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Constitutionalism and the Good: Explorations

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CONSTITUTIONALISM AND THE GOOD: EXPLORATIONS†

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INTRODUCTION

> He cannot long be good that knows not why he is good.
>
> Richard Carew[1]

Important as it always is to try to do the right thing, it can be even more important to understand what one is doing. This is not only because understanding is necessary in order for one to be able to discern what is truly good in any particular situation: the general rules, useful as they are, cannot always be relied upon. It is also because understanding—to know *what is* (including to know what one is doing and why)—such understanding is very good in itself. This points up the importance for us of prudence.

Prudence can be institutionalized, so to speak, in a constitutional system, something which is discussed in the course of several of the discussions which follow. Much of what we do recognize as good is incorporated in, or depends upon, the workings of long-established institutions. These institutions have been investigated in various books of mine, beginning in the doctoral dissertation which became my first book.[2]

In the background, if not even at the foundations, of any constitutional system are reflections upon the very notion of morality. It can sometimes help us see ourselves by considering how other peoples have come to terms with the challenges of life and community and perhaps also of understanding itself.[3]

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1. Richard Carew, *Survey of Cornwall* 219 (1602); *see infra* notes 42, 209, 418. *Compare infra* text accompanying note 239.

2. *See* GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971) [hereinafter ANASTAPLO, THE CONSTITUTIONALIST]. For subsequent investigations of the Constitution, see GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY (1995) [hereinafter ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION]; George ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY [hereinafter ANASTAPLO, THE CONSTITUTION OF 1787].

3. *See, e.g.*, GEORGE ANASTAPLO, BUT NOT PHILOSOPHY: SEVEN INTRODUCTIONS TO NON-WESTERN THOUGHT (2002) [hereinafter ANASTAPLO, BUT NOT PHILOSOPHY]. On how Americans have responded to such challenges, see GEORGE ANASTAPLO, ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY (1999) [hereinafter ANASTAPLO, ABRAHAM LINCOLN]; GEORGE

The human being, as well as the citizen, has to be considered in these inquiries. The human being is often best looked at, and thought about, with the help of works of art. And it is often, if not usually, the case that the more exalted the human being is, the more civic-minded the citizen will be.[4]

I have, with a view to bringing together wide-ranging but related remarks crafted for various occasions, developed my *Explorarions* genre.[5] It is critical, in thinking about what is said over the years, to be aware of the circumstances in which diverse remarks are made. Among the revealing elements of those circumstances are the audiences which happen to be dealt with.

Circumstances can also affect who or what one has been influenced by. The importance in these matters of friendship is hard to exaggerate, especially as one is directed to and supported in pursuit of the very best.[6]

The collection one brings together from time to time, with a view to illuminating problems and issues of one's day, can be very much a personal thing. This is evident in the elaborate cross-references I usually provide to other things of mine. The significance of circumstances is suggested by the detailed accounting for my materials which I have provided in bibliographies where the sources of my published things are charted in detail.[7] I am glad to be able to acknowledge again the generosity of the editors of this law review in permitting me to develop and share my thinking as I am privileged to do

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ANASTAPLO, THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT [hereinafter ANASTAPLO, THE AMERICAN MORALIST].

4. On what works of art can teach us about the human being, see GEORGE ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE (1983) [hereinafter ANASTAPLO, THE ARTIST AS THINKER]; GEORGE ANASTAPLO, THE THINKER AS ARTIST: FROM HOMER TO PLATO & ARISTOTLE (1997) [hereinafter ANASTAPLO, THE THINKER AS ARTIST]. These inquiries were anticipated by GEORGE ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM, AND THE COMMON GOOD (1975) [hereinafter ANASTAPLO, HUMAN BEING AND CITIZEN], and by the notes in ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2.

Consider as well a Letter to the Editor I prepared in July 2003 for my fellow Chicagoans: It has not been sufficiently publicized that there is currently on loan at our Art Institute, from Madrid's Prado, Velázquez's "Aesop" painting. It is a great exemplar of what may be called conjectural portraiture, an achievement that it would be a shame for any local art lover to miss. One can be both humbled and exalted upon studying this masterpiece, an uncanny probing of the philosophical soul.

5. For citations to my *Explorations*, see *infra* notes 26, 38, 108, 127, 142, 256, 371, 410. *See also* the bibliographies cited to in *infra* note 7. Most of the notes for this Article have been prepared at this time (2003).

6. *See, e.g.*, *infra* note 176; *see also* Parts 6 and 7 and the Conclusion of this Article; *infra* text accompanying note 248.

7. For these bibliographies, see George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRANDEIS L.J. 17, 219-286 (2001); George Anastaplo, *Law & Literature and the Moderns: Explorations*, 20 N. ILL. U. L. REV. 251, 581-710 (2000); LAW AND PHILOSOPHY: THE PRACTICE OF THEORY 1073-1145 (John A. Murley, William T. Braithwaite and Robert L. Stone eds., 1992); Leo Strauss: A Bibliographic Legacy (John A. Murley ed., forthcoming).

here.

1. READING THE CONSTITUTION[8]

> As the British Constitution is the most subtile organism which has proceeded from the womb and the long gestation of progressive history, so the American Constitution is, so far as I can see, the most wondrous work ever struck off at a given time by the brain and purpose of man.
>
> William E. Gladstone[9]

I.

We hear a good deal these days about "original intent" and the Constitution of 1787. Some insist that the original intent of the Framers of the Constitution should be respected, that only thus can we avoid arbitrary government. In this way, it is argued, the authority of the People is recognized and the integrity of the political process is maintained. Otherwise, it is not truly a Constitution that we live under but rather the will of one or another set of officials who happen, for the moment, to wield power.[10]

The argument for "original intent" is usually accompanied at this time by an attack upon judicial usurpation: judges are seen to have taken over lawmaking prerogatives from legislatures, State as well as National. But although various instances of judicial activism may have inspired the current insistence upon original intent, the concern expressed here goes much deeper, for it is a concern at its roots about the powers to be exercised by the General Government of the United States. Thus, a recourse to "original intent" was made in effect by some of the critics of the New Deal fifty years ago in an effort to restrain, with the aid of the judges, what the President and Congress were trying to do in restoring the economy of the country.[11]

In opposition to those who stand for "original intent" are those who stand for a "living Constitution." A living, and hence growing, Constitution is seen to be necessary if the American people are to be able to cope with radically

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8. A talk given at a Conference in Celebration of the Bicentennial of the Constitution for College Teachers, Loop College, Chicago, Illinois, March 20, 1987. I have used variations of this title in other publications as well. *See, e.g.*, George Anastaplo, *How to Read the Constitution of the United States*, 17 LOY. U. CHI. L.J. 1 (1985) [hereinafter Anastaplo, *How to Read the Constitution*].

9. William E. Gladstone, *Kin Beyond Sea*, N. AM. REV., Sept. 1878.

10. On the limits of appeals to "original intent" today, see *infra* text accompanying note 59.

11. On commerce and the commerce power, see ANASTAPLO, THE CONSTITUTION of 1787, *supra* note 2, at 332 (Index). *See also infra* note 17, *infra* text accompanying note 24, Part 2 of this Article.

changing circumstances. A "horse-and-buggy constitution" must be replaced, it has been said, by something adequate for our times. The courts may thus be looked to in this effort to make the Constitution "relevant"—but the courts, when they so conduct themselves, merely reflect the necessities of the times and the will of the People, thereby permitting the People to wrench themselves loose from "the dead hand of the past."[12]

II.

The issue is joined in this fashion from time to time between those who stand for "original intent" and those who stand for "a living Constitution." I presume to suggest that both of these positions are sound: we want reliable guidance from our constitutional instruments; and we want to be able to take care of pressing and ever-changing needs.

I also presume to suggest that both of these positions (as conventionally understood) are mistaken, perhaps most of all in that their proponents do not appreciate how they can be properly reconciled. Vital to such reconciliation is an informed awareness of what the Constitution does and does not say. Or, put another way, a living or growing Constitution need not be resorted to if it should be recognized what the true original intent of the Framers of the Constitution was: an intent to invest Congress with broad powers to regulate the economy of the Country and its interests in the world at large. Those originally broad powers have been enhanced by such constitutional amendments as the Fourteenth Amendment, permitting the General Government to supervise various activities in the States, particularly those concerned with race relations and with the administration of justice.[13] Something of that supervisory power recognized in various Amendments had been anticipated by the Republican Form of Government Guarantee in Article IV of the Constitution of 1787, however neglected that power has always been.[14]

I have just spoken of "an informed awareness of what the Constitution does, and does not, say" as being vital to the reconciliation between two seemingly irreconcilable positions. It is such an informed awareness that I

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12. For a vigorous repudiation of this approach to constitutional interpretation, see WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION (1953). *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 457; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 333; George Anastaplo, *Mr. Crosskey, the American Constitution, and the Natures of Things*, 15 LOY. U. CHI. L.J. 181, 201 (1984); *infra* notes 46 and 55.

13. On the Fourteenth Amendment, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 458; ANASTAPLO, THE CONSTITUTION of 1787, *supra* note 2, at 334.

14. On republican government and the Republican Form of Government Guarantee, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 463; ANASTAPLO, THE CONSTITUTION of 1787, *supra* note 2, at 337; *see also infra* note 418.

attempt to provide in my commentaries on the Constitution of 1787.[15] Some who want the General Government to exercise broad powers do not understand how such powers are indeed provided for in the Constitution—and so they attempt to skirt the Constitution. Others who insist upon original intent do not appreciate what they are really asking for. We can wonder, then, what it is that the Constitution of 1787 does provide for.

I was surprised to learn, upon preparing my first commentary on the Constitution for publication, that there evidently had not been, since the Ratification Campaign of 1787-1788, any other attempt among us to set forth a book-length section-by-section commentary upon the United States Constitution proceeding primarily from the original text itself. Even during the Ratification period, the longer commentaries (as in *The Federalist* and in the State Ratifying Conventions) were not systematic, but rather were tailored, properly enough, to local interests and concerns.[16] This means, among other things, that one cannot rely simply upon the suggested interpretations of various constitutional provisions by partisans who were determined, in 1787-1788, to secure either the ratification or the rejection of the Constitution.

III.

There have been, of course, many instructive systematic accounts of constitutional law in our own time, but these have relied far more than I wanted to do in my commentary upon judicial and other official interpretations and applications of the Constitution. Those official interpretations have been quite varied over the past two centuries, even over the past half-century or so, which does not inspire confidence in the conclusion that it is indeed the Constitution that is being expounded.[17]

Perhaps the greatest systematic commentary upon the Constitution has been that of Joseph Story a century and a half ago.[18] But even that commentary did not attempt to proceed primarily from the original text itself. Indeed, Justice Story might have considered it "academic" and otherwise impractical (if not even subversive of his own intentions) to attempt to do so. He explains, in his Preface of 1833, what he looked to in expounding the Constitution:

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15. *See supra* note 2.

16. On *The Federalist*, see *infra* Part 13.

17. It can be instructive to compare constitutional law casebooks of the 1940s with those we have today. Hardly anyone today can be interested in, say, most of the Commerce Clause cases which were once so critical (for example, with respect to the "original package" issue). *See supra* note 11; *infra* text accompanying note 24.

18. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833). On Justice Story, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 464; ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 821; *see also infra* note 21.

> From two great sources . . . I have drawn by far the greatest part of my most valuable materials. These are, *The Federalist*, an incomparable commentary of three of the greatest statesmen of their age, and the extraordinary Judgments of Mr. Chief Justice Marshall upon constitutional law. The former have discussed the structure and organization of the national government, in all its departments, with admirable fulness and force. The latter has expounded the application and limits of its powers and functions with unrivalled profoundness and felicity. *The Federalist* could do little more than state the objects and general bearing of those powers and functions. The masterly reasoning of the Chief Justice has followed them out to their ultimate results and boundaries with a precision and clearness, approaching, as near as may be, to mathematical demonstration.[19]

I have anticipated, in my comments upon the limited reliability of the Ratification Campaign expositions of the Constitution, Justice Story's account of how he used his materials:

> The reader must not expect to find in these pages any novel views and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. My object will be sufficiently attained, if I shall have succeeded in bringing before the reader the true view of its powers, maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government.[20]

But, we should at once add, to rely, in expounding the Constitution, upon the view of it "maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government" may be—in fact, is likely to be—very much affected by chance political circumstances.[21]

IV.

If politics and hence chance affect, naturally enough, what practical citizens do with and say about the Constitution, it may require considerable effort to clear away the superstructure which conceals from view the original structure. One compromise or adjustment leads to another, as dedicated statesmen grapple with "the actual practice of the government." After a while, the Constitution itself can be lost sight of.[22]

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19. STORY, *supra* note 18, at I, vii-viii; *see also supra* note 16.

20. *Id.* at I, viii.

21. On Justice Story, see CROSSKEY, *supra* note 12, at 1406; *see also* supra note 18.

22. One indication of this is how little time is spent on the text of the Constitution in the typical law school constitutional law course. Even less time is devoted, of course, to *the*

One illustration bearing on all this which has always appealed to my constitutional law students might be usefully recalled here. It is about Dizzy Dean, a baseball legend in the St. Louis and Southern Illinois area in which I grew up. He won 120 games in his first five seasons as a regular pitcher with the St. Louis Cardinals and was only twenty-six when he broke a toe in an All-Star game in 1937. He tried to come back too soon and, favoring his injured toe, ruined his arm. The career of Dizzy Dean can remind us of the distortion that can take place, and the considerable damage that can be done, when one part of a well-constructed "system" is used to do the work intended for another part.

Consider, for example, what has been done with "due process" because the Privileges and Immunities Clause of the Fourteenth Amendment became practically unavailable soon after that Amendment was ratified.[23] That this was done to the post-Civil War Amendments, and so, soon after their ratification, despite the great sacrifices of the war which those amendments were intended to take advantage of and consolidate, should remind us of the distortions that political "necessities" (or passions) can induce. Much the same seems to have happened to the great domestic powers of Congress not long after the ratification of the Constitution of 1787. This may be seen most of all perhaps in what led to and resulted from misreadings of the Commerce Clause for more than a century.[24] Of course, we now recognize a virtually unlimited commerce power for Congress—but that has not been because the Constitution is "living" or "growing" but rather because we have returned to the reading of the Commerce Clause relied upon by Chief Justice Marshall a century and a half ago.[25] By doing so we have recognized how truly practical the Framers of the Constitution were: for it must have seemed as obvious to them, as it now does to us, that only the National Government would be able to exercise effectively the power to regulate the economy of the Country, just as it must have seemed obvious to them that some such power should be *available* to the National Government (however inadvisable it may often be to exercise much of that power and however obvious it may be that there are both good and bad ways of exercising such power).[26]

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founding constitutional document of the American regime, the Declaration of Independence. On the Declaration of Independence, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 11, 31.

23. On the Fourteenth Amendment, see *supra* note 13.

24. On the Commerce Clause and the commerce power, see *supra* notes 11, 17.

25. *See* Wickard v. Filburn, 317 U.S. 111, 121 (1942) (Justice Jackson's comment on the scope of *Gibbons v. Ogden*); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

26. On law and economic policy, see George Anastaplo, *Legal Education, Economics, and Law School Governance: Explorations*, 46 S.D. L. REV. 102, 201 (2001). *See also infra* text accompanying note 67.

V.

I have suggested that the Constitution itself can be lost sight of if we rely upon what practical men have been obliged to do and say from time to time. I now suggest that one cannot truly see what practical men have done if one does not know what the original intention was—for one cannot see adjustments, distortions, and compromises for what they are if one does not know what is being changed, how, and why.

Furthermore, if one relies primarily on Supreme Court cases, legislative applications, and executive interpretations, one is not apt to see fully how well-crafted the Constitution truly is. It is only when the superb craftsmanship of the Constitution—craftsmanship that many are not somehow aware of, even as they proceed otherwise in reading it—it is only when its superb craftsmanship is seen for what it is that the nature and extent of the powers of the General Government can be reliably grasped. If the Constitution is regarded as carefully crafted, then we can take seriously the many indications therein that various general powers were indeed originally intended by the Framers of the Constitution.

What does this mean, in practice, for teachers of constitutional law? My constitutional law courses, both for political science departments and in law schools, have been distinguished by their considerable concern with the Constitution itself. We do not begin to look at cases until several weeks have been spent studying fundamental constitutional documents. These documents include Magna Carta, the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and of course, the Constitution of 1787 with its subsequent amendments.[27]

It is sometimes difficult to persuade students to look at the Constitution itself—really to look at it—especially if they have already picked up the current orthodoxy about what the Constitution does or does not say. Also pernicious is the general opinion, at least among supposedly sophisticated people, that the Constitution is what the judges say it is.

I gather, from talking to other teachers of constitutional law and to many students who have taken other constitutional law courses than mine at one time or another, that an insistence upon an understanding of the Constitution as the principal object of a constitutional law course is quite rare in this Country. On the other hand, I do have the impression that the student who does come to understand the Constitution as originally designed, is far better equipped than most students to make sense of the many renderings of the Constitution produced by practical men in a variety of circumstances. This superior ability to explain transient phenomena follows from any interpretation of the Constitution that not only examines what its parts are but

27. For these and related documents, see the appendices in THE AMENDMENTS TO THE CONSTITUTION and THE CONSTITUTION of 1787, *supra* note 2; *see also infra* note 31.

also how those parts fit together.[28]

VI.

We have noticed Justice Story's warning that the reader of his *Commentaries* should "not expect to find in [his] pages any novel views and novel constructions of the Constitution."[29] He can assure his reader:

> The expositions to be found in the work are less to be regarded as my own opinions than as those of the great minds which framed the Constitution, or which have been from time to time called upon to administer it. Upon subjects of government, it has always appeared to me that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation.[30]

I am obliged to endorse his repudiation of "metaphysical refinements" in these matters. But this does not mean that the Constitution should not be dealt with as a well-crafted instrument. Various commentaries upon the Constitution—including my own—have been prepared with considerable care. Should not the Constitution itself be regarded as having been made with at least equal care—especially since its Framers included men far more talented and far more experienced than any of us commentators are apt to be?

