenity issue or of the issue about whether confidential deliberations by courts and others should be exposed to public view. (Consider the implications in all this of the opinion, such as seems to be found in Hobbes' Levia-
than, that the private, or personal, is somehow real, whereas the public is somehow artificial.)

I mention, in passing, that Benjamin Franklin indicated, at the end of the Federal Convention, that he had reservations about parts of the Constitution they had just written but that these reservations would die with him. Does this raise a question whether James Madison should have provided for the publication of his notes? That remarkable publication does remind us of what men are capable of in such circumstances. But would they be equally capable in the future if it is known that a publishable record is being made? (Still, it was obvious to the delegates that Madison was making elaborate notes.)

IV.

The importance of private rights is reflected in what was said in the Federal Convention about what it is that government should aim at. Or, perhaps it should be said, the importance of private rights may best be seen in the repeated insistence in the Convention upon what government should not aim at. Glory and empire should not be the primary ends of government; conquest and the use of force abroad should be discouraged.

The ends of government, various delegates indicated, should be much more modest. (It is a nice question whether those who believed this most strongly tended to be those who made much of the States as against the Union.) Such delegates probably were most concerned about domestic tranquility and an assured (and ever-growing?) prosperity. Is it thus that one's pursuit of happiness is best secured? (Is there not something Hobbesian about this too? A thirst for glory is illusory in its object, if not simply mad?)

But even these men, who can be said to have made so much of the securing of private rights, were aware of the significance of what they were doing, for which, if they should prove successful, they would be celebrated widely and for generations to come. It was several times said in the Convention that they were deciding perhaps forever the fate of republican government for all mankind. They were concerned lest they so conduct themselves that they would be objects of enduring reproach.

Thus, these men sought, and seemed to enjoy prospec-
tively, the somewhat private satisfaction of becoming public benefactors who would be recognized to be such.

V.

I have been talking about how a concern for private rights and private interests have determined, or at least have very much affected, such things as public law and the goals of government. Thus, the concern for private rights predisposes Americans toward a critical role for the States, toward "modest" government, and toward encouraging local institutions, private as well as public. This is one element in our constitutional development.

Another element in that development, and evident throughout the Convention proceedings, was the recognition of the limitations placed upon the delegates by the country's circumstances. It was again and again said by delegates that they should not try to write the very best constitution; the circumstances simply were not right for that. It takes time, they said, to develop the conditions which make the best possible: thus, a certain kind of people is needed for the very best constitution; since the American people are not yet that kind, the form of government appropriate to them has to be a compromise with the best. (This is one thing, by the way, which it would have been difficult to face up to, and to say, if the Convention proceedings had been public.)

The best constitution previously known to mankind, it seemed, was that found in Great Britain—in that very country from which the American colonists had been obliged to separate themselves! That the British constitution was indeed the best was several times acknowledged during the Convention without, so far as I know, ever having been contradicted at length. (There is a critical problem here which I can do no more than touch upon in this investigation of the relation between private rights and public law: is "the best constitution in the world" one that was itself considered by the British people, or by students of that constitution, to have been instituted to secure the rights of men? Or was it instituted for some other purpose? Liberty was regarded by Blackstone as vital to that constitution.)

VI.

The British Constitution (it was again and again lamented
in the Federal Convention) is simply not feasible for the American people, at least for a century or two. But it is not only because the people of the United States are not constituted as the British are that a British-style constitution is not now feasible, although this difference in peoples was made the most of.

Also of some importance was a concern, especially among delegates from the smaller States, that the prerogatives of all of the States be respected, prerogatives for which the Articles of Confederation had provided a model but which a unitary British-style constitution would override. Each State under the Articles had an equal vote; but delegates from the larger States complained that they had had to agree to that kind of equality during the war because of the great dangers facing the country; and, such delegates added, they were no longer under such duress, and so would not allow all States to continue to have an equal voice in the government.

The smaller States spoke of the integrity of their communities, of their equal status among the States, and of the state of nature which all the States had been in (with respect to one another) before forming the Union. Their opponents, although they would not speak so bluntly in the Convention, considered any major concern about protecting the prerogatives of States primarily the concern of local political men of little talent but of established appetites who were afraid they would be pushed aside if American politics became truly national.

It is likely that some selfishness was exhibited here in defense of the interests of States as States. But there must also have been considerable concern about respecting differences due to geography, "history," and so forth. On the other hand, the very things that made the States important (as champions of the private rights of men) also made them a hindrance to the formation of a national government with sufficient powers to secure those private rights effectively. (Perhaps it can be said that to rely upon the prerogatives of the smaller States was, in effect, the most critical defense of the prerogatives of States as States, since the larger States could be considered as tending, in their size and hence in their approach to government, toward the perspective of a national government.)