Just as a proper commentary can take on a life of its own, so may the Constitution itself. That is, one can read it with the presupposition that the whole makes sense, that it repays careful study. I should at once add that an adequate grasp of the constitutional "whole" requires one to have a reliable sense of the circumstances of the time when the Constitution was framed and of the Anglo-American constitutional and legal heritage that the Framers brought to the Federal Convention of 1787.[31] On the other hand, one should not permit technicalities and the opinions of "experts" to interfere with a common-sense perception of what *is* there for all to read.

The People at large, upon ratifying the Constitution, obviously did not grasp everything that was in it. They took the word, so to speak, of their most influential statesmen. In addition, they did grasp that the Constitution should be read in the way that such instruments could reasonably be expected to be read in that day. What one hopes for, therefore, as a student of the

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28. A solid grounding in constitutional interpretation—that is, in reading a well-crafted document such as the Constitution—should be invaluable for lawyers who are likely to devote considerable effort throughout their careers to reading documents.

29. STORY, *supra* note 18, at I, viii.

30. *Id.*

31. *See* LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM: A SOURCE BOOK (George Anastaplo ed., 1999); *see also supra* note 27.

Constitution, is an account of it which reflects an informed Eighteenth Century approach to such matters.

VII.

It is important, in considering the Constitution, to recognize in all this the ultimate power of the People. It is, after all, the People who have ordained and established the Constitution. This means, among other things, that legislative supremacy, among the branches of government, is implied: it is evident, in the Constitution, that it is the legislature, not the executive or the judiciary, which should direct whatever ordaining and establishing is to be done by government itself.[32]

The ultimate power of the People also means that the best checks upon abuse of governmental power resides in the People, not in one or another branch of government. After all, since the authority for the Constitution stems from the People, who else is in principle in as good a position as the People (when properly instructed) to assess what government does? If so, then many of the questions we regard as constitutional questions are truly political questions—and this recognition, too, can very much affect how we should regard much of what passes for "constitutional law" among us.

Perhaps I venture upon what may be considered by some to be suspect metaphysics when I wonder whether there is not a sense of "the People" which sees the people as the embodiment of political wisdom. Thus, one would have to try to determine not what the opinion of the People happens to be at any particular time *but rather what is truly good.* That is, the People, as Supreme Legislator, can be assumed to want to do what is right—and what is right depends upon the use of reason in order to learn the lessons taught us by nature. Thus, it can be said, the Constitution is so devised as to permit reason to rule.[33]

In any event, much is to be said for regarding the Constitution of 1787 as an exemplary work of the mind, adapted to the immediate circumstances and the enduring aspirations of the American people. It is to a respectful explication of such a text that a proper commentary should be directed by the enlightened citizen.

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32. Thus, it is Congress that has the power to ordain and establish courts inferior to the United States Supreme Court. On the Judiciary Article, see ANASTAPLO, THE CONSTITUTION of 1787, *supra* note 2 at 124, 136.

33. This observation has been attributed to Scott Buchanan, once Dean of St. John's College, Annapolis, Maryland.

2. THE TAKING CLAUSE OF THE FIFTH AMENDMENT[34]

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. . . . The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on it's side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right. . . . And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner . . . . [The] right of property, ... as we have formerly seen, owes its origin not to the law of nature, but merely to civil society.
>
> William Blackstone[35]

I.

The Taking or Eminent Domain Clause of the Fifth Amendment is straightforward: "nor shall private property be taken for public use, without just compensation."[36] If any part of a person's property is taken for public

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34. This paper was prepared for delivery at the Annual Meeting of the Southwestern Social Sciences Association, Little Rock, Arkansas, March 30, 1989. On property, see also *infra* Part 3 of this Article.

35. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book II, i, 2, 11, 15, Book IV, i, 9 (1766).

36. Similar clauses may be found in State constitutions. For the traditional interpretation of the Taking Clause, see JOSEPH L. SAX, *Takings of Property, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1855 (1986). The Sax entry concludes,

> Although no single theory wholly dominates taking law, two guidelines permit safe prediction about the great majority of cases. Courts will find a taking and require just

use, then he is entitled to compensation. It may be difficult to determine in any particular situation whether any property has been taken or what it is worth. But that there should be private property, as well as standards of justice to be applied in dealing with it, was generally accepted in the United States at the time that the Bill of Rights was drafted and ratified (1789-1791).

It seems to have been generally accepted at that time that such governmental measures as restrictions upon uses of private property, export and import regulations, various kinds of taxation, wage and price controls, and welfare legislation did not constitute "takings" which required "just compensation." Judicial interpretations and applications of the Taking Clause, from the earliest days under the Constitution down to our time, reflect this general acceptance of the scope of permissible governmental activity (whether or not "for public use") without any requirement of compensation.

The most troublesome challenges to the traditional interpretation of the Taking Clause arise when executive or judicial, as distinguished perhaps from legislative, activity deprives one in effect of the ability to use one's property as one had. A dramatic instance is when low-level military training flights make it virtually impossible to continue to work a chicken farm.[37] Less dramatic is an official diversion of streams, in the course of construction work, which makes a private wharf far less useful.[38] But it may be sounder to consider such cases as posing issues of tort liability on the part of government rather than as instances of takings for which just compensation is due.[39]

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compensation if (1) the government acquires physical possession of the property; or if (2) regulation so reduces the owner's values that virtually no net economic return is left to the proprietor).

Id. at 1857. Courts find it difficult, in applying the Taking Clause (as distinguished from imposing tort liability), to go much beyond direct physical appropriation of property by the government. *See infra* note 54.

37. *See* United States v. Causby, 328 U.S. 256 (1946).

38. *See* Barron v. Baltimore, 32 U.S. 243 (1833). Chief Justice Marshall, who wrote the Opinion of the Court, does not say that the effects of the construction work complained of here did constitute a taking, whatever the State trial court might have believed. On the application of the Bill of Rights to the States, see CROSSKEY, *supra* note 12, at Chap. XXX, "The Supreme Court's Destruction of the Constitutional Limitations on State Authority, Contained in the Original Constitution and Initial Amendments." Professor Crosskey considered *Barron v. Baltimore* to have been "incorrectly decided" in holding that Amendments II-VIII do not apply to the States. *Id.* at 1076. If Mr. Crosskey is correct, was the Chief Justice willing to use this case, ruling as he did with respect to the Bill of Rights, because the plaintiff would not have had a claim anyway under the Taking Clause? On *Barron v. Baltimore*, see George Anastaplo, *Law, Judges, and the Principles of Regimes*, 70 TENN. L. REV. 456, 519 (2003).

39. Is the eminent domain approach, however dubious it may be, likely to be resorted to by the complaining property owner whenever sovereign immunity doctrines rule out the tort liability approach? The eminent domain approach, if successful, is an effective repudiation of sovereign immunity, something which there is no evidence that the Framers of the Constitution

II.

These observations about the Taking Clause would once have been considered a reliable guide to an interpretation of that clause. But advocates of "libertarian" tendencies have now emerged with doctrines that call much governmental activity into question. A recent instance of this is a book by Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*.[40]

One questionable feature of the Epstein approach is that it presents a political-economic agenda as a constitutional argument, an argument for which there does not seem to be any basis either in the original intention of the Framers of the Bill of Rights or (as Professor Epstein recognizes) in the body of judicial interpretations of the Taking Clause. And yet he can be seen to question and reject "the constitutionality of many key features of twentieth-century American government including progressive income taxes, the National Labor Relations Act, systems of unemployment compensation, social security, and most forms of zoning."[41]

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and of the Bill of Rights intended as a constitutional necessity.

40. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). Critical to the Epstein position, here and elsewhere, seems to be the following opinion:

> Perhaps the clearest and most important purpose of the Constitution was to place a set of limitations upon government power, both at the state and at the federal levels. The primary end of the framework for government envisioned by the framers was to avoid the twin perils of dictatorship on the one hand and tyranny by majorities on the other.

Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 710 (1984). I believe it is sounder to regard the Constitution primarily as a considerable empowerment of the National Government made safe in large part by a proper distribution of powers. *See infra* notes 41 and 59. On the Commerce Clause, see *supra* note 11.

41. Jeremy Paul, *Book Review: Searching for the Status Quo*, 7 CARDOZO L. REV. 743 (1986) (reviewing TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN). Another reviewer sums up the Epstein position as "suggest[ing] that maximum hour-minimum wage laws (pp. 279-81), the National Labor Relations Act (p. 280), the progressive income tax (pp. 295-303), wealth transfer taxes (pp. 303-05), unemployment benefits (p. 309), social security (p. 326), and all welfare payments (pp. 314-24) would or could be struck down. He recognizes that all these changes are unlikely and suggests that the courts could start down his road merely by striking down minimum wage laws (pp. 324-29)." Russell K. Osgood, *Book Review*: TAKINGS, 37 J. LEGAL EDUC. 453, 454 (1987).

Mr. Epstein repeatedly recognizes the scope of his demolition project. *See, e.g.*, EPSTEIN, *supra* note 40, at 281:

> It will be said that my position invalidates much of the twentieth-century legislation, and so it does. But does that make the position wrong in principle? The breadth of my charges shows only that there is a clear pattern of constitutional decisions in a wide diversity of cases. The linkages among the cases tend to make much of the legislation stand and fall together. If my arguments here are correct, then any New Deal economic and social legislation that suffers from the vices of the labor statutes in principle should

Mr. Epstein's essay is a well-publicized version of one kind of highly partisan scholarship, some of it rather wild, that passes for constitutional interpretation these days. As such it requires our attention, if only to remind us of the merits of the traditional approach.[42]

III.

Mr. Epstein's detailed arguments need not concern us here. They have been addressed at length and soundly criticized by economists, by legal historians, and by constitutional law experts. It does seem to be widely believed that neither the language of the Constitution nor the teaching of the cases supports his expansive use of the Taking Clause.[43]

Here and there, however, ringing endorsements of Mr. Epstein's argument *can* be heard.[44] Still others believe, notwithstanding the

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be consigned to the same constitutional fate. The New Deal *is* inconsistent with the principles of limited government and with the constitutional provisions designed to serve that end.

See also id. at 65, 112, 312, 322-29. The critical issue here is not whether the New Deal programs were well conceived—many of them may not have been—but rather whether they were unconstitutional. *See supra* note 4; *infra* note 59.

It is curious what Mr. Epstein has to do to the Sixteenth Amendment and to the General Welfare Clause in order to justify a demolition project which includes invalidation of the progressive income tax along with several New Deal programs. *See, e.g.*, EPSTEIN, *supra* note 40, 296-97, 42-43. Fancy footwork is needed also to take care of the traditional defense of sovereign immunity. *See, e.g., id.* at 156. *Compare* Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1564-65 (1986) (reviewing TAKINGS). Also intriguing have been Mr. Epstein's efforts to explain away as well the bankruptcy power provided in the Constitution. *See Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 155-59, 202, 204-05 (1986).

42. On prudence and the Constitution, see ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 337; ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 462. *See also* George Anastaplo, *American Constitutionalism and the Virtue of Prudence*, *in* ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS, AND AMERICAN CONSTITUTIONALISM 77 (Leo Paul S. de Alverez ed., 1976); *infra* note 418.

43. *See, e.g.*, Stanley C. Brubaker, *Constutional Bicentennial Symposium: The "Rights Revolution": Conserving the Constitution*, 1987 AM. B. FOUND. RES. J. 261, 265 (1987) (reviewing TAKINGS); Thomas C. Grey, *The Mathusian Constitution*, 41 U. MIAMI L. REV. 21, 24 (1986) (reviewing TAKINGS); Mark Kelman, *Taking* TAKINGS *Seriously: An Essay for Centrist*, 74 CAL. L. REV. 1829, 1829 (1986) (reviewing TAKINGS); Thomas Ross, *Taking* TAKINGS *Seriously*, 80 NW. U. L. REV. 1591, 1597 (1986) (reviewing TAKINGS); Joseph L. Sax, *Takings: Private Property and the Power of Eminent Domain*, 53 U. CHI. L. REV. 279, 279 (1986) (book review); *Richard Epstein on the Foundations of Takings*, 99 HARV. L. REV. 791 (1986).

44. The WALL STREET JOURNAL has been particularly enthusiastic. *See, e.g.*, Gordon Crovitz, *Is the New Deal Unconstitutional?*, WALL ST. J., Jan. 13, 1986, at 24 (reviewing TAKINGS); Claudia Rosett, *The Year's Best Books*, WALL ST. J., Dec. 24, 1985, at 7. *See also*

reservations they may have, that it has been useful for him to provide the provocations that he has. Considerable instructive discussion has been engendered, to which Mr. Epstein has not been loathe to contribute further.[45]

Still, one cannot help but wonder whether any of the eminent legal scholars whose help Mr. Epstein acknowledges in the preface to his book ever counselled him that the pronouncements he was offering up as constitutional argument were anything but that. One must wonder, that is, what in the world the Constitution means to them.[46]

IV.

The most instructive fact about the Epstein book may be that it illustrates the distorting effects of not reading the Constitution as a whole. Distortions are compounded by the considerable reliance by contemporary legal scholars upon judicial review, even though there is nothing in the Constitution which indicates that such review of acts of Congress was anticipated. Substantial reliance upon judicial review, if not even upon "judicial activism,"[47] may be seen in the extent to which Mr. Epstein wants the courts to deal with the many ways in which he believes that governments take private property for public use. There is reflected here the tendency of all too many people trained in the law these days *not* to recognize that most governing among us should be done politically, that the judicial role is merely that of adjudicating, not primarily or substantially that of supervising or directing.

It is salutary to recall here the insistence, by friends of the Constitution in the Ratification Campaign of 1787-1788, that no bill of rights was needed, that many important rights (including those protecting property) were already sufficiently recognized in the constitutional system they advocated. This, too, suggests that the Taking Clause is far more modest than some of its recent interpreters would like it to be.[48]

John L. Dodd, *Takings: Private Property and the Power of Eminent Domain*, 14 W. ST. U. L. REV. 639 (1987); Edward Foster, TAKINGS, 4 CONST. COMMENT. 443, 451 (1987) (book review); Ellen Frankel Paul, *Takings: Private Property and the Power of Eminent Domain*, 55 GEO. WASH. L. REV. 152, 178 (1986) (book review).

45. *See, e.g.*, Jeffrey Rogers Hummel, *Epstein's Takings Doctrine and the Public-Goods Problem*, 65 TEX. L. REV. 1233, 1233 (1987) (reviewing TAKINGS).

46. I recently had occasion to ask the students in a seminar I conducted at the University of Chicago Law School whether they had ever been assigned anything by William Crosskey. Evidently not!

47. *See supra* Part 1 of this Article. A particularly troubling eruption of "judicial activism" is what the United States Supreme Court did in *Bush v. Gore*, 531 U. S. 98 (2000). *See* George Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, 34 LOY. U. CHI. L.J. 131 (2000); *see also infra* note 287.

48. It is odd that something as innovative as Mr. Epstein believes that the Taking Clause was intended to be was left out of the Constitution of 1787. Almost all of the other rights protected by the Bill of Rights of 1791 had long been well-established and hence did not need

In any event, novelties in these matters should be regarded with considerable skepticism, including any theory which calls for wholesale invalidation of hundreds, if not tens of thousands, of statutes enacted by Congress for two centuries now.

V.

Similar departures from sound constitutional interpretation may be seen in what has happened in recent decades in the readings of the First Amendment prohibition of abridgments of freedom of speech or of the press. This protection is now casually extended to a variety of utterances, including obscenity and commercial advertising, that were never believed by the framers of the First Amendment to be entitled to immunity.

It does not seem to be appreciated, that is, that "freedom of speech, or of the press" is primarily concerned with self-government. This is the way I have summed up my own interpretation of the Speech and Press Clause of the First Amendment:

> The First Amendment to the Constitution prohibits Congress, in its law-making capacity, from cutting down in any way or for any reason freedom of speech and of the press. The extent of this freedom is to be measured not merely by the common-law treatises and cases available on December 15, 1791—the date of the ratification of the First Amendment—but also by the general understanding and practice of the people of the United States who insisted upon, had written for them, and ratified (through their State legislatures) the First Amendment. An important indication of the extent of this freedom is to be seen in the teachings of the Declaration of Independence and in the events leading up to the Revolution.
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> Although the prohibition in the First Amendment is absolute—we see here a restraint upon Congress that is unqualified, among restraints that *are* qualified—the absolute prohibition does not relate to all forms of expression but only to that which the terms, "freedom of speech, or of the press" were then taken to encompass, political speech, speech having to do with the duties and concerns of self-governing citizens. Thus, for example, this constitutional provision is not primarily or directly concerned with what we now call artistic expression or with the problems of obscenity. Rather, the First Amendment acknowledges that the sovereign citizen has the right freely to discuss the public business, a privilege theretofore claimed only for members of legislative bodies.[49]

Interpretations of the First Amendment today evidently do not place much reliance upon the parliamentary prototype for the "freedom of speech" language of the amendment.[50] Here, too, one can see political or social

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to be in the original Constitution. *See infra* note 309 and accompanying text.

49. ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 15-16.

50. For Thomas More's "freedom of speech" petition, see ANASTAPLO, THE AMENDMENTS

preferences being substituted for serious constitutional examination. At the same time, the political context of the Constitution itself, as well as of the First Amendment, tends to be ignored.

The context of the Taking Clause is similarly disregarded. That clause comes at the end of the Fifth Amendment, rounding off provisions which are concerned primarily with limitations upon the Courts and, to some extent, upon the Executive.[51]

The dominant concern of the Fifth Amendment is with judicial proceedings which threaten life, liberty, and property: due process has to be insisted upon in such instances. The Taking Clause guards against any evasion of the Due Process Guarantee that tries to do to a person on the civil side of the docket what could not properly be done to a person on the criminal side.

VI.

A general system of allocating and exchanging property is taken for granted by the Taking Clause, so far as the courts and the Executive are concerned. But such general rules are properly subject to legislative alteration, something that the more libertarian interpreters of the Taking Clause today do not seem to recognize. Thus, most issues raised with respect to the regulation or redistribution of property (say, through the use of environmental protection measures or the use of progressive taxation and welfare benefits) depend upon political, not judicial, questions.

One critical problem with the libertarian approach here is that it treats property as if it exists independent of government.[52] But is not the property one has usually determined by law? Most property, at least in the modern world, depends upon society and law; much of it would not even exist otherwise. Human beings may have a natural right to property, but that does not mean that any particular piece of property one has, or one's right to it, is determined altogether by nature and not at all by convention.

Property allocations and property rights rest upon general rules. These are subject to change, and sensible people know that. The major decision by the

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TO THE CONSTITUTION, *supra* note 2, at 256. *See also id.* at 461.

51. he Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

52. *See, e.g.*, EPSTEIN, *supra* note 40, at 5, 308. Compare the Blackstone passages used in the text at *supra* note 35. Is not Mr. Epstein aware that he is skating on thin ice by using Blackstone as he does? More fancy footwork is conjured up. *See id.* at 22 n.6; *supra* note 41.

United States Supreme Court that lends some support to a libertarian reading of the Taking Clause is *Pennsylvania Coal Company v. Mahon*.[53] A coal company, having sold land in which it retained mineral rights, including the right to mine coal without corporate responsibility for any damage caused on the surface, had found its operations curtailed by a subsequently enacted State law which obliged it to take account of what happened on the surface. One suspects that Justice Holmes, who wrote the Opinion of the Court, found for the company because he regarded this law as, in effect, an attempt by the surface owners to welsh on their contractual undertakings.[54]

But should not the coal company have always recognized that the law which regulated its development of its resources could change?[55] After all, the People of Pennsylvania may not want to have their State littered by sunken lots, especially in densely populated areas, no matter what miners and builders have happened to agree to.[56]

We know and generally agree that rules may change from time to time. We are not entitled to unchanging rules about the use and retention of property, however much we *may* be entitled to compensation when we as individuals personally lose to government action the use of our property *while the general rules remain unchanged.* Changes in general rules can be

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53. 260 U.S. 393 (1922). Mr. Epstein does not believe that Justice Holmes went far enough in *Pennsylvania Coal*. *See* EPSTEIN, *supra* note 40, at 94. On *Mahon*, see Part 3 of this Article.

54. The immunity contracted for by the coal company probably meant, in some if not in all instances, a cheaper price for the purchasers of land upon which to build. Even so, the holding in *Mahon* has been largely abandoned by the Court. The Brandeis dissent on that occasion has generally prevailed. Indeed, it has been argued, the United States Supreme Court never really applied extensively the doctrine it laid down in *Mahon*. *See, e.g.*, Neal S. Manne, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447 (1980). I suspect that much the same will happen with such cases as *Nollan v. California Coastal Commission*, 483 U.S. 825, 841-42 (1987). *See infra* text accompanying note 59.

55. The Contracts Clause, which was also invoked by the coal company, is irrelevant here, even in its orthodox interpretation. The Supreme Court did not deal with the Contracts Clause argument. For another interpretation of the Contracts Clause (which interpretation would also be irrelevant here), *see* THE CONSTITUTION OF 1787, *supra* note 2, at 333; Crosskey, *supra* note 12, at 352-60; *see infra* note 79. This interpretation might seem to lend support to Mr. Epstein's position, except that (1) it applies only to the States, and (2) it assumes a broad commerce power in the United States. Consider, as well, the implications of Mr. Crosskey's reading of the Ex Post Facto Clauses as bearing also on civil matters. CROSSKEY, *supra* note 12, at 324-51. But, however that may be, Mr. Crosskey's Constitution is hardly one of severely limited powers.

56. Should the State be obliged to pay all landowners *not* to dig holes which threaten subsidence? That is, one may be tempted to dig even when there are no prospects of minerals—if "just compensation" is thereby to be extracted?

All this is not unrelated to the equities of mandatory seat-belt or motorcycle helmet legislation. Who but the public is likely to pay in our circumstances for most long-term medical treatment following upon injuries "voluntarily" risked?

expected to affect the use we can continue to make of the property we have been entitled heretofore to acquire or to develop. Although we may not be entitled to compensation in most such cases, we are assured by the First Amendment that we are entitled to discuss fully the proposed legislative change and thereafter its consequences.[57]

Communities sometimes act foolishly, even unjustly, in the changes they make in their laws. But most of this conduct, however lamentable at times, need not be considered to pose constitutional issues, whether under the Taking Clause or under other provisions of the Constitution.

VII.

The current libertarian approach to the Taking Clause is merely one manifestation of a general approach that questions the legitimacy of all government except at the most elementary level. It is an unnaturally cramped interpretation of the Constitution that would restrict government to keeping the peace and protecting private property.[58]

As a moral argument as well, the libertarian approach here can be rather dubious, legitimating whatever degree of selfishness one happens to be inclined to exhibit in social relations. It should be evident that a decent people are not going to permit a moral or political theory, especially when it is of a doctrinaire tenor, to keep them from being sensible in trying to be and to do good. We should not want in any event to reduce all governing either to calculation—certainly not to mere economic calculation—or to judicial administration.

It is, in short, hardly prudent to permit the Taking Clause to take over the entire Constitution. Recollections of other bizarre readings of the Constitution by recourse to the Due Process Clause, and earlier to the slavery provisions in the Constitution of 1787, should remind us that special pleading, when couched in terms of constitutional interpretation, can give constitutionalism (and especially "original intent") a bad name among citizens who continue to hold a commonsensical belief in the common good.[59]

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57. On the First Amendment, see *supra* note 49 and accompanying text; *see also supra* note 50.

58. James Wilson did say at the Constitutional Convention, on August 13, 1787, "War, Commerce & Revenue [are] the great objects of the General Government." But he said as well, on July 13, 1787, "[I cannot] agree that [the protection of] property [is] the sole or the primary object of Government and society. The cultivation and improvement of the human mind [is] the most noble object." *Compare* EPSTEIN, *supra* note 40, at 344-45. We need not examine here what John Locke thought about these matters. It is not likely that Mr. Epstein has read Locke any more carefully than he has read the Constitution.

59. One can be reminded here of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), of *Lochner v. New York*, 198 U.S. 45 (1905), and of early anti-New Deal cases (see Part I of this Article).

On original intent and a proper reading of the Constitution, see ANASTAPLO, THE

3. PROPERTY AND THE CONSTITUTION[60]

> Most of the villages of Egypt are situated upon eminences of rubbish, which rise a few feet above the reach of the inundation, and are surrounded by palm-trees, or have a few of these trees in their vicinity. The rubbish which they occupy consists of materials of former huts, or of an ancient town . . .
>
> E.W. Lane[61]

I.

The speaker at a University of Chicago Physics Department Colloquium this afternoon dealt with a highly technical topic concerned with the random movements and combinations of the minute particles being investigated by him and his colleagues.[62] An anticipation of the randomness involved was

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CONSTITUTION OF 1987, *supra* note 2; George Anastaplo, *How to Read the Constitution*, *supra* note 8.

The bizarre is reflected in an ingenuous comment by Professor Epstein as quoted in MERRIL'S ILL. LEGAL TIMES, Feb. 1988, at 17:

> The more I thought about the concept of taking, the more I realized that, gee, if you start to apply this, everything becomes a taking. This seems crazy at first. But if you accept the premise that eminent domain creates a right of compensation, then it just doesn't make sense to limit takings strictly to simply land use paradigms.

Compare the observation by Professor Brubaker, a political scientist:

> Though he pretends to locate his theory in the ordinary meanings of the people who wrote and ratified the Constitution, the terms on which the Constitution was written, presented, and justified to the people and ratified by them—that is, the terms of *republican* government—receive not a word. "That honorable determination" referred to by Madison in the FEDERALIST, "which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government," has no place in Epstein's world. Politics is not an arena of honor, but a necessary nuisance. In place of republican government and a people ruling themselves deliberately through a structure of separated powers, Epstein provides a pallid notion of "representation" in which what is made present again is man's economic, not his political, nature. Politics might as well consist of punching our preferences into a giant computer program; there is no need for deliberate process through which we come to realize a common good.

Brubaker, *supra* note 43, at 276.

60. A talk given in a Constitutional Law course, Loyola University of Chicago School of Law, Chicago, Illinois, November 21, 2002. On property, see also *supra* Part 2 of this Article.

61. E.W. LANE, AN ACCOUNT OF THE MANNERS AND CUSTOMS OF THE MODERN EGYPTIANS 21-22 (5th ed., 1836). The prosaic elements in the exalted claims of property are often lost sight of.

62. For speculations about ultimate particles, see ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 252-53; *see also* ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 806-08; *infra* note 64; *see also infra* note 233 and accompanying text.

provided by an illustration drawn by the speaker from everyday experience, labeled by him, "The Drunken Pedestrian and the Lazy Policemen."

This was a story of the drunkard who weaves his way along city streets, "bouncing" (so to speak) in one of four directions at each intersection encountered. The question was what the odds were that he would, before getting to the sanctuary of his home, encounter one of the policemen who had parked themselves at three of the intersections in the area through which the pedestrian was moving.[63]

The illustration aroused considerable interest, perhaps especially among those of us in the audience who suspected that this might be the only part of the talk that we could understand.[64] Certainly, the audience's response was quite lively. I will return to the Saga of the Drunken Pedestrian and the Lazy Policemen and what we may learn, from this illustration of randomness, about our ways of knowing things.[65]

II.

The case for the protection of property as fundamental to the assurance of ordered liberty has been made most authoritatively, for the English-speaking peoples, by John Locke. The primacy of property for Locke is reflected in his inclusion within that "property" term much of one's being, not only the material possessions one happens to have.[66]

The Lockean influence is evident among the American Founders. In our own time it is to be seen in political economists such as Friederich Hayek and Milton Friedman, culminating for them in the case for the merits of a market economy.[67]

Any governmental or other organized communal regulation of how one uses one's material possession can be regarded with suspicion. Indeed, the presumption seems to be that any interference with the private enjoyment of one's possessions is likely to be harmful for everyone, so much so that it verges on the unnatural. It is almost as if it is natural that one should have the possessions one has, so much that only the most serious necessity warrants

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63. Data were available as to the number of intersections, the location of the pedestrian's home, the distribution of the policemen, and so forth.

64. On the University of Chicago Physics Colloquium, see George Anastaplo, *Thursday Afternoons*, *in* S. CHANDRASEKHAR: THE MAN BEHIND THE LEGEND (Kameshwar C. Wali, ed., 1997), at 122; *see also infra* note 231 and accompanying text.

65. On the ways of knowing, see George Anastaplo, *The Forms of Our Knowing: A Somewhat Socratic Introduction*, *in* JACQUES MARTAIN AND THE MANY WAYS OF KNOWING 1 (Douglas A. Ollivant ed., 2002).

66. *See* Robert A. Goldwin, *John Locke in* HISTORY OF POLITICAL PHILOSOPHY 476 (Joseph Cropsey & Leo Strauss, eds., University of Chicago Press 1987); *infra* text accompanying note 237.

67. *See* Anastaplo, *supra* note 26, at 132-205.

interference with one's possessions or their enjoyment.[68]

The taxation that may sometimes be necessary is to be exacted only by a legislature in which taxpayers are represented. The complete taking of some of one's property for public use may also sometimes be necessary–and for this one should be fully compensated, leaving one in the same personal economic condition as before. Here, as elsewhere, "sentimental" considerations can be ignored–or, at least, they have their price.[69]

A proper political order is aware of these considerations. Such awareness is incorporated in any constitutional arrangement worthy of respect and allegiance.

Critical here, then, is the belief that the protection of property rights is vital to the protection of all other rights that may be cherished. Thus, an effective freedom of speech may depend upon citizens who are able to maintain themselves despite governmental disapproval. The same may be said, to some extent, about an effective free exercise of religion.[70]

III.

An old-fashioned protection of property rights is seen by some these days to have been stalwardly exhibited by Justice Sutherland in the *Blaisdell* case.[71] His dissenting opinion, joined by three other Justices on that occasion, protested the effective suspension of the property rights of various creditors in Minnesota.[72]

Justice Sutherland can be extolled as a champion of the original, not of an evolving, Constitution against the claims of relativism and positivism.[73] Indeed, his rigorous constitutionalism on behalf of the Contracts Clause can be likened by the Justice's admirers to that of Justice Black on behalf of the First Amendment.

Much is to be said, of course, for a firm constitutionalism, so long as the terms relied upon are interpreted properly—and so long as the Framers who originally used such terms were sensible.[74] It may be impossible to say what the social consequences would have been in Minnesota during the Great Depression if the attempted foreclosures on a large scale had been permitted.

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68. *See, e.g.*, supra note 59.

69. Consider, as pointing to something even higher, the pledge, at the end of the Declaration of Independence, of Lives, Fortune, and Honor.

70. On the importance of property in our regime, see ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 819. On religious liberty, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 463.

71. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

72. *Id.* at 448. Justice Sutherland was joined in dissent by Justices Van Devanter, McReynolds, and Butler.

73. *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994).

74. *See, e.g.*, *supra* note 59 and accompanying text.

The creditors argued, of course, that *they* were being forced, unfairly, to bear the costs of relieving unfortunate debtors, costs that the entire community should have borne if relief was generally deemed necessary. The debtors, on the other hand, no doubt felt that their original contracting had presupposed the normal fluctuations of a market economy, not the extended disaster of the Great Depression–and not to recognize this distinction would be to undermine (in an unforeseeable manner) *their* property rights.[75]

IV.

Much of Justice Sutherland's dissenting opinion addresses whatever may be said about the specialness, if not the uniqueness, of the Great Depression. This the Justice does, in large part, by arguing that the Framers of the Contracts Clause had been concerned to prevent precisely the kind of well-intentioned relief that the State of Minnesota had resorted to on this occasion. The effects of such relief measures, for the economy as a whole, were regarded by the Framers as so disastrous and so unjust that recourse to these measures should be strictly forbidden. In short, Justice Sutherland argued there had been serious financial emergencies before 1787—and the Constitution was explicit about what should *not* be done in response to them.[76]

We need not concern ourselves here with whether Justice Sutherland's reading of the Contracts Clause is correct. His *is* the reading generally accepted today, as it was by the entire Court then, notwithstanding whatever differences of opinion the Justices had about the adjustments that might be made in its implementation because of emergencies.[77]

One curious feature of the Sutherland reading and application of the Contracts Clause is that he does not consider (if interferences with obligations of contracts are as serious as he understands them to have been regarded by the Framers) why the General Government was not restrained in the way that the States had been with respect to any impairment of the obligations of contracts. Why, for instance, was there not done here what was done about the power of both the General Government and the State Governments with respect to *ex post facto* laws and bills of attainder?[78]

One may even wonder whether the States are restrained here as they are with respect to the conduct of the foreign relations of the Country. One may wonder, that is, whether what the *States* (but only the States) may do about the obligations of contracts was believed to be undesirable, just as one may

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75. *See, e.g., supra* note 41 and accompanying text.

76. *See* Baisdell, 290 U.S. at 448-83.

77. It need be no more than noted here that the original intention with respect to the Contracts Clause may have been quite different from what is assumed today. *See supra* note 55.

78. *See* U.S. CONST. art. I, §§ 9-10.

wonder whether what the *United States* might have done about the international slave trade before 1808 was believed in some quarters to be undesirable.[79]

V.

If the United States Government is not limited with respect to the impairment of the obligations of contracts, this suggests that limitations upon the rights of property owners were not considered simply, or always, improper.[80] Why, then, in the 1930s, was not the Congress, rather than the State legislatures, relied upon to provide the much-sought-for debtor relief?[81]

Was there no political will nationwide with respect to such matters? The New Deal did try even more comprehensive financial remedies than debtor-relief, but it faced stiff judicial resistance in the early years of the Roosevelt Administration. The lack of debtor-relief efforts by the Congress may reflect the artificial limitations that had long been imposed by the Courts, requiring (if anything was to be attempted) something like the *Missouri v. Holland* subterfuge.[82]

Certainly, today, there would not likely be any sustained effective judicial nullification of the Congressional power to moderate the drastic effects of severe economic troubles upon debtors generally. An enlarged Commerce Power could be drawn upon, as could bankruptcy-related and appropriation (if not taxation) powers.[83]

The critical point which has been noticed here *is* that impairment of the obligations of contracts was not considered by the Framers to be so objectionable that the United States government was to be prevented from ever doing that. This point might well require a reconsideration of the general approach taken here by Justice Sutherland and his admirers.

Even more revealing is what all this suggests about how the Framers regarded the prerogatives of the propertied in circumstances where other vital community interests are at stake.[84]

VI.

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79. All this bears, I again mention in passing, upon what the Contracts Clause really means. *See supra* note 55.

80. Are such limitations apt to be fairer if placed nationwide, rather than State by State? The thesis of *Federalist No. 10* is perhaps relevant here. *See* Part 13 of this Article.

81. There *is* the Fifth Amendment and its Due Process and Takings Clause to be reckoned with. *See supra* note 51. But it can be questioned whether such provisions need be considered as obstacles to debtor-relief measures in extraordinary circumstances. *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 458.

82. 252 U.S. 416 (1920).

83. These and like powers are reinforced by the Necessary and Proper Clause. *See, e.g.*, ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 336.