The Convention debated this State-equality issue extensively. It may be true (as some argued) that the small State-
large State difference was not the fundamental one that summer, but it certainly was important and it had to be resolved. The resolution took the form, as we know, of the now-familiar differences between the two Houses of Congress, with the Senate (based upon equal votes for all States) being in this respect more like the one-house legislature under the Articles of Confederation. In fact, even the name "Congress" for our national legislature reflects its origins in a body which was made up under the Articles of Confederation of deputations from States, just as would be a Congress in which sovereign nations are represented, with each equal as State to the others. (There are other features of the Constitution which still respect the claims of the small States to be treated as equals to the large: consider, for example, how States vote in Congress in the event no President is elected by Presidential electors or how States vote on proposed constitutional amendments.)

The States continue to be recognized as significant elements under the Constitution, so much so that all new States admitted to the Union came in with the prerogatives of the original thirteen.

VII.

To make much of the States and the way things happened to be arranged under the Articles of Confederation and otherwise is to defer considerably to chance developments. Is this inevitable in public life? A private person can become, if he is fortunate in his training, natural gifts and circumstances, less susceptible to chance than can any public person or any community. Does not the life of philosophy mean, in effect, a temporary conquest of chance, both with respect to the mode of one's life and with respect to the primary end of one's life (a comprehensive understanding of the meaning of things)?

And yet, leading members of the Federal Convention could insist that, for Americans at least, reason is to govern, not chance alone. (See, on this, the opening passage of Federalist No. 1.) Such a response was made, for example, when it was suggested that a lottery be relied upon to choose among certain candidates for office. (Compare ancient Athens, where democratic principles were indeed carried to this "logical" extreme.) The insistence upon reason, rather than upon chance, was in opposition to sentiments (such as those by John Dickenson) which presupposed that the most useful political
things have evolved among men by accident. It is not an accident, perhaps, that Dickenson had been reluctant to invoke the right of revolution against the British: does not that right and its invocation make more than he was inclined to do of deliberate appraisals and of systematic refashioning of one’s government? Should one expect also that those who made more of chance would also make more of the States as against a strong national government which ignored arbitrary State lines as much as possible?

Be all this as it may, we do see a remarkable reliance upon reasoning in the Federal Convention. Is not this related to the assumption in the Declaration of Independence itself that reasons should be given for the action the colonists were taking, that a people should at least try to explain itself? Is there not a natural openness in man to reasoning, especially in political relations? Perhaps significant here is the fact that anyone who tries to rule is likely to advance some plausible title to rule. (See Plato, Laws 690A sq.)

VIII.

Among the things that reasonable men in politics know—among the things prudent men know (for that is what reason-in-the-life-of-action comes down to?)—is that statesmen are indeed limited by their circumstances.

We have already noticed the account that had to be taken of the established prerogatives (and expectations) of the States. And we have already noticed the inadvisability of contemporaneous public discourse on the sensitive matters discussed in the Federal Convention.

But more critical, and perhaps at the root of all such circumstantial restraints, are the limitations of the people themselves. (This is aside from what had been noticed about the differences between the American people and the British people or between one State and another in the American Union.) The limitations of the people are particularly important here, since the American emphasis upon equality and upon the determination to be republican made so much of the people.

It is again and again indicated in the Federal Convention that the people can be easily led astray, that their understanding is limited, and so forth. And this can be said even as the constitutional system devised is one that ultimately rests upon the people’s will.
IX.

The limitations of the people are not restricted to their capacities as citizens (including the productive or private lives with which citizenship has to be somewhat concerned).

We are reminded here of another people, with its peculiar limitations, those second-class (or three-fifth class) citizens who made up the considerable body of African slaves in the United States in 1787.

Their limitations, due in large part both to the way of life from which they had been wrenched and to the way of life to which they had been condemned, affected what could be done with them. In addition, slavery (with its attendant investments, costs and discipline) affected the prosperity and happiness of the whites among whom the slaves lived.

And yet all the time, there was the continuing awareness that the principles of the regime (as seen in the "created equal" language of the Declaration of Independence) raised a question about the institution of slavery. Northerners and Southerners alike were aware of this as a problem. (Consider, for example, how bitterly so hardheaded a commerce-minded man as Gouverneur Morris could condemn slavery. Consider, also, James Madison's reluctance to have it explicitly recognized in the Constitution itself that there could be such a thing as property in men.)