84. For an enthusiastic advocacy of the prerogatives of the propertied, see *supra* note 41.

The spiritual ancestor of Justice Sutherland in *Blaisdell* is Justice Holmes in *Pennsylvania Coal Company v. Mahon.*[85] The Holmes argument depended there upon the contracts entered into between the coal companies and those who had purchased land for home-building.[86]

Of course, homeowners (who probably got cheaper lots because of the risk of subsidence after coal was removed) would benefit by (and they may well have lobbied for) any State interventions that discouraged subsidence-producing mining activities by the coal companies. But should not a community in its own collective interest, be able to keep its landscape from being disfigured by houses in various stages of disappearance? (Here, there may be "drunken" houses rather than a drunken pedestrian.) That is, this may not be a controversy only between coal companies and homeowners.[87]

Should not owners generally recognize that their uses of their own property may, in some circumstances, create problems that it would be unnatural to expect the community to disregard? Nor can it be reasonably expected that the community at large would pay compensation (on the basis of a "taking" doctrine) because of its various measures, designed to serve the common good, which happen to reduce the value of some property (even as it may enhance the value of other property).[88]

The proper remedy of the threatened property owners here (the coal owners) is political, not judicial. Justice Holmes, unlike Justice Brandeis who dissented in *Pennsylvania Coal Company*[89], did not appreciate this. An even more bizarre effort to substitute judicial for political remedies was that seen in *Dred Scott v. Sanford.*[90] It is particularly appropriate that Justice Sutherland relies, in his *Blaisdell* dissent, upon language from the Chief Justice in *Dred Scott.*[91]

VII.

Fundamental to this analysis should be the recognition that almost all of our property, especially our real estate and our monetary assets, depends upon the definitions, processes, and protection provided by the community, acting for the most part through its governments. It can be doubted whether individual choices, or that amalgam of such choices known as the "market," is in the final analysis a better guide to the creation and proper use of

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85. 260 U.S. 393, 412-16 (1922).

86. *See supra* note 53.

87. *See, e.g., supra* notes 55-57 and accompanying text.

88. An obvious instance of this would be the re-routing of a highway.

89. 260 U.S. 393, 416-22 (J. Brandeis dissenting).

90. 60 U.S. (19 How.) 393 (1857). On *Dred Scott*, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 363.

91. *See Blaisdell*, 290 U.S. at 450.

property than the considered opinions of the community.[92]

Also, fundamental here may be the opposition between reasoning and desiring. Is not the community, far more than the typical property owner, apt to take the common good into account? Is it not also more apt to be concerned about corrupting or other destructive influences? Implicit in all the property-gathering and property-keeping, which the community permits, facilitates, and protects, must be the understanding that the community should have the decisive word about how property is used (which includes how it should *not* be used in various circumstances). It should also be understood that the guidance provided by the community might vary from time to time as circumstances change, including the circumstances of what comes to be known about how property is being used elsewhere.[93]

Particularly to be noticed is the fact that when one acquires beautiful things, or things which may come to be regarded as beautiful or otherwise precious—one acquires such things at the risk of someday being treated by the community as a trustee, in effect, of the things one happens to have. This can mean, among other things, that one may not be able to consume or destroy at will whatever one has had the good fortune, or the misfortune, to "own."

These and like conditions are implicit in any mature understanding that a community may have about property and property-owners. These are conditions, I repeat, which can properly be changed from time to time, preferably after a full discussion of competing needs and contending equities.[94]

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92. *See* Anastaplo, supra note 26, at 253 (on John Woolman).

93. It has been instructive to watch in Chicago how Mayor Richard M. Daley has been influenced by civic practices he has observed in Paris.

94. That is, both freedom of speech and a sensitivity about justice are much to be relied upon here. Consider, in this connection, my November 13, 2002 memorandum for the organizer of a University of Chicago conference on community regulation of the uses of private property:

> There needs to be provided, as part of the discussions anticipated by your Conference next year, an examination of the presuppositions about private property usually relied upon by those who question both the authority and the judgment of any community which would impose "landmark" or related restrictions upon the owners of any property.
>
> Particularly in need of study is an insistence that private judgment, especially as registered by "the market," is highly likely to be superior to any public judgment with respect to such matters as aesthetic mandates. Particularly urged here by the champions of private property is that the true costs of public undertakings in these matters be assessed properly.
>
> The point of departure for the kind of fundamental inquiry that I am suggesting should include a recognition of the exalted status of private property in the constitutional and legal systems usefully developed by the English-speaking peoples since at least Magna Carta.

On the properly elevated regard for private property among us, see ANASTAPLO, THE

VIII.

Another way of putting these remarks is to recognize the tension between individualism and civic-mindedness. These can be put to good use in tandem, but one of them must ultimately prevail when they are in conflict. The modern emphasis upon the sanctity of property, which does tend to encourage ever-greater productivity and a generally higher standard of living, can undermine the sense of community and self-sacrifice, traits which are needed if there is to be that reliable, continuing protection of property which property-owners themselves require and expect. It is only prudent to keep in mind the fact that much of the protection required (say, in police and military services) has to come from many in the community who do not themselves have, and who cannot reasonably hope to have anytime soon, much property of their own.

Of course, everyone, or almost everyone, is likely to benefit when property is routinely used productively. Care must be taken, in regulating and drawing upon the more conspicuous property in the community, that the golden goose not be killed or even intimidated too much, especially in an age when wealth is eminently (sometimes even callously) mobile.

But one should not make too much of the temperament and fate of the golden goose, lest decisions with respect to these matters be reduced to considerations merely of calculating self-interest. The risks, as well as the insights, of the new-fashionable Law and Economics approach should be kept in mind upon probing these issues.[95]

Prudence is very much needed here, a prudence which includes an informed sensitivity as to what fairness calls for. The "human" aspect of things, which includes but should not be dominated by economic calculations, should always be kept in view. A comprehensive sense of the common good is what the Constitution and its proper interpretation should always aim at.[96]

IX.

I return to the Saga of the Drunken Pedestrian and the Lazy Policemen, a story that very much engaged the interest of today's Physics Colloquium at its outset. The Saga was returned to in the closing minutes of the Colloquium—but by then the engaging story had been reduced to a complicated formula, shown in a slide, which the speaker had to say that he would try to explain after the meeting to anyone interested. We have here a cautionary tale about such "scientific" treatments of human nature and

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CONSTITUTIONALIST, *supra* note 2, at 213-27; *see also infra* note 346.

95. *See, e.g.*, Anastaplo, *supra* note 26, at 132.

96. This bears upon how *Erie Railroad. Co. v. Tompkins*, 304 U.S. 64 (1938), should be assessed. *See, e.g.*, Anastaplo, *Law, Judges, and the Principles of Regimes*, *supra* note 38, at 511.

conduct as are evident in the Law and Economics movement.[97]

It is the risk of dehumanizing human relations, sometimes in the interest of science (social or otherwise), which has to be guarded against by the truly prudent–by anyone who is interested in understanding human beings primarily in human terms and thereby doing the best for them, including by helping them to become and to remain as good as they are capable of being.[98]

4. ORESTES, HIS COMPANION PYLADES, AND THE NATURE OF JUSTICE[99]

> Gellius declares that it is right to hold that not everything a father orders must be obeyed. "For what," he says, "if a father shall order his son to betray his country, to kill his mother, or to do some other base and unholy act?"
>
> Grotius[100]

I.

An instructive study a quarter of a century ago of the American jury, by Harry Kalven, Jr. and Hans Zeisel, has a chapter on the hung jury which I discussed with the authors after I happened upon evidence which seemed to contradict one of their more intriguing findings.[101] It turned out that my evidence, when properly examined, was not what it had seemed to be. That finding, the Hung Jury "phenomenon" discussed in the *American Jury* treatise, can help us understand the Orestes story.

The "Hung Jury" chapter opens with these observations:

> The hung jury is, in a way, the jury system's most interesting phenomenon. In one sense it marks a failure of the system, since it necessarily brings a declaration of mistrial in its wake. In another sense, it is a valued assurance of integrity, since it can serve to protect the dissent of a minority. Also, in terms of sheer numbers, the hung jury is an important phenomenon, since more than 5 percent of all juries, or some 3000 trials per year, end in such a mistrial.
>
> This ambivalence toward the hung jury is mirrored in the law's

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97. The layman can be left with the impression that the "human" element is sacrificed on the altar of "scientific" ingenuity. On human nature and conduct, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303.

98. *See, e.g*, the concluding chapter of Aristotle's *Nicomachean Ethics*. On the *Ethics*, see ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 318.

99. A talk given at a Faculty Workshop, Loyola University of Chicago School of Law, October 22, 2002.

100. HUGO GROTIUS, DE JURE BELLI AC PACIS BOOK II CHAPTER XXVI (1625). *See* LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 31, at I, 228-29.

101. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 453-63 (1966).

> difficulty in defining the degree of pressure the judge may put on an apparently deadlocked jury.[102]

Included in the lore surrounding the hung jury is the myth of the lone "hanging juror," a myth which can be instructive for us to draw upon on this occasion. Kalven and Zeisel provide an instructive table, "First Ballot and Frequency of Hung Jury."[103] They then observe:

> [This table] reveals the first ballot constellations from which hung juries are likely to develop.
>
> To begin with, [this table] confirms our earlier conclusion that the likelihood of hung juries is not dependent on the direction of the minority votes [that is, voting for conviction or for acquittal] . . . .
>
> [There is] a new point that emerges from this table, shedding some light on the popular notion of the "hanging juror." According to this [popular] notion, juries hang not so much because of the objective situation of the case, but rather because once in a while an eccentric juror will refuse to play his proper role.
>
> The table shows that juries which begin with an overwhelming majority in either direction are not likely to hang. It requires a massive minority of 4 or 5 jurors at the first vote [of a twelve-member] jury to develop the likelihood of a hung jury.
>
> If one may take the first ballot vote as a measure of the ambiguity of the case, then it follows that the case itself must be the primary cause of a hung jury.[104]

The authors then conclude their chapter on the Hung Jury with these suggestions:

> But the substantial minority need exist only at the beginning of the deliberations. During the process it may be whittled away, and we know from [another table][105] how small it may be at the end when the judge gives up and declares a mistrial.
>
> Nevertheless, for one or two jurors to hold out to the end, it would appear necessary that they had *companionship* at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct

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102. *Id.* at 453.
103. *Id.* at 462.
104. *Id.* at 462-63.
105. *Id.* at 460 ("Last Vote of Hung Jury").

> observation if all other members of the group claim that he must have been mistaken. To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally.[106]

The experiments by the psychologists referred to here help explain what goes on among jurors, and indeed within the community at large. The typical human being senses, and allows for, the limits of his perceptions, especially in ambiguous situations. This explanation reminds us of how much the awareness and securing of justice depends upon common sense and experience as well as upon what one has been taught by one's community. We probably should not want to have it otherwise.[107]

II.

The ancient story of Orestes, as he is within his city, goes like this:[108] Agamemnon, the leader of the Achaeans (the Greeks) at Troy, is murdered, along with his captive Cassandra, upon his return home. This is done by his wife Clytemnestra and her lover, Aegisthus. The wife had come to hate her husband because he had sacrificed one of their daughters, Iphigenia, at the outset of the Trojan War in order to advance his expedition.[109]

Thereafter Orestes, the son of Agamemnon and Clytemnestra, who had been raised in exile, returns home. Orestes believes he has been ordered by Apollo to kill his mother. And this he does.[110]

This is the traditional story, with a number of variations offered by diverse artists about precisely what happened to Orestes and others, including his sister Electra and his companion, Pylades, after the killing of Clytemnestra and Aegisthus. Little is said thereafter either about the killing of Aegisthus along with Clytemnestra or, for that matter, about the killing of Cassandra along with Agamemnon.[111]

This story, anticipated by Homer, has been retold by playwrights and others across millennia.[112] It is typical, in the telling of the story of Orestes'

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106. *Id.* at 463 (emphasis added). Irrelevant here are those rare instances in which one or more jurors may be bribed.

107. Law students, for example, can resent the use of cameras as the basis of citations for violations of traffic laws. What does this suggest about how much law-abidingness we really want and on what terms?

108. I draw in this talk upon the Richmond Lattimore translation of Aeschylus' ORESTEIA as published by the University of Chicago Press in 1953. On the *Oresteia*, see ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 109; George Anastaplo, *On Trial: Explorations*, 22 LOY. U. CHI. L.J. 765, 796 (1991) (*see infra* note 176).

109. *See* Aeschylus, *Agamemnon*, *in* the ORESTEIA, *supra* note 108.

110. *See* Aeschylus, *The Libatiun Bearers*, *in* the ORESTEIA, *supra* note 108.

111. This is also true of THE EUMENIDES, the third play in the ORESTEIA.

112. In the Twentieth Century, for instance, the playwright Eugene O'Neill drew upon the troubles of this markedly dysfunctional family in "Mourning Becomes Electra."

return home on his dreadful mission, that he is accompanied by Pylades.

Orestes and Pylades are cousins who had grown up together in Phocis, a land not far from Delphi, the site of Apollo's oracle.[113] Phocis had provided Orestes the protection and training he needed as a youth and was ruled by Pylades' father, who was married to Agamemnon's sister.[114]

Technical reasons may be offered to account for Pylades' presence, such as that someone is needed on stage with Orestes, especially when he first returns home. But, usually, Pylades has little to say on stage, in this part of Orestes' career; others, such as Electra or an old teacher of Orestes, may have much more to say to him.[115]

In short, Pylades does "have" to be there and we are challenged to consider why.

III.

There may be, depending on how a playwright presents the old story, something more than "technical" reasons requiring Pylades' presence.

An indication of relevant reasons is given in probably the best, and certainly the most famous, version of the Orestes story to have survived from antiquity, Aeschylus' *Oresteia*. Critical to that story, for our purposes, is what happens when Orestes is finally prepared to kill his mother after having already killed Aesgisthus:

> **Orestes:** You next: the other one in there has had enough.
> **Clytemnestra:** Beloved, strong Aesgisthus, are you dead indeed?
> **Orestes:** You love your man, then? You shall lie in the same grave with him, and never be unfaithful even in death.
> **Clytemnestra:** Hold, my son. Oh take pity, child, before this breast where many a time, a drowsing baby, you would feed and with soft gums sucked in the milk that made you strong.[116]

Here, as we can see, the most demanding invocation is made of the relation between mother and child. It is this that moves Orestes to turn to Pylades, who then utters his only speech in the play:

> **Orestes:** What shall I do, Pylades? Be shamed to kill my mother?
> **Pylades:** What then becomes thereafter of the oracles declared by Loxias [Apollo] at Pytho [Delphi]? What of sworn oaths? Count all men hateful

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113. On Delphi, see ANASTAPLO, THE ARTIST AS A THINKER, *supra* note 4, at 93, 119.

114. Pylades' parents were Strophius and Anaxibia.

115. In the summer of 2002, I met an actor who, in his youth, had played Pylades to Sam Wanamaker's Orestes. He had nothing to say in their version of the story, but nevertheless he had to pay close attention, shadowing Orestes throughout the play. He remembers this as quite exacting. (This actor was Robert Thompson, formerly of the Rosary College faculty.)

116. AESCHYLUS, THE LIBATION BEARERS 892-97.

to you rather than the gods.
Orestes: I judge that you win. Your advice is good. (To Clytemnestra:) Come here. My purpose is to kill you over his body. You thought him bigger than my father while he lived. Die then and sleep beside him, since he is the man you love, and he whom you should have loved got only your hate.[117]

Thus, Pylades reminds Orestes of Apollo's command, which Orestes reinforces by reminding his mother in turn of her duty to the husband she had killed. Even so, should we not want Orestes to hesitate? Would it not be unnatural for him to act without any reluctance or hesitation? But his sister Electra, who has no qualms at all, could not be used as well as Pylades here to confirm Apollo and to urge Orestes to kill their mother. Electra's encouragement of Orestes would be as if he had urged himself on to this momentous deed.

An inquiry into what Pylades' lone intervention means is reinforced by the recognition that Pylades does have much more to say in other plays.[118] It should be noticed that having Pylades kill Clytemnestra, while Orestes kills Aegisthus, does not avoid the evident atrocity of matricide, since Pylades would be acting on this occasion as Orestes' agent.

IV.

What, then, does the use of Pylades suggest? It seems that the doing of justice, even pursuant to a divine order, needs something more than the doer's recollection of what has been ordered and one's own interpretation of what that means. An appropriate confirmation here must come from someone knowledgeable outside the immediate family. Pylades' cousinship is *not* stressed in the play.[119]

That is, one needs for this kind of unnatural action (or "situation") the deepest form of assurance. A supposed order from Apollo does not suffice, nor does one's own anger or ambition.[120] One can be reminded here of Socrates' response to a report from Delphi about him personally, a report which Socrates questioned, at least to the extent of testing what Apollo had

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117. *Id.* at 899-907.

118. *See* EURIPIDES, IPHIGENIA IN AULIS. In the tradition, Pylades is reported to have eventually married Orestes' sister, Electra.

119. Compare Ajax and *his* divine inspiration. He too sought revenge, but all on his own (as misled by Athena). *See* SOPHOCLES, AJAX. Consider also the madness of Heracles in Euripides' HERACLES. (Is Pylades' cousinship ever mentioned in *our* play?)

120. Compare the Persians' way of dealing with this kind of situation. Their piety overcame their desire for the truth, that is, they insist that no child ever kills a parent, that reported cases do not have the facts right, etc. *See* HERODOTUS, HISTORY, I, 137; *see also infra* note 132.

been reported as having said at Delphi.[121]

Orestes' reliance upon Pylades instructs us that one needs something more than one's own judgment or perceptions in such matters. This is related to the Kalven and Zeisel report about the rarity, if not impossibility, of the completely lone holdout throughout a jury's deliberations. One can learn from this that the radically unconventional participant has to persuade at least one other (who is not like himself in the way that a sibling may be) before he undertakes a momentous, if not even monstrous, act that is far more likely than not to be prompted by a delusion.