The importance of this issue can be seen, of course, in the Civil War and what led up to it. But the issue was vital from the beginning—and so it could be said by Madison and by others in the Federal Convention that the slavery issue was what really divided the States, not such differences as those between large States and small States.

X.

One can see in the slavery issue that deep conflict among private rights which I touched upon early in my remarks on this occasion. There are, of course, the rights of Africans to their lives and liberty. (Notice how Chief Justice Roger D. Taney and Senator Stephen A. Douglas dealt with this: they simply read the African out of the Declaration of Independence.) Then there were the rights of the Southern white man—his right to his property (duly paid for) and his right to self-preservation (which was threatened by emancipation): it was widely believed that wholesale emancipation would bring
bankruptcy for whites in the South, a general breakdown of law and order, and the misery of helpless Africans. It is important for us to appreciate why and how good men of considerable political talent "had to" acquiesce in slavery.

The slavery issue (an issue which would not die and the aftereffects of which continue among us in various forms) reminds us of the fundamental tension between expediency and justice. Still, it was recognized in the Federal Convention, at least by some members, that unless a political arrangement is just, it cannot be expected to endure.

Does recourse to expediency tend to respect private rights and the limitations of people? It may be seen in the use of extraordinary measures in perilous times (which recourse to the Convention can itself be understood to have been).

Does a concern for justice, on the other hand, tend to make more of universal standards of the common good, perhaps even of the requirements of humanity at large? Does it not tend to discourage an emphasis upon private rights? Is it not a concern for "the whole human race" (to use Gouverneur Morris' phrase) a concern for more than the mere amalgamation of everyone's private rights? A concern for private rights is not as likely (at least in our circumstances) to look to Nature for guidance as is a concern for the common good: "the common good" implies, more than do "private rights," the ascendancy of an enduring perfection over transient satisfactions in our judgments both as human beings and as citizens.

XI.

The problem of reconciling expediency and justice may be seen as well in the problem (recognized again and again in the Federal Convention) of dealing with avarice and with ambition. The concern was to deal with avarice and ambition, not to eliminate them. Avarice is useful in the commercial life of the community and ambition is useful in its political life.

Does an efficient commercial life, especially on a continent-wide basis, tend to promote certain desires, to break down State barriers, and to make people more or less uniform? Does it also tend to discourage the arbitrary and the shortsighted and the foolish, by making them vulnerable both in the market place and before a national public opinion?

It was indicated in the Convention that the most effective way of dealing with avarice, and perhaps also with ambition—a
way which does not require constant governmental intervention but depends much more instead on people to police themselves—is to allow vice to counter vice. This is not an appeal to higher principles, but rather to the natural workings of self-interest. This may be seen in Douglas' position with respect to the spread of slavery: there was, he believed, no need publicly to condemn slavery, which would antagonize the South against the North; rather, he depended upon white prejudices—the prejudices of free labor against Africans and hence slavery—to keep slavery from taking root in the Territories.

The use, as well as the limits, of vice to counter (and hence control) vice may be seen in a playful illustration by Franklin. The Scottish lawyers, he reported, manage to keep the quality of their courts high by always choosing as judges those of their colleagues who are most successful—and this they do, he explained, in order to be able to divide their prosperous colleagues' practice among themselves. But, it should be noticed, this approach can operate to produce judges of quality only so long as successful lawyers, whose competition is thereby eliminated by their colleagues, are successful for the right reasons and in the right way.

XII.

There is a further problem with any reliance upon vice to counteract vice. When vice is set against vice, are not both of the vices involved somehow being legitimated? What are the consequences of such legitimation? May it even lead to a failure, in some circumstances, to recognize vice as vice? If something should come not to be recognized as a vice, may not people neglect to set another vice against it? (Is this problem critical to any appraisal of the workings of economic theories?)

Besides, if these are indeed vices, are they not ultimately irrational? If so, would it not be a matter of chance who or what did prevail when vices contend with one another? (Is there for this approach no natural hierarchy among vices, just as there is no natural hierarchy among rights?) If vices are to be used intelligently (and to be discarded or rearranged as need requires), must there not be higher principles by which one should be guided (in making use of vices) and to which one can appeal (in opposition to certain vices)? That is, must not one sometimes raise people above considerations of mere self-interest?
Consider in this connection the suggestion made by Franklin at a critical point in the Federal Convention, when an impasse had been reached: he suggested that the delegates begin opening each day’s session with prayer, for they were obviously in need of divine help. Franklin’s proposal seems to have been embarrassing to some of the more freethinking delegates; yet it could not be simply voted down: not only would this have been an affront to the venerable Franklin but not a few of the more pious Convention delegates would have been offended. The proposal was allowed to fade away without a vote on it, reflecting a sensitivity on each side to the sensibilities of the other side.