We should be reminded by all this that justice very much depends upon a common understanding of things, upon what others also perceive and appreciate and for which plausible arguments are needed. Such a dependence is particularly appropriate considering how much the doing of justice is concerned with a proper ordering of social relations, which ordering includes settling upon arrangements which appear to be appropriate.[122]

V.

We can be reminded by all this of the problem of "solipcism," the term associated with the metaphysical position that the human being cannot know truly, or with certainty, anything besides his own perceptions. Thus, there is no assurance that there is either "a world" out there or what, precisely, is the cause of the perceptions one does happen to have.[123]

The most impressive use of the solipcistic approach is that found in Descartes, but only to test an approach that presumably goes beyond solipcism.[124] Descartes, however, stirred things up, perhaps unsettling old-fashioned philosophy more than he either intended or recognized.

Be that as it may, there is always the problem of determining whether whatever one may be confident of, so different from what everyone else believes is a dream, a hallucination, or some other form of delusion.[125] Certainly, things may not be what they seem in such matters.

The would-be heretic, rebel, or iconoclast is properly suspected. If one

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121. *See, e.g.*, ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 8; ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 95-96.

122. Are not those activities which "have" to be hidden from view, as was done by the Nazis and by the Stalinists even at the height of their respective powers, likely to be inherently suspect? *See infra* text accompanying note 156.

123. The term "solipcism" was evidently coined by an apostate Jesuit several centuries ago and was applied by him to his former order. But it refers, in its emphasis upon a kind of self-centeredness, to a metaphysical position which goes back to antiquity. *See, e.g.*, 7 ENCYCLOPEDIA OF PHILOSOPHY 487 (Paul Edwards ed., 1967) (defining solipcism).

124. On Descartes, see ANASTAPLO *supra* note 3, at 83; Anastaplo, *supra* note 65, at I .

125. We are quite unsympathetic, for example, toward those who kill innocent people because "God" told them to do it. Consider, however, the discussion of Joan of Arc in Anastaplo, *supra* note 108, at 921.

stands alone, or almost alone, one should at least be cautious in insisting upon one's superiority. Of course, if one is really deluded or delusional, one may even imagine that one has far more support than one truly has, and if so, there may not be much that can be done by one to protect oneself from one's folly.[126]

Prudent pioneers need to examine themselves and be both willing and able to explain themselves, making explicit their reasons and inviting challenging responses from others to the arguments they make. Sometimes the support they look for, and perhaps most require, has to come from the heritage of the community, not from any of the associates they happen to have at the moment. In these ways, then, the risks of megalomania and paranoia are minimized. They cannot be completely reduced, however, without eliminating completely all inspiration and innovation.[127]

VI.

It is not only the distinctive individual who needs bolstering. The community is also shaped and reinforced by reassurances, especially when it is obliged to assert itself.

Much depends, for the community, on conventions, that is, on agreements (sometimes incorporated in traditions) as to *what is*. Such agreements are grounded in common experience. One can hope that such conventions are somehow connected to the natural.[128]

The laws of the community, including its constitution, are conventions. The more they are shaped by a sense of what is right by nature, the more they are apt to be sound and enduring. Law depends upon common opinion as well as upon common purposes. It is assumed by any legal system that we *are* in touch with one another and that it matters not only what others may do but also what they may believe.

It is only prudent for one to wonder whether something is likely to be natural, or grounded in nature, if one is the only person who (after having thoroughly explained oneself) is persuaded by the facts that one offers and by the arguments one makes. Self-sufficiency is important; it is a trait to be cherished. But it is an informed self-sufficiency and hence prudence which are to be encouraged, especially when one might be moved unduly by self-seeking. [129]

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126. Consider, for example, the discussion of Thomas More, in Anastaplo, *On Trial*, *supra* note 108, at 950; *see also id.* at 882, 900.

127. On prophecy, see George Anastaplo, *Law & Literature and the Bible: Explorations*, 23 OKLA. CITY U. L. REV. 515, 521 (1998); *see also infra* note 134.

128. *See* ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303; *infra* notes 156 and 162.

129. The limits of the Law & Economics approach may be noticed here, especially if it should make too much of self-seeking. *See, e.g.*, ANASTAPLO, *supra* note 26, at 132.

VII.

We can now return, however briefly, to Orestes. After the execution of his mother, Orestes is "alone." Thus, in the Aeschylus version of the story, he alone, of all those on stage, sees the Furies at this stage of the proceedings. The Furies, who monitor specified offenses (including patricide and matricide, but not infanticide or the killing of spouses), are not concerned about Pylades.[130]

Orestes has to be ministered to through ritual purification in Delphi and thereafter by a trial in Athens. Thus, *some* community must somehow pass on him. Apollo's support matters at this stage of the proceedings. Orestes does not need Pylades at his trial, inasmuch as Apollo himself appears on Orestes' behalf.[131]

So what is being said about revelation and about the use and abuse of myths? How should Orestes' matricide be regarded if there should not be an Apollo, either to be invoked by Pylades or to be called by Orestes as a witness and sponsor at his trial?[132] We might also wonder, What does Pylades, as reliable companion, need in order to be properly confident in his own daring invocation of Apollo?

Epilogue[133]

One should avoid the temptation of discounting any reliance upon Apollo, in such circumstances as confronted Orestes, because it happens to be obvious *to us* that Apollo never existed, etc., unless one is prepared to argue as well that all revelations should be suspect. Of course, one might respond that the true revelation *should* be relied upon, but most people usually do not receive and accept even the true revelation upon any better ground than the Greeks received their principal stories about Apollo and his fellow divinities.[134]

Besides, there always remains the question, then as now, of who provides the appropriate interpretation of *the* revelation of one's day? In any event, even Apollo's directive may not *seem* sufficient to everyone, as may be seen in how the Furies persist in their deadly pursuit of Orestes despite Apollo's

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130. The Furies, it should be remembered, had pursued neither Agamemnon for the sacrifice of his daughter nor Clytemnestra for the slaughter of her husband.

131. That trial is set forth in Aeschylus' *The Eumenides*. For the trial in Iraq of a son who had killed his adulterous mother, see Neil MacFarquhar, *With Iraq Courts Gone, Young Clerics Judge*, N.Y. TIMES, Aug. 4, 2003, at A1.

132. *See, e.g.*, Anastaplo, *supra* note 107, at 877-79 (on Plato's *Euthyphro*).

133. This Epilogue was prepared and distributed to the Loyola University of Chicago School of Law Faculty after our discussion of my Faculty Workshop talk on October 22, 2002.

134. On prophecy, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 389-90; *see also supra* note 127.

emphatic endorsement of him.[135]

The persistence of the Furies testifies to, at least, the enormity of matricide, which might not seem to matter much to an actor (when ambition and revenge move one) if there is not an authoritative set of opinions about the divine to guide a community. It testifies as well to the importance for Orestes of Pylades' support, inducing us to wonder perhaps about what the considerations are that a Pylades should himself take into account in the most "awkward" situations. We can recall here the necessity, reported in the Kalven and Zeisel treatise, of "companionship at the beginning of [a jury's] deliberations"[136] if one is to be able to maintain oneself as the lone juror in the face of any dominant opinion which is usually entitled to considerable respect.

Whatever Pylades is like in the tradition and however he is used in the matricide scene by other artists, Aeschylus does seem to present him in a way, with his lone dramatic intervention, which invites speculations about the respect that decent human beings should indeed exhibit when they venture to challenge the authoritative opinions of the community[137] which has already nurtured their families for generations and upon which their families will thereafter rely for generations to come.

5. HOW TO BEGIN TO THINK ABOUT THE GOOD[138]

> Good we must love, and must hate ill,
> For ill is ill, and good good still . . .
>
> John Donne [139]

I.

It is sometimes fashionable to talk about the fragility of goodness.[140] This kind of assessment does assume that there is such a thing, or condition, as goodness, however difficult it may sometimes be to determine precisely what it is or how to secure it.

The fragility of goodness may be due, at least in part, to chance (or

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135. Indeed, in Aeschylus' *The Eumenides*, the Furies can criticize Apollo as a usurper, threatening their age-old prerogatives.

136. *See supra* text accompanying note 106.

137. The Declaration of Independence, we should recall, exhibited "a decent Respect to the Opinions of Mankind."

138. A talk given in a Jurisprudence course, Loyola University of Chicago School of Law, Chicago, Illinois, November 26, 2002.

139. JOHN DONNE, *Community* 1-2, *in* JOHN DONNE: SELECTED POETRY (John Carey ed. 1996).

140. *See, e.g.*, MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS (1986).

"fortuna").[141] It may be due as well to the influence and actions of evil people. Whether such people exist or have incentives and opportunities to promote their mischief may itself depend in large part upon chance.[142]

It may be wondered, moreover, whether goodness is difficult, if not impossible, to determine in a reliable and consistent manner. That is, can it truly be known what is good? Who is capable both of knowing this and of acting upon what may be known?

Some may not wonder about these matters. They may insist instead that the good which people extol is merely a matter of opinion and as such is indeed the product of chance influences. Or, at least, they may insist that whatever the good may be in the abstract, it is impossible, or virtually impossible, to know what it is in particular circumstances–and truly to know as well that one does know what it is. For one thing, the consequences of one's choices may (again, partly because of chance factors) be difficult, if not impossible, to anticipate. And so one is left with an *ethic of intentions*.[143]

II.

An ethic of intentions can mean, among other things, that one may be displayed as someone who always means well, however dubious, if not disastrous, one's choices often turn out to be. And *that* may not seem good, and not only to those of a practical turn of mind. This kind of argument, however, with its recognition of the dubious and the disastrous, does seem to assume that the good can be known reliably enough to permit appraisals of what various courses of action have meant when they have been chosen.

Thus, some of the arguments used here seem to concede that there is such a quality as goodness which can be somehow known and used with respect to what has been said and done. Underlying these and related observations may be the recognition, either reasoned to or somehow intuited, that discourse about human things is difficult, if not impossible, if one does not have some steady sense of the good that is shared by one's associates.[144] This may be seen even in discourse about material things, including about the care and uses of the human body.

Chance is no doubt critical in the conduct and consequences of human activities, and it cannot be altogether guarded against. Perhaps the repeated intrusion of chance into our affairs serves to remind us of something so vital

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141. *See* MACHIAVELLI, THE PRINCE 146, ch. 26.

142. The careers of Stalin and Hitler come to mind. On the career of Iago, see George Anastaplo, *Law & Literature and Shakespeare: Explorations*, 26 OKLA. CITY U. L. REV. 1, 98, 109 (2001).

143. On Immanuel Kant and an ethic of intention, see ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 27.

144. *See, e.g.*, the opening passage in ARISTOTLE, NICOMACHEAN ETHICS. *Compare id. with id.* at Book 1, Chapters 7-8.

to our very existence as our mortality—and hence reminds us of our dependence upon bodies that cannot be fully subject to our control.

And yet, are there not better and worse ways of anticipating and of responding to the chance factors and events which are very much part of our lives? In short, is there not a good inherent in the best responses to what we learn and do about the limitations of our access to the good?[145]

Furthermore, is there not even a good in that understanding which permits us to recognize, and perhaps to accommodate ourselves to, the difficulties that may chance to keep us from knowing what can usefully be known about the good?

Critical to these remarks up to this point has been the assumption, if not also the awareness, that understanding is itself a good (if not even the greatest or most secure good) which is, in some measure, now and then available to us, permitting us to associate ourselves with all (past, present, and future) who might understand. Perhaps it is also assumed that all goods, or at least all substantial goods, depend upon the understanding—that this is somehow to be expected in the lives of rational animals.

III.

Unfortunately, however, there are people who are, or at least seem to be, evil. They, including perhaps their very existence, must be reckoned with, even though the recognition (however secured) of them *as* evil is itself testimony to the guidance provided by goodness in any understanding of what is done and said all around us.

Among the things said are how the evil can talk about themselves. I remind you of my indignant mobster (on display in Judge Prentice Marshall's courtroom some years ago) who insisted that no one had ever given *him* anything, that he had had to work hard for everything he had gotten. That his "work"had included considerable violence and theft, he might have gone on to say, was inevitable considering the harsh circumstances in which he happened to find himself.

It is particularly important that would-be lawyers discipline themselves to try to figure out what it is "the other side" was thinking of when it conducted itself as it did in any transaction that is being litigated. What was sought for—and why it was believed that one might properly do what was done to secure what was sought? If one does not know "the other" in this way, one cannot fully know what one is dealing with. Nor may one be as sensible, or as good, as one may be in the response one makes and in the remedy one seeks.[146]

IV.

145. *See id.* at Book I, Chapters 9-10.

146. *See* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 46, 74.

What, then, is at the core of those who may be, or who seem to be, truly evil? Are not their actions somehow grounded in ignorance? Do they truly understand what they are doing not only to others, but perhaps most of all to themselves, however sophisticated they may believe themselves to be?

Vital to any effort to understand what evil means and how it comes to be is that ancient teaching which insisted that all human action aims at a good. This is heard at the beginning of both the *Nicomachean Ethics* and the *Politics* of Aristotle.[147] It is a teaching which he had learned from Plato who in turn had heard Socrates saying such things.[148]

Is there not *something* good, apparent to all who study it situation by situation, aimed at even by evil men? The issue is not whether that which happens to be sought is indeed good– whether it is wealth or physical and psychic gratification or power—but whether what is done to get any particular good, or what has to be sacrificed for it, is worth what is sought.

V.

One can investigate a variety of instances to try to determine whether there *is* something good in what is being said and done in questionable cases. Particularly challenging for us has been what Southern spokesmen said in behalf of their involvement in slavery before the Civil War.[149] We have noticed, for example, how the "Necessary Evil" argument was transformed into the "Positive Good" argument when it became apparent to Southerners that slavery was not as likely to be phased out in the not-too-distant future as it might have seemed during the Founding Period.

It is probably inevitable for people of sound mind and a generally decent disposition to make the best case that they can for the activities they are more or less "stuck with."[150] This may be seen in Southern spokesmen, especially John Calhoun, in the fateful decades before the Civil War.[151] This can be consistent with the opinion that slavery would not have been adopted *de novo* in the 1830's and thereafter by the South instead of its being by then an institution deeply established there for centuries. In short, it did not seem to most Southerners that there was any easy way out—and truly good way out—for the community as a whole, whatever individuals here and there might do on their own. One can see implicit in this kind of situation the

147. *See supra* note 144.

148. On how this teaching can be adhered to even in the most trying circumstances, see PLATO, CRITO; *see also* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4 at 203; *infra* note 174.

149. *See* LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 31, at I, 221, II, 54, 58. *Compare id.* at I, 252; *see also* ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 51.

150. "Rationalization" is a term used today for such an effort.

151. *See supra* note 149.

caution against innovations, such as the importation of slaves, which can trap one's descendants, if not oneself, in "impossible" situations. This caution seems to have been recognized by Abraham Lincoln who said again and again, in his political career, that Northerners who found themselves in circumstances similar to those faced by Southerners would probably feel and act much the same as the Southerners were doing.[152]

I have qualified what I have said, about what our actions routinely aim at, by indicating that insanity poses a special problem here.[153] Perhaps the insane, too, always aim at some good– but because of their deep-rooted disability it may be difficult to discern what the relevant good is for them in some situations. These considerations remind us that the workings of rationality are vital in what human beings aim at and do. Among the goods human beings do aim at is an understanding of how things are, an understanding which may be sought not only because it can be useful in guiding actions but perhaps even more because it is simply good to know things. But, we have noticed, what one may learn and how, as well as what one may do with what one has learned, may very much depend upon chance. An immediate reminder of this is to compare the quite diverse matters which happen to be talked about, why, and how in various courses in a law school.

VI.

The workings of chance may be seen in what happens to appear from time to time to challenge us in our opinions about the character and workings of the good. We have studied those matters by considering slavery as it, and its aftermath, affected how this country has conducted itself for more than two centuries. But it happens, because of material unexpectedly provided to me by a member of this class, that another challenge to our opinions about the good also invites our consideration. These materials are speeches by Joseph Goebbels, the leading propagandist of the German Nazi Party during the Second World War. Particularly instructive here are speeches made by him on February 18, 1943 and on December 31, 1943. By this time it had become evident, even to the most ardent Nazis, that the fortunes of war had turned against Germany. The disaster at Stalingrad had by then become apparent to all; the great cross-Channel invasion of the continent by the Allies was generally regarded as imminent.[154]

It is instructive to see what it is that Dr. Goebbels has to invoke in order

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152. Is not this implied in Lincoln's Second Inaugural Address? On that address, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 243.

153. On insanity, see George Anastaplo, *Samplings: Nine Talks*, 27 POL. SCI. REVIEWER 345, 389 (1998). *See also* George Anastaplo, *Psychiatry and the Law: An Old-Fashioned Approach*, *in* BY REASON OF INSANITY 167 (Lawrence Zelic Freedman ed., 1983).

154. That invasion was to come in June 1944. *See, e.g.*, Anastaplo, *supra* note 38, at 499. On the Nazi regime, see Anastaplo, *On Trial*, *supra* note 108, at 977; *infra* note 159.

to move the multitudes he depends upon. He certainly knows enough about the good—about the virtues that civilized people everywhere evidently recognize—to be able to present his cause as worthy of respect and dedication. Courage, temperance, and self-sacrifice are made much of by him, as is a determination to suppress the anti-social and the uncivilized (which he had long taken the Bolsheviks, the Plutocrats, and the Jews to be). Goebbels can even speak in 1943 of massive bombings of cities in much the same way that the Jesuit priest we have studied did.[155]

Of course, he does not say much, if anything, explicitly about the massive atrocities that the Nazis were responsible for. His silence in this respect is, in effect, a tacit repudiation of what was being done by the Nazis. Particularly instructive for Goebbels had been the public revulsion upon his showing of the film-records made of the torture-executions of some of the officers condemned after the June 20, 1943 plot against Hitler.[156]

It does seem that Goebbels knew enough about the good, as conventionally understood, to be able to tailor for public consumption the propaganda that he developed. But there is more than propaganda that is revealing here. There are also Goebbels's diaries of the same period, which I have begun to examine. In those diaries, which he may have expected would some day be read by an appreciative public, there is also the hatred of Bolsheviks, Jews, and Plutocrats that is routinely exploited in public.[157] But there is also a respect shown in the diaries for various of the conventional virtues, especially courage, justice, and temperance. Goebbels at least knew what should be *said*, even if only to himself, about such virtues.[158]

One suspects, upon reading these outpourings, some of them desperate, all of them unpolished—that how Goebbels usually saw the moral universe is somehow reflected there. It is significant that the routine slaughter of Jews, on an unprecedented scale, is not something that can be readily spoken of by him even in this personal record.

Again and again, in all that Goebbels says—in private as in public—the claims of the good, even as conventionally understood, assert themselves. He knows at least enough about the good, and the influence it has—he knows enough about all that to be able to make a plausibly-sounding case for the public he must deal with. However deluded and corrupted that public has become, it must still be spoken to as if it respected the traditional moral

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155. *See supra* note 149 at II, 199.

156. *See supra* note 122. On the "dilemmas, not to speak of the horrors, consequent upon the modern project," see ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 265-66; *see also supra* text accompanying note 128.

157. The Jews are "privileged" to be condemned as leaders of both the Bolsheviks and the Plutocrats.

158. On Aristotle and the conventional virtues, see ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 318-19.

standards of Germany's sacred heritage.[159]

To say all that I have on this occasion does no more than suggest those problems with Goebbels's understanding of things, and hence with his soul, which kept him from applying properly the moral standards that he invoked and that he himself might have, in some sense, really believed in. Thus, the depths and causes of his ignorance—the ignorance of the best educated of the Nazi leaders—are very much in need of investigation, especially from the perspective of those who believe in the sovereignty of the good. That ignorance is reflected in how "unrealistic" the hopes and expectations of Goebbels and his colleagues were once the fortunes of war had turned massively against them. One could wonder, long before this, about their sanity.[160]

VII.

The circumstances which helped make Goebbels and his associates what they were require investigation. I was reminded, by a concert I attended this weekend while working on the Goebbels materials, of the difference that circumstances can make in one's opinions about matters great as well as small. One of the pieces on the concert program was a sad Shostakovich symphony, which, one of the musicians told me at the intermission, had brought tears to the eyes of its composer as he worked on it. The symphony, and the tears, had been prompted because of the great sacrifices by the Russians at Stalingrad. It had happened, however, that I had just been reading, the preceding hour, passages in a Goebbels text in which he lamented the Stalingrad disaster for the Germans who had conducted themselves so selflessly there.[161]

Thus, the difficulty of being clear about what is truly good on any particular occasion is illustrated by the sentiments shared both by Russians and by Germans, even as each side regarded its adversaries as diabolical. Still, however much they differed in admiring what they did and in condemning what they did, did not both sides agree that there were good things worth fighting and dying for? One is challenged, that is, to see what these two sides shared, of moral worth, in what they did and said on those and like occasions–and to see, as well, what we can learn, if not even respect, in how they tried to account for themselves.

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159. Those standards were usefully reaffirmed at the 1945-1946 Nuremberg Trial. *See supra* note 154.

160. It can be touching, by the way, to see Goebbels, in his diaries, "thank God" for this or that bit of "good news." He had been so corrupted by this time that he could not understand that anything which postponed the final destruction of the Nazi regime was not really good news for the Germans.

161. On how Ulysses S. Grant spoke of the Cause to which Robert E. Lee had dedicated himself, see GEORGE ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 651.

Chance may be seen here, too—in what we happen to learn as well as in the condition we are in when we learn it. Is it merely accidental that one sees something so powerful and so enduring in goodness that even the hypocritical and the cynical, to say nothing of the diabolical, must repeatedly defer to it one way or another?[162] That is, is it not prudent and otherwise good for us to propose that there is something natural not only in the definition but also in the staying power of goodness? Indeed, one may even suspect, an enduring goodness may be drawn upon even by those who lament the fragility of goodness.[163]

6. THE ACCIDENTAL LEO STRAUSS[164]

Ah, did you once see Shelley plain,
And did he stop and speak to you,
And did you speak to him again?
How strange it seems and new!

Robert Browning [165]

I.

One can be reminded of the range of Leo Strauss's influence by the titles for the papers for this panel. One paper is on John Locke; the other is on Moses Maimonides and Niccolò Machiavelli.[166] The Strauss work on Locke is illuminated not only by what he had to say about Thomas Hobbes and his immediate predecessors, but also by what he had to say about Plato and Aristotle, among others.[167] His work on Maimonides is illuminated by his Jewish, including Biblical, studies.[168] His work on Machiavelli is illuminated not only by what he had to say about Xenophon and Aristophanes, among others, but also by what he had to say about the doctrines of materialists and

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162. This is critical, in the first book of Plato's *Republic*, to the silencing of Thrasymachus (who is hardly diabolical). Consider also how the prophet Nathan confronts King David with respect to his acquisition of Bathsheba. *See* Anastaplo, *supra* note 127, at 641. Consider how John Milton must deal with Satan in *Paradise Lost*.

163. *See, e.g.*, ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 161 (on George Orwell's *1984*).

164. Remarks prepared for the New Studies on Leo Strauss Panel, Claremont Institute for the Study of Statesmanship and Political Philosophy , at the Annual Convention, American Political Science Association, Boston, Massachusetts, August 29, 2002.

165. Robert Browning, *Memorabilla*.

166. *See, e.g.*, HISTORY OF POLITICAL PHILOSOPHY (Joseph Cropsey & Leo Strauss, eds. 1987), *supra* note 66, at 228, 296, 476.

167. *See, e.g.*, *id.* at 33, 118, 396.

168. *See, e.g.*, LEO STRAUSS, *How to Begin to Study* THE GUIDE OF THE PERPLEXED, *in* MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED xi (Shlomo Pines trans., 1963), at xi.

atheists.[169]

II.

One can wonder how the Strauss intellectual career is to be understood when it is noticed how much of his important work was "accidental" in its origins, in that they were responses to chance invitations and opportunities. This can include not only such obvious things as his intriguing *Genesis* lecture,[170] but even what is perhaps his most influential work, *Natural Right and History*.[171] Perhaps more critical here is the fact that so much of his work came to be written in English and in a way or about subjects that were very much affected by experiences in the United States.

Strauss "accidentalism" extends in various ways to those who have learned from Leo Strauss. I believe that we could all benefit from an informed inquiry, by a younger scholar today, into how the Strauss one got from personal, including classroom, association with him compares with the Strauss one gets from a study of his published work. I, for example, have long recognized that there are many emerging students of Leo Strauss who know his published work much better than I ever will. Perhaps I acknowledge personal limitations when I confess that he would have meant *far* less to me if I had not had (for more than a decade in Chicago) as much personal contact with him as I happened to have.[172]

Be that as it may, I do have the impression that extended contact with Mr. Strauss revealed facets of his thought and of his way of thinking, that may not be evident on the printed page. These can include the concerns and examples of a practical character that he could draw upon in developing arguments. These are far more important than the sometimes peculiar impracticality, in everyday affairs, that he could sometimes exhibit and that are readily remembered in anecdotes. Those who rely primarily upon the printed page

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169. *See, e.g.*, HISTORY OF POLITICAL PHILOSOPHY, *supra* note 66, at 90, 296; LEO STRAUSS, SOCRATES AND ARISTOPHANES (1996).

170. *See*, LEO STRAUSS, *On the Interpretation of Genesis, in* JEWISH PHILOSOPHY AND THE CRISIS OF MODERNITY: ESSAYS AND LECTURES IN MODERN JEWISH THOUGHT 359 (Kenneth Hart Green ed., 1997).

171. LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953).

172. *See, e.g.*, ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 249; *see also infra* note 176.

may be more inclined than Leo Strauss's older students are to believe that "the claims of moral virtue" "did not fundamentally animate and inform his writings."[173] Some have even gone so far as to argue that morality was for Mr. Strauss simply utilitarian, invoked primarily, if not exclusively, in the interest of safeguarding philosophy, that it was not something that he regarded as worthy of respect for its own sake.[174]

I do not mean to suggest that no intelligent student who knew him personally could make such arguments. But I do suggest that such arguments have to reckon with the substantial moral fervor exhibited again and again by Mr. Strauss in response both to the great events of his time and to everyday matters and associations, including of course in his dealings with students and colleagues.[175] Indeed, one can wonder how seriously even *Natural Right and History* can be taken if it is not believed that there is for human beings a substantial (somehow "objective") moral force animating invocations of and dependence upon natural right.

I have, somewhat accidentally perhaps, touched upon matters that could well be investigated in an effort to determine what Leo Strauss brought to the widely-ranging work he did. One further consequence of such an investigation could be that it might both induce and help us to consider, in an informed way, how the "published" Plato and Aristotle differed from the "oral" versions. An aid to such consideration could be an inquiry into what can be discerned of the "historical" Socrates from the accounts of him that happen to be available from Plato, Xenophon, Aristophanes, Diogenes, Laertius, and Aristotle, among others. The transcripts of the Strauss courses, however cautiously some of them have to be dealt with, can help enterprising younger scholars identify and examine the differences between the oral Strauss and the published Strauss.

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173. Steven Lenzner, THE WEEKLY STANDARD, Aug. 28, 2002, at 37.

174. And yet, we recall, Socrates himself was willing, on more than one occasion, to put his life at risk for the possibility of continuing to philosophize, rather than to commit injustices. *See* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 8; *see also supra* notes 148, 202, *infra* text accompanying note 180; *infra* text accompanying note 208; *infra* text accompanying note 227.

175. *See* STRAUSS, *supra* note 169, at 329-45.

III.

Underlying all of these matters, and how Leo Strauss himself may have regarded them, is what modern science teaches us not only about the matters once authoritatively dealt with by Revelation but also about the vastness of the universe, about the probabilities of rational life elsewhere in other solar systems and in other galaxies, and about the sobering vulnerability of the perhaps somewhat accidental human species in the very long run. Such teachings, which bear upon the question of the nature of nature as well as upon questions about the workings of Providence–such teachings may have very much affected those thinkers, especially in Germany, who (somewhat accidentally) helped challenge the Leo Strauss that we were privileged to come to know and to cherish.[176]

7. THE CAREER OF HANS-GEORG GADAMER[177]

One who justifies the wicked and one who condemns the righteous are both alike an abomination to the Lord.

Do not remove the ancient landmark that your ancestors set up.

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176. A salutary reminder about the character of the millennia-long philosophic enterprise, inspired by the recollections recorded in these remarks (see, e.g., supra text accompanying note 172), is provided for use here by an old friend, Laurence Berns of St. John's College:

> Something underlies everything accidental, namely nature. There are powerful natural attractions between minds like Strauss's and those of his good students; they seek one another naturally; they find out about each others' existence. They *will* find one another. Especially in the students there is a natural sense of incompleteness that leads them to seek men, women, books, and experiences that might make them more whole. I guess that what I am talking about is the *philia* in *philosophia*, the *thaumazein*, the mixture of wonder and admiration, which is said to be the natural beginning of philosophy.
>
> There is a beautiful statement in Goethe's *Maximen und Reflexionen* (877) that puts this in a more general form: "With the truly like-minded one cannot in the long run keep apart, they find each other again and again together; with the basically opposite-minded one tries in vain to maintain unity, but again and again it breaks apart."

See also GEORGE ANASTAPLO, ON TRIAL: FROM ADAM & EVE, TO O.J. SIMPSON app. C (*Chance and the Good Life*) (forthcoming); *infra* text accompanying note 207.

177. A talk given in a Jurisprudence course, The School of Law, Loyola University of Chicago, Chicago, Illinois, March 20, 2002. Some of the observations found in the notes to this part (e.g., infra note 211) were spoken on this occasion. The full title of this talk is *The Career of Hans-Georg Gadamor: A Provisional Assessment.*

Solomon[178]

I.

We are scheduled to discuss today the relation between everyday morality and the legal/political order. Critical to such a discussion is an awareness of how a supposed basis of morality in nature might be understood, an awareness which includes an inquiry into the meaning of "the Good."[179]

Our point of departure, in preparing for this discussion, should be the two accounts you have about an encounter I happened to have a quarter-century ago with the then-much-acclaimed behaviorist, B. F. Skinner.[180] That discussion, chaired by an eminent philosophy professor, Hans Jonas, suggested how and why Mr. Skinner relied upon some notion of that very Good which he tended to dismiss as unknowable. One can see, upon considering Mr. Skinner's invocation of "survival" as a standard, how the Good is somehow aimed at even by those who insist upon dismissing it as completely subjective and hence as "unscientific."[181]

We should have our scheduled discussion after I make some remarks that have been inspired by the obituary yesterday in *The New York Times* of Hans-Georg Gadamer, a much-acclaimed philosophy professor who has died in Heidelberg at the age of 102.[182] It is instructive, especially for law students who are likely to be engaged one way or another in the public life of their community, to see how the decisions one makes in a period of crisis (in Professor Gadamer's case, between 1933 and 1945) can affect one's actions and, even more important, one's understanding of oneself, for a half-century thereafter.[183] The desire, if not even the compulsion, to explain oneself may itself also testify to the "reality" of the Good.

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178. *Proverbs* 17:15, 22:28.

179. On the Good, the True, and the Beautiful, see ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 275-78. On the Noble and the Just, see ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 182. On the Doctrine of the Ideas, see *id.* at 303. On Revelation, Philosophy, and the Good, see the Conclusion of this Article.

180. *See* Appendix A of Part 7 of this Article.

181. *See supra* text accompanying note 174.

182. Stuart Lavietes, *Hans-Georg Gadamer, 102, Who Questioned Fixed Truths*, N.Y. TIMES, Mar. 23, 2002, at A23; *see also infra* note 190.

183. Consider, for example, the career of Werner Heisenberg, particularly as examined in Michael Frayn's recent play, *Copenhagen*.

II.

My one extended encounter with Mr. Gadamer was during an hours-long dinner three of us had one fine summer evening in Heidelberg in 1984. I was there to give a talk on "Civil Disobedience," about which I will say more later.[184] Although I had heard Mr. Gadamer lecture in the United States, we had never before talked at length. I was content to encourage him to do most of the talking on that occasion, which he was quite willing to do.

This was, at least for me, a memorable evening. For one thing, I do not recall ever having had so long a private dinner, the length of which was made possible because Mr. Gadamer (who was then in his eighties) very much enjoyed the food and drink lavished upon us. Indeed, I have never met anyone who enjoyed himself more at a dinner table.[185]

It is important to notice about Mr. Gadamer that he, a quite affable man, was very good company, at least in such circumstances. It was obvious that here was a genial, solidly intelligent scholar who could readily "get along" with people, however rigorous he may have been in the lecture hall and the seminar room.[186]

I do not recall much of what we talked about on that occasion. Perhaps I have notes on that conversation somewhere. Perhaps, also, the third member of our party, a former student of mine who was providing such generous hospitality, remembers more than I do.[187] What did strike me most about Mr. Gadamer's opinions during that conversation was how much he underestimated one of my teachers, Leo Strauss, a man (who had died a decade before) whom he had been in the university with sixty years before.[188] He did recognize Mr. Strauss as a very good Continental-style professor, but he suggested in effect that if we Americans knew more about the education that had once been available in Germany we would not make as much of Mr. Strauss as some of us do. This correction was provided in an inoffensive

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184. *See* ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 537.

185. A runner-up to Professor Gadamer here was Professor Richard P. McKeon of the University of Chicago Philosophy Department. Mr. McKeon, unlike Mr. Gadamer, was an ardent democrat who was rather rough on his students.

186. In his last decades, his wife was also quite hospitable.

187. Our host on that occasion was Professor J. Harvey Lomax of the University of Memphis Political Science Department.

188. On Leo Strauss, see Part 6 and the Conclusion of this Article. *See also* ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 249-71; LEO STRAUSS, THE STRAUSSIANS, AND THE AMERICAN REGIME, 3-30 (Kenneth L. Deutsch & John A. Murley eds. 1999).

way, determined though it was. Mr. Gadamer's assessment of Mr. Strauss was, in this respect, pretty much that held by most talented philosophy professors everywhere—and as such could not be resented.[189]

III.

It was Mr. Gadamer's ability to "get along" with people which should make him interesting for us. This ability is recognized in his *New York Times* obituary where it is recorded:

> Dr. Gadamer received two doctorates for his work on Plato, from Marburg University in 1922 and from Heidelberg—where he studied with [Martin] Heidegger—in 1929. He began his university teaching career in 1934 at Kiel, moving to Marburg in 1937 and then to Leipzig in 1939.
>
> Unlike his mentor Heidegger, he was never associated with Nazi efforts to remake German universities, and, as a result, Soviet authorities allowed him to keep his Leipzig post after World War II.
>
> His ability to avoid politics was due in part to his deep involvement in academic interests. He once remarked to a colleague, "I basically only read books that are at least 2,000 years old."
>
> Allowed to move to West Germany in 1947, he received his appointment at Heidelberg in 1949, retiring in 1968. In the years that followed he lectured at a number of American universities . . .[190]

The contrast with Martin Heidegger, noticed in this obituary as elsewhere, is striking. Heidegger evidently believed that he could, once the Nazis were in power, take over the intellectual leadership of their national movement. Mr. Gadamer has several times recorded his being disturbed by Heidegger's notorious Rektor's Speech at Freiberg in 1933. He wanted nothing to do with any such dalliance with the Nazis.[191]

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189. Mr. Gadamer praised Max Weber much more, a scholar that Mr. Strauss subjected to a severe critique. *See* STRAUSS, *supra* note 171, at 36-78. Mr. Gadamer did not appreciate how critical the theological question is for philosophy as a whole. *See* the Conclusion of this Article.