What did the prayer proposal really come down to? Was it not a way of inducing members to step back, to get outside their particular, divisive interests? To pray—or, indeed, to call for prayer—is to ask, in effect, “How would all this look to someone whose good opinion you cherish?” Did, for Franklin (who was, to say the least, not conventionally pious)—did, for Franklin, the proposal itself matter most, not any prayer thereafter? Did he not succeed therefore in what he attempted, even though official prayers were never resorted to in the Convention?

The decision of Franklin to proceed thus does suggest that self-interest (or an overriding concern for private right) cannot always be enough. Much should be made of self-interest, sensibly pursued (that is, what is called enlightened self-interest), but it must itself be subject to principles grounded in Nature which regulate reliance upon it. In any event, an emphasis upon personal virtues is more likely than is an emphasis upon private rights to aim at excellence, an excellence which tends to be public (if not even philosophical) in its orientation. An emphasis upon private rights, on the other hand, easily leads to an insistence upon an undiscriminating equality, to a recourse to private lives, perhaps even to a suppression of liberty (so long as all are similarly restrained).

XIII.

The need to rely (in the Franklin mode) upon higher principles is reflected in the observation, made in the Federal Convention, that since the sentiments of the people are hard to know it is best simply to do the right thing and depend upon the people eventually to recognize and ratify this.
It is also difficult to be sure of what the enduring interests of any people are: circumstances are so varied and so changeable, that those interests may not be what they seem at the moment. Thus, it was pointed out in the Convention, for the delegates to make much of the immediate interests of their States, or to institute special privileges for the thirteen original States, or to place limitations upon the new Western States would be shortsighted, since the delegates themselves could not know where their own descendants would live and what they would be doing.

Besides, what is truly in one's interest if one's soul is big, if one is open to the noble? Is it not better to aim at what is good and right, not just for the moment, but on a permanent basis, not just for individuals but for the "whole human race"?

With these observations we can return to the Declaration of Independence passage with which we began on this occasion. If this securing of rights (and private rights at that) is the primary end of our government, and if there is no natural hierarchy among such rights, then our way of life can easily deteriorate into hedonism or mere selfish gratification. (There is much in our way of life that encourages self-indulgence, especially since our remarkable material abundance naturally tempts us in that direction.)

It is instructive to notice, therefore, that the Declaration does conclude with an emphasis upon "our sacred Honor," which points us to something outside of ourselves. At the least, "honor" suggests a community response, preferably that of self-sacrifice in the interest of something elevated.

It is instructive to notice as well that the right of revolution is the only right in the Declaration of Independence that also is referred to as a duty. If rights were all that mattered, one would be left the choice of whether to insist upon them. One can "legitimately" neglect one's rights (and why not do so if one is comfortable and self-absorbed?)

But where duty is involved, it is different. To speak of duty is to presuppose standards. At the very least, it would seem from the Declaration, men have the obligation to insist that governments respect those rights which attest to and permit full development of their humanity, in private as well as in public, that humanity which is reflected in the self-evident truth that "all men are created equal."

What did the Founders believe about all this, especially
about whether a concern for private rights should take precedence over respect for public law (when these are in conflict with one another)? We have been considering what various members of the Federal Convention thought about this subject. But, as we have seen, the opinions of the people at large may have been different. This is reflected in what has been noticed about the limitations of the people. Indeed, one suspects, the people might have been less "sophisticated" than some of their leaders about the primacy of private rights. That is, do not a healthy people tend to be patriotic? Do they not tend to believe that there are eternal principles superior to private rights and interests, whatever they might personally tend to settle for in practice? Does the American openness to justice, as commonly understand, indicate that private rights might not be fundamental among us? Certainly one of the most exalted of rights, freedom of speech, has a decidedly public cast to it.

Are not the people of the United States the true founders of this regime, that people for whom the delegates in the Federal Convention acted and in the name of whom the Constitution itself is proclaimed? Americans do seem to remain a people who, whatever self-centeredness there is in their increasing absorption with private life, still by and large naturally consider public law, or the concern for justice and the common good, as ultimately taking precedence over private rights.

With these observations I suggest that the apparent emphasis in the Declaration of Independence upon the primacy of private rights may have been unnaturally influenced by political theorists. But then, I further suggest, the enduring appeal of the Declaration of Independence for the American people may not truly have been because of any apparent emphasis therein upon private rights but rather because of the public-spirited nobility that that Declaration displays in its appeal to justice, to the sacred, and to the common good—a prudent appeal which all men are expected to be able to respond to by nature.