190. Lavietes, *supra* note 183, at A23. On Mr. Gadamer and Greek thought, see Anastaplo, *Mr. Crosskey*, *supra* note 12, at 260 n.271.

191. *See infra* text accompanying note 205. On Martin Heidegger as "the Macbeth of philosophy," see ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 269; Martin Heidegger, *The Self-Assertion of the German University*, 38 REV. OF METAPHYSICS 467, 470-80 (1985) (reprinting the 1933 Rektor's speech).

Mr. Gadamer was reconciled with Heidegger after his teacher abandoned his efforts with the Nazis. There is, however, evidence that such efforts on Heidegger's part lasted substantially longer than Mr. Gadamer reports that they did.[192] Be that as it may, although Mr. Gadamer did not like what Heidegger had done with the Nazis, that evidently did not permanently affect the relations between these two men during several decades thereafter.

In short, Heidegger left a highly questionable career behind as a Human Being, however influential he remains as a Thinker.

IV.

Mr. Gadamer, an obviously decent man, managed to stay aloof from politics, being able to hold important academic posts under both the Nazis and the Communists. Thus, it is reported that "at Leipzig during World War II, he showed neither open sympathy for nor resistance to Hitler's regime, concentrating on his work."[193]

Some questions have been raised about this, of course.[194] But there is no disputing the observation that Mr. Gadamer did not like what, first, the Nazis and, then, the Stalinists did in and to Germany, as well as elsewhere. This did not keep him, however, from getting along with both Nazis and Stalinists fairly well, and evidently with a clear conscience.

Mr. Gadamer can occasionally be spoken of as having "worked quasi-underground" in Germany, as having been "part of the opposition" in the Third Reich.[195] The evidence for this kind of civil disobedience is unpersuasive. Even so, Mr. Gadamer's credentials, or lack of credentials, here did not keep Leo Strauss from getting along cordially with him after the Second World War, so much so that Mr. Strauss gave a lecture at Hamburg in 1954, pursuant to an invitation evidently secured by Mr. Gadamer.[196] This is in marked, and revealing, contrast to how Mr. Strauss, to the end of his life, regarded Martin Heidegger because of his dealings with the Nazis.[197]

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192. *See, e.g.*, ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 152.

193. WASH. POST, Mar. 17, 2002.

194. *See, e.g.*, Richard Wolin, *Untruth and Method*, NEW REPUBLIC, May 15, 2000, at 38.

195. *See, e.g.*, HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY 66, 148 (Dieter Misgeld & Groeme Nicholson eds., 1992). On Heidegger and the Nazis, see *id.* at 9-14.

196. There was also between them an exchange of letters which has been published.

197. *See, e.g.*, ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 475 n.284.

V.

When one reflects on the statement, "I basically only read books that are at least 2,000 years old," one can be reminded of the considerable work done by Mr. Gadamer on the Platonic dialogues.[198] And one can be readily, if not even naturally, reminded in turn of the career of Socrates.

It is in the *Apology of Socrates* that we come upon a passage which has Socrates recalling troubles he had had with both the oligarchic and the democratic regimes which had run wild in Athens.[199] Not that Socrates was actively engaged in "resistance" to those questionable regimes—but there was something about the way he conducted himself which, in effect, challenged such regimes.[200]

Socrates was not put in jeopardy because of his metaphysical opinions—those were probably considered harmless, because they were either irrelevant or incomprehensible for most people. The actions he took, or refused to take, and because of which he was endangered, were actions which depended not upon metaphysics but rather upon elementary notions about good and bad, about right and wrong—notions which every decent human being, in his maturity, should be aware of and responsive to.

The simply "human" response, to which even the most elevated philosopher should be sensitive, is suggested in a 1948 letter to Heidegger by one of his pre-War students, a "secular" Jew turned Marxist, who was deeply troubled by his teacher's dealings with the Nazis. That student, Herbert Marcuse, is said to have put the challenge thus to Heidegger:

> A philosopher can be deceived regarding political matters; in which case he will openly acknowledge his error. But he cannot be deceived about a regime that has killed millions of Jews—merely because they were Jews—that made terror into an everyday phenomenon, and that turned everything that pertains to the ideas of spirit, freedom, and truth into its bloody opposite; a regime that in every respect imaginable was the deadly caricature of the Western tradition that you yourself so frequently explicated and justified.[201]

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198. *See infra* text accompanying note 206; *see also* HANS-GEORG GADAMER, PHILOSOPHIC APPRENTICESHIPS (1985).

199. *See* Appendix B at *infra* text accompanying note 227.

200. Bad as those regimes could sometimes be in Athens, they were nowhere near as bad (or as destructive) as the Nazis or the Stalinists always were in Germany, Russia, and elsewhere.

201. RICHARD WOLIN, HEIDEGGER'S CHILDREN: HANNAH ARENDT, KARL LOWITH, HANS JONAS, AND HERBERT MARCUSE 9 (2001); *see also* Shlomo Avineri, *A Banal Story*, NEW REPUBLIC, Feb. 24, 2003, at 25.

This kind of assessment of Nazism, against the background of Socrates' career when successive Athenian regimes went wild, encourages us to consider further the terms on which one not only collaborates as Heidegger did but "merely" goes along as most good Germans evidently did for a decade. Recollections of Socrates can be instructive here. It is significant, perhaps, that Heidegger's own influential studies of the Greeks seem to skip from the pre-Socratics to Plato: it can be suspected that he never did assimilate into his very being *the life*, insofar as it can be distinguished from the metaphysics, of Socrates, that life as recorded in, say, the *Euthyphro*, *Apology*, *Crito*, *Phaedo*, and *Parmenides* of Plato.[202]

Is it also significant that when Leo Strauss was invited, upon the nomination of Mr. Gadamer to lecture at Hamburg in1954, he chose (I have been told) Socrates as his subject?[203]

VI.

Mr. Gadamer inherited from his most eminent teacher not only his grounding in historicism, relativism, and German patriotism, but also the need, albeit far less of a need, to account for his relations with the Nazis inasmuch as he did stay in Germany and, to some extent, prospered during the Nazi regime. It may well be, in any event, that our awareness of the Good is such that we, in retrospect, naturally arrange, if not even adjust, our experiences to permit us to be comfortable with them.

The Gadamer account is definitely not that of a collaborator, or even that of an occasional sympathizer with the Nazis, but rather that of an accommodationist who did have Jewish friends and who could, after the War, speak with insight and sympathy about Judaism.[204] Such sentiments about Judaism would probably have been regarded by Heidegger as dangerously cosmopolitan, and hence as a threat to Germanness.

Mr. Gadamer made it clear, as he was entitled to do, that he never sympathized with Heidegger's 1933 Rektor's Speech, that speech in which philosophy was recruited for the Nazi program.[205] The most interesting passage I know from Mr. Gadamer's various attempts at an *apologia* is the following from his post-1968 "Reflections on My Philosophical Journey," a

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202. *See, e.g.*, ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 8, 203; *supra* note 174; *infra* text accompanying note 218; *infra* text accompanying note 228.

203. *See* Part 6 of this Article.

204. *See, e.g.*, *The Philosoply and Religion of Judaism*, *in* HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY, *supra* note 195, 155-64.

205. *See supra* text accompanying note 191.

long passage which testifies to the all-too-human tendency to try to make sense of one's life in the least painful way:

> My publication of [an essay on Plato's *Republic* in 1934] documents my position vis-a-vis National Socialism with the motto placed at the beginning: "Whoever philosophizes will not be in agreement with the conceptions of the times." As a quotation from Goethe it was indeed well masked, as it was in continuity with Goethe's characterization of the Platonic writings. But if one does not want to make a martyr of oneself or voluntarily choose emigration, such a motto can nevertheless convey a certain emphasis to the understanding reader in a time of enforced conformity, an affirmation of one's own identity . . . Indeed, from that time on the fact that one strenuously avoided politically relevant themes (and publications outside one's special field altogether) was in accord with the same law of self-preservation. It remains true even to this day that a state which, in philosophical questions, designates a single "doctrine" about the state as "correct," must know that its best people will move into other fields where they will not be censured by politicians—which in effect means by laymen. In this case, it makes no difference whether they are black or red [Nazi or Stalinist], no outcry can change anything. So I continued my work unnoticed and found gifted students . . . Fortunately, in those days the policies of national-socialistic politics, in preparation for war in the East, somewhat moderated their pressure on the universities, and so my academic opportunities, which for years had been nil, improved. After ten years of working in Marburg as a *Dozent*, I finally attained the long-desired rank of professor at Marburg in the Spring of 1937. In 1938, an offer of a chair in classical philology at Halle came, and shortly thereafter I received a call to the philosophical ordinariate in Leipzig, which confronted me with new tasks.[206]

Most, if not all, of the points made here may be found elsewhere in Mr. Gadamer's writings and interviews. Appeals are made by him, on various occasions, to what is here called "the understanding reader." Such a reader should no doubt want to give an obviously decent man the benefit of the doubt, especially with respect to matters in which circumstances and temperament can very much matter.[207]

Still, there are at least two serious problems with the account just quoted from these "Reflections." One problem can be noticed upon considering the recognition by Mr. Gadamer that he did "not want to make a martyr of [him]self or voluntarily choose emigration." This is summed up by his

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206. THE PHILOSOPHY OF HANS-GEORG GADAMER 13 (Lewis Edwin Hahn ed. 1997).

207. *See supra* note 176.

invocation shortly thereafter of the "law of self-preservation."[208]

Martyrdom would have been risked, of course, if one joined or was identified with opposition, to say nothing of resistance, movements within Germany. It can be unseemly, for anyone on the outside, to volunteer others for martyrdom. But emigration, too, was an option that, it seems, Mr. Gadamer could have taken advantage of, as did others with far fewer prospects than he would have had abroad.[209]

The Gadamer experience with "emigration" is rather curious. For he did leave Germany at least twice during the Second World War. Once, in 1941, he went to Occupied France, to give a lecture (in effect, on the German view of relations among States) to an audience of captured French officers. This, aside from details in the talk, could seem insensitive. On that occasion, of course, he was still subject to the control of the German authorities.[210]

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208. On the modern respect for the "law of self-preservation," see Laurence Berns, *Thomas Hobbes*, *in* HISTORY OF POLITICAL PHILOSOPHY, *supra* note 66, at 396.

209. I am reminded, by way of contrast, of that fine man, Christian Mackauer, who graced the faculty of the University of Chicago for so many years. He was a German Gentile who (partly because his wife was Jewish) could not abide the Nazis. Central to affirmation of the Good can be worthy exemplars. *See infra* text accompanying note 217. Consider, as well, my unpublished Letter to the Editor of June 2003, in response to Jenny Strauss Clay, "The Real Leo Strauss," N.Y. TIMES, June 7, 2003, at A29:

> Leo Strauss's daughter has reported that she does not recognize her father in the recent news stories about him as the mastermind behind the neo-conservative ideologues who control American foreign policy today. Some of us, who were Mr. Strauss's students at the University of Chicago, also fail to see him as the reactionary guru that some would evidently like him to be.
>
> I recall, for example, what he said to me after I lost my Bar Admission "loyalty-oath" case in the United States Supreme Court. (366 U.S. 82 [1961]) That is, his two-sentence letter to me, of June 22, 1961, was hardly that of a rightwing ideologue: "This is only to pay you my respects for your brave and just action. If the American Bench and Bar have any sense of shame they must come on their knees and apologize to you."
>
> I suspect that Leo Strauss, upon confronting those Administration adventurists who now claim to find in his teachings support for their presumptuous imperialism, would recall (as he often did) the Dutch grandmother's advice: "You will be surprised, my son, to learn with how little wisdom this world of ours is governed."

See supra text accompanying note 175; *see also* Ron Grossman, *How An Academic Came to Dominate Foreign Policy*, CHI. TRIB., June 22, 2003, sec. 7, p. 1, 6.

210. He argued on several occasions since the Second World War that France's position on reparations after the First World War contributed significantly to the German disaster. *See* STEVEN P. REMY, THE HEIDELBERG MYTH: THE NAZIFICATION AND DENAZIFICATION OF A GERMAN UNIVERSITY 229 (2002).

Another trip out of Germany took him to Portugal, in early 1944, to give lectures there. Nothing is said, at least in the materials I have seen, about whether his wife and daughter were held hostage pending his return to Germany. However that may have been, there is no indication of any interest on Mr. Gadamer's part in getting himself and his family out of Germany at any time after the rise to power of the Nazis.

At the same time, we are given to understand, Mr. Gadamer was aware of the dreadfully stultifying effect the Nazi regime, and later the Stalinist regime, had on the intellectual life of Germany for decades. And yet, the sovereign "law of self-preservation," to which we will return, evidently dictated that he remain and make the best of a bad situation.[211]

VII.

The second serious problem with the account I have quoted from the Gadamer "Reflections" appears in that part of the passage which begins, "Fortunately, in those days the policies of national-socialistic politics, in preparation for war in the East . . ."[212] This preparation for war led, we are told, to a relaxation of Nazi control over the universities—and this permitted Mr. Gadamer a critical academic promotion in 1937. But this seems to have been several years before the invasion of Russia, which suggests that other factors might also have been at work here.

What is not mentioned here—although it is mentioned elsewhere in his works by Mr. Gadamer—is that critical to the opportunities that did become available to him in 1937 and 1938 is that Jewish professors had been removed from the posts to which he was called. Of course, his refusal to take advantage of such openings would not have restored the men removed to those posts. And we see, even in this country (where the stakes are much lower), that men in academic life do not hesitate to fill posts for which others (who, for some reason or other, have incurred the displeasure of the authorities) are obviously better qualified.[213]

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211. One thing that he did do, according to what Peter H. von Blackenhagen told a friend of mine, was to intervene with a former student of his in the Gestapo to save another former student who was endangered.

212. *See supra* text accompanying note 206.

213. Mr. Gadamer reports elsewhere that one or more of the Jewish professors who had been ousted told him that he should accept the appointments offered to him. Precisely what men say in such circumstances, and why, would have to be carefully weighed in determining how their counsel is to be understood. *See, e.g.*, Heidegger, *supra* note 191, at 481, 483; *see also id.* at 501 (on the Gadamer career); Anastaplo, *supra* note 26, at 300-01.

Chance can play a critical part here, of course, including with respect to the temperament and circumstances of the people involved. Some people, for example, are more spirited than others, so much so that they can even seem to be looking for opportunities to "take a stand." Of course, if the prospect of getting oneself killed is very high, that can (and usually should) put a damper on the spirits of most of us. Still, there can be something sobering in what happens to those who do accommodate themselves to an unjust system, especially as they try to explain that accommodation in a way that ultimately satisfies themselves.

Particularly troubling for the good Germans must have been the recognition that the more they allowed the impositions of the Nazis, the more dangerous it became to resist future impositions. Shortly after the Nazis took power, but well before they had consolidated themselves as they did in the years immediately following, Jewish and "left-leaning" professors were dismissed from their posts. *That* was the time for decent people to resist with a minimum of risk and with a reasonable hope of success.[214]

Something is to be said, that is, for a tradition of civil disobedience. That tradition usually finds its most responsible expression in an established respect for a vigorous freedom of speech.[215] The limitations of the Germans with respect to these matters contributed to the crippling of decent men who recognized the evil of the Nazis but did not know how they could remain good citizens while putting up a determined opposition to the awful things which were systematically being done in their name.

VIII.

We can return now to our two B. F. Skinner passages by noticing, first, the role played by Hans Jonas in his chairing of this encounter and in his subsequent comment upon it. He, as is evident in the first Skinner passage, also recognizes the authority of Socrates in such matters.[216]

I draw now upon Mr. Jonas for a comment elsewhere which illuminates further the Heidegger problem by which Mr. Gadamer was oppressed for more than a half-century. Mr. Jonas, another student of Heidegger, had fled from Germany to Great Britain in the 1930's. His comment contrasts the conduct of Heidegger with that of an undistinguished practitioner of an old school in German philosophy:

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214. Today, one can wonder what is being acquiesced in with respect to the treatment of people of Arab descent in the United States.

215. On freedom of speech in the United States, see *supra* text accompanying note 49.

216. *See infra* Appendix A, *infra* text accompanying notes 225, 226.

> To illustrate the plight of ethics in contemporary philosophy, let me open this paper with a personal reminiscence. When in 1945 I re-entered vanquished Germany as a member of the Jewish Brigade in the British army, I had to decide on whom of my former teachers in philosophy I could in good conscience visit, and whom not. It turned out that the "no" fell on my main teacher [he refers here to Heidegger, without naming him], perhaps the most original and profound, certainly one of the most influential among the philosophers of this century, who by the criteria which then had to govern my choice had failed the human test of the time; whereas the "yes" included the much lesser figure of a rather narrow traditionalist of Kantian persuasion, who meant little to me philosophically but of whose record in those dark years I heard admirable things. When I did visit him and congratulated him on the courage of his principled stand, he said a memorable thing: "Jonas," he said, "I tell you this: Without Kant's teaching I couldn't have done it." Here was a limited man, but sustained in an honorable course of action by the moral force of an outmoded philosophy; and there was the giant of contemporary thought—not hindered, some even say helped, by his philosophy in joining the cause of evil. The point is that this was more than a private failing, just as the other's better bearing was, by his own avowal, more than a private virtue. The tragedy was that the truly twentieth-century thinker of the two, he whose word had stirred the youth of a whole generation after the First World War, had not offered in his philosophy a reason for setting conduct in the noble tradition stemming from Socrates and Plato and ending, perhaps, in Kant.[217]

We notice again, in the passage just quoted, the importance of Socrates in these matters, that Socrates who (we can recall) refused to cooperate in any way in the condemnation of the generals by bloodthirsty democrats or in the arrest of Leon at Salamis by bloodthirsty oligarchs.[218]

We need not concern ourselves here with what made the Heideggerean school as advanced as it was believed to be in philosophical circles and what made the Kantian school appear to be outmoded.[219] The critical thing here is that there could be said to have been among some academics a proper human response to human challenges, not simply the professional philosophical response.[220]

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217. ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 146-47 (quoting Hans Jonas in J. CENT. CONFERENCES AM. RABBIS 27 (1968)); *see infra* Appendix C, *infra* text accompanying note 228.

218. *See supra* text accompanying note 202; *infra* Appendix C.

219. *See infra* Appendix C; ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 27.

220. I mention in passing that years later Mr. Jonas was reconciled with Mr. Heidegger, something which happened to lead to an embarrassing situation from which I had to extricate

Indeed, the professional philosopher may have a tendency to believe that he is necessarily in opposition to the opinion (even the decent opinion) of his day. This is reflected in how Mr. Gadamer spoke, in his "Reflections," about the motto he took from Goethe.[221] Here, too, more reliable guidance is provided by Socrates—as in Plato's *Crito*, where Socrates indicates that the people at large, or the un-philosophical, are apt (if only by chance) to be right half of the time.[222] Is it not the duty of the philosophically-minded to reinforce and refine the decent tendencies of a properly-developed people?

IX.

However outmoded the Kantian school appeared to be, it could sometimes provide a reliable moral compass that B. F. Skinner's "Behaviorism" evidently could not explicitly acknowledge. "Behaviorism," as is suggested in the Skinner passage we have before us,[223] relies on a calculus (sometimes perhaps a rather complicated calculus) about pleasure and pain, a calculus which is grounded in primitive (and somewhat accidental) desires and aversions.

Mr. Gadamer was, of course, much more sophisticated about these matters than Mr. Skinner, but both of these scholars seemed to place a considerable (perhaps an undue) emphasis upon self-preservation (which Mr. Skinner could speak of as "survival") as fundamental. This is not to deny that Mr. Gadamer was better grounded in philosophy, including in the teachings of Socrates and Plato, than Mr. Skinner—and perhaps better grounded also than Mr. Marcuse, even though Mr. Marcuse had been another student (with Mr. Gadamer) of Heidegger. But, I suspect, that both Mr. Skinner and Mr. Marcuse would have had less to explain away if they too had been confronted with the kind of challenge that the typical German academic was. Is this in part due to vital differences in temperament?[224] Such provisional assessments invite further investigation.

We must wonder, in any event, whether it is an undue regard for self-preservation (something that does seem to be fundamental to the way that Martin Heidegger conducted himself, sometimes shamelessly, from the 1930s to the end of his life)—we must indeed wonder whether *that* can lead one to

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myself. But that is a story for another day.

221. *See supra* text accompanying note 206. I am reminded of the ever-so-subtle thanks paid to good neighbors in Marcel Proust's *Swann's Way*.

222. *See* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 203.

223. *See infra* Appendix A; *infra* text accompanying notes 225 and 226.

224. *See* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 1; *see also* MURLEY, *supra* note 7, at 539.

try, again and again, to explain away (not to repent for) whatever seems threatening in the "image" of oneself that one finds useful and happens to be comfortable with. It is this which can leave an observer saddened upon seeing how the reluctant accommodations of decent men, of considerable talent, accomplishments and good will, may keep them from ever fully being what they truly aspire to be.

APPENDIX A

A SOCRATIC CROSS-EXAMINATION: B. F. SKINNER, WITH THE HELP OF GEORGE ANASTAPLO, ON THE LIMITATIONS OF BEHAVIORISM (1969)

Part One (by Leon R. Kass)[225]

It is now more than thirty years since I first met Hans Jonas in the pages of his book, *The Phenomenon of Life: Toward a Philosophical Biology*. I was then a practicing biochemist working at the National Institutes of Health. But I was a somewhat eccentric biochemist, both because I had acquired a moralist's interest in the meaning of the new biology and, even more, because I had a vague interest in the philosophy of organism, secretly harboring inarticulate yet definite non-reductionist prejudices. My closest friend, having read Jonas' "Is God a Mathematician? (The Meaning of Metabolism)," strongly recommended that I read *The Phenomenon of Life*, whose paperback edition had just appeared. I took the book with me on our family vacation in West Virginia, and pored over it steadily for two weeks. It left me out of breath from the intellectual effort needed to comprehend the dense and sophisticated philosophical arguments (and the author's Germanic style). At the same time, I was thrilled to discover that there was indeed a way to philosophize non-reductively about living nature (including man) even in the face of the great accomplishments of modern biology.

A few months later, in the autumn of 1969, I met Hans Jonas in the flesh. I had organized the first NIH Symposium on Ethical Issues in Biomedical Advance and, mainly because I wanted to meet him, invited Jonas to be the moderator. "Look for a short man with a briefcase, holding a cigarette in the European manner," said my prescient wife as I left for the airport to meet my esteemed guest. Following her advice, I picked him out immediately and we soon fell into lively conversation. The next few days were exhilarating.

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225. This passage is copied from the beginning of Leon R. Kass, *Appreciating the Phenomenon of Life*, 23 GRADUATE FAC. PHIL. J. (The New School), 51-52 (2001). On Dr. Kass, see Gary Rosen, *Who's Afraid of Leon Kass?*, COMMENTARY, January 2003, at 28.

Jonas not only moderated with skill and grace; with his opening and closing remarks and his other substantive interventions, he gave the whole proceedings the wished-for and fitting tone of moral and philosophical seriousness. I recall the special delight he took in George Anastaplo's devastating Socratic cross-examination of B. F. Skinner, which revealed even to the meanest capacity the epistemological and moral self-contradictions inherent in the behaviorist's claims for the truth and beneficence of behaviorism.

Part Two (by George Anastaplo)[226]

My exchange with one of the Bethesda panel bears upon the argument of this essay (I am the first speaker in the following excerpt):

Anastaplo: . . .You used, on at least two occasions, [in comparing us moderns with the ancients], the notion of progress, that "we" are better than "they." I find that heartening because any serious notion of progress has some place, if only dimly, an awareness of what *the best* is. Are you prepared to say there *is* a best?

Skinner: I thought I was addressing that question in my talk this afternoon. There are ways in which we act to make things as we call them, "better," and we do say that this is good and that is not good, and so on, and I suppose that if you have good and better, you have a best, but the notion of the evolution of a species or of culture never gives you the opportunity of foreseeing the final state. If it's a question of eschatology, I pass.

Anastaplo: May I comment on that? Look, you can't talk about the better or the good without a notion of the best. I think you do have a notion of the best. I think you have a notion of the best by which you guide your life and on which your own comments just now are based. Your notion of the best, I think, whether you recognize it or not, is a full development of the human reason, primarily with a view to understanding man and the world around him. I think that's your secret best. If that is so, then we can begin to talk seriously about which societies, which cultures, are more apt to contribute to that, and which ones are less apt to contribute to that. We don't talk about survival as [the basis for] judgment. For instance, you observed that survival is the only value by which we will be judged. That simply is not

226. This passage is copied from HUMAN BEING AND CITIZEN, *supra* note 4, at 282-83 n.7. The essay drawn upon, "In Search of the Soulless 'Self,'" was prepared for a symposium, "Research in Neuro- and Psycho-Biology, Prospects and Social Implications," delivered at the National Institutes of Health in Bethesda, Maryland, on October 17, 1969. The symposium panel included Hans Jonas (Moderator), Gardner Quarton, B.F. Skinner, and George Anastaplo. *See infra* text at notes 318-19.

true. That is not a fact. We know—we look back over ancient "cultures" (as we call them) and we see some that we judge and judge very highly, and by any ordinary notion of survival, they have failed, compared to the trivial or bestial, barbaric culture which overwhelmed them. And yet I think you would say that they were better than the ones that conquered them. If you don't say it, I think that you would have serious problems talking about progress. If you *do* say it, then, as I say, we can begin talking seriously about what makes for the best man, what the proper questions are and how one goes about discovering what [the answers to] those questions are.

Skinner: I take survival to be a value only in a survival framework, and if you like to call that begging the question, you can.... You can't judge a culture simply by choosing those particular features that you admire, and say that Greek culture was great because of its law and its sculpture and so on. It was extremely weak in many respects and it happened to be weak because it overlooked the fact that it made itself extraordinarily attractive to barbarians, and that was a weakness.... In the long run, I think the culture which abandons its interest in surviving is not going to survive and in that sense it is a weak culture, and not a good culture.

APPENDIX B

ON SOCRATES' TROUBLES WITH BOTH DEMOCRATIC AND OLIGARCHIC REGIMES IN ATHENS[227]

For know well, men of Athens, if I had long ago attempted to be politically active, I would long ago have perished, and I would have benefitted neither you nor myself. Now do not be vexed with me when I speak the truth. For there is no human being who will preserve his life if he genuinely opposes either you or any other multitude and prevents many unjust and unlawful things from happening in the city. Rather, if someone who really fights for the just is going to preserve himself even for a short time, it is necessary for him to lead a private rather than a public life.

I for my part will offer great proofs of these things for you—not speeches, but what *you* honor, deeds. Do listen to what happened to me, so that you may see that I would not yield even to one man against the just because of a fear of death, even if I were to perish by refusing to yield. I will tell you vulgar things, typical of the law courts, but true. I, men of Athens,

227. This passage is taken from Plato's APOLOGY OF SOCRATES, 31D-32E (in the translation by Thomas G. West and Grace Starry West, published by the Cornell University Press). *See supra* text accompanying note 218.

never held any office in the city except for being once on the Council. And it happened that our tribe, Antiochis, held the prytany when you wished to judge the ten generals (the ones who did not pick up the men from the naval battle) as a group—unlawfully, as it seemed to all of you in the time afterwards. I alone of the prytanes opposed your doing anything against the laws then, and I voted against it. And although the orators were ready to indict me and arrest me, and you were ordering and shouting, I supposed that I should run the risk [by siding] with the law and the just rather than side with you because of fear of prison or death when you were counseling unjust things.

Now this was when the city was still under the democracy. But again, when the oligarchy came to be, the Thirty summoned five of us into the Tholos, and they ordered us to arrest Leon the Salaminian and bring him from Salamis to die. They ordered many others to do many things of this sort, wishing that as many as possible would be implicated in the responsibility. Then, however, I showed again, not in speech but in deed, that I do not even care about death in any way at all—if it is not too crude to say so—but that my whole care is to commit no unjust or impious deed. That government, as strong as it was, did not shock me into doing anything unjust. When we came out of the Tholos, the other four went to Salamis and arrested Leon, but I departed and went home. And perhaps I would have died because of this, if that government had not been quickly overthrown. And you will have many witnesses of these things.

Do you suppose, then, that I would have survived so many years if I had been publicly active and had acted in a manner worthy of a good man, coming to the aid of the just things and, as one ought, regarding this as most important? Far from it, men of Athens; nor would any other human being.

APPENDIX C

HANS JONAS ON MARTIN HEIDEGGER AND THE STATUS OF MORALITY[228]

It would be difficult to exaggerate the reputation of [Martin Heidegger] in Twentieth-Century philosophical circles. His notorious public collaboration with the Nazis in the early days of Hitler's power is instructive, especially if we take him at his word in his postwar ratification of his prewar suggestion that "the inner truth and greatness" of the Nazi movement was directed to "the encounter between global technology and man." (See

228. This passage is copied from ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 146-48. *See supra* text accompanying note 217.

Heidegger, *An Introduction to Metaphysics*, p. 166; *Spiegel* Interview [published May 31, 1976], p. 275.)

The disease accompanying technology may be seen not only in what it was that Heidegger was responding to, but also in the form of his response. His response was peculiarly infected by the disease itself. It was a response by perhaps the greatest European thinker of his time, but it was a response that was not in the best tradition of European thought.

This is illustrated by the report in 1968 by Hans Jonas, a scholar (now living in the United States) who had fled from Germany to Great Britain in the 1930s. His report contrasts the conduct of Heidegger with that of an undistinguished practitioner of an old school in German philosophy (*Journal of Central Conference of American Rabbis*, January 1968, p. 27):

> To illustrate the plight of ethics in contemporary philosophy, let me open this paper with a personal reminiscence. When in 1945 I re-entered vanquished Germany as a member of the Jewish Brigade in the British army, I had to decide on whom of my former teachers in philosophy I could in good conscience visit, and whom not. It turned out that the "no" fell on my main teacher [he refers here to Heidegger, without naming him], perhaps the most original and profound, certainly one of the most influential among the philosophers of this century, who by the criteria which then had to govern my choice had failed the human test of the time; whereas the "yes" included the much lesser figure of a rather narrow traditionalist of Kantian persuasion, who meant little to me philosophically but of whose record in those dark years I heard admirable things. When I did visit him and congratulated him on the courage of his principled stand, he said a memorable thing: "Jonas," he said, "I tell you this: Without Kant's teaching I couldn't have done it." Here was a limited man, but sustained in an honorable course of action by the moral force of an outmoded philosophy; and there was the giant of contemporary thought—not hindered, some even say helped, by his philosophy in joining the cause of evil. The point is that this was more than a private failing, just as the other's better bearing was, by his own avowal, more than a private virtue. The tragedy was that the truly twentieth-century thinker of the two, he whose word had stirred the youth of a whole generation after the First World War, had not offered in his philosophy a reason for setting conduct in the noble tradition stemming from Socrates and Plato and ending, perhaps, in Kant.

"Thus, there is in this personal experience," Professor Jonas continued,

> an indication of the plight of modern philosophy when it comes to ethical norms, which are conspicuously absent from its universe of truth. How are we to explain this vacuum? What, with so different a past, has caused the great Nothing with which philosophy today responds to one of the oldest questions—the question of how we ought to live?

Mr. Jonas then suggested an answer to the question of how this had come to be:

> Three interrelated determinants of modern thought have a share in the nihilistic situation, or less dramatically put, in the contemporary impasse of ethical theory—two of them theoretical and the third practical: the modern concept of nature, the modern concept of man, and the fact of modern technology supported by both. All three imply the negotiation of certain fundamental tenets of the philosophical as well as the religious tradition.

We notice that Mr. Jonas observed that "ethical norms" are "conspicuously absent" from "modern philosophy." To what extent did technology, or the modern natural science upon which it depends, replace old-fashioned "ethical norms"? Did Heidegger's radical approach to philosophical questions help undermine the best of German idealism (seen, perhaps, in thinkers such as Kant)? Or was it that Kant and those immediately influenced by him were themselves decisively affected by modern natural science and other developments and hence contributed to the subversion of the natural basis for "ethical norms"?

Mr. Jonas could himself speak of the principled German professor who resisted the Nazis as having been sustained by "the moral force of an outmoded philosophy." Such a man might have been one of thousands. I suspect that not enough credit is given to many, albeit a minority of, Germans who had to make very difficult decisions and who did stand for humanity. It should be remembered that the Nazis had to conceal from the German people at large the worst atrocities they committed, which suggests that the Nazis were obliged to recognize that there remained among the German people a residual sense of humanity that it would have been dangerous to offend too much, even in the name of national security in time of war.

This residual sense of humanity, I might add, goes far deeper than even whatever Kant provided. Modern philosophical thought has all too often weakened the effectiveness of this sense, thereby permitting mere technological considerations and the economic and other so-called practical considerations closely allied to technology to dominate communal developments. One consequence of this is the subversion of the status of the natural. I will return to this later. For the moment it suffices to notice further that for Mr. Jonas not only would Kantianism be outmoded, but also perhaps Platonic thought, which does provide the life of Socrates as a model of how the thoughtful man should live, especially in dark times.

Let us return directly to Heidegger, whose scholarly thought, as Mr. Jonas noticed, some say even helped Heidegger to ally himself with the cause of evil. That thought, to which some contemporary intellectuals subscribe "in theory" however much they may abhor its practical alliance with Nazism,

may be in decisive respects too abstract and metaphysical, with insufficient concern for the ethical and the political. This may be a critical Twentieth-Century failing: ethical questions tend to be regarded as beyond the realm of philosophy or science; rather, the things truly knowable are "questions of fact."

Technology as well as modern metaphysics can be seen as peculiarly well-qualified to deal with questions of fact. But people cannot help noticing that when technology is in the saddle something vital is missing from human life, and so a political remedy is sought. It is all too often sought by men who have themselves contributed to the problem—by men who are, in any event, ill-equipped to think politically (that is to say, with prudence, which must be distinguished from the cunning and opportunism to which Heidegger himself all too often resorted). It is, in these matters, prudent to keep in mind an observation by Emil Fackenheim: "The Scottish-Catholic historian Maclom Hay asks why what happened in Germany did not happen in France forty years earlier, during the Dreyfus affair. He replies that in France there were fifty righteous men." (*The Jewish Thought of Emil Fackenheim: A Reader* [1987], p. 136).

8. CIVILIZATION AND ITS DISCONTENTED[229]

A little learning is a dangerous thing,
Drink deep, or taste not the Pierian spring.
There shallow draughts intoxicate the brain,
And drinking largely sobers us again.

Alexander Pope[230]

Three University of Chicago talks that I happened to hear and to respond to this past week, within a twenty-four hour period, had common features which can be instructive for us as students of jurisprudence and hence of that collective understanding upon which law depends. All three talks, by distinguished ("cutting edge") intellectuals, were given to audiences that had, for the most part, little inclination to challenge what was being said. And yet, in each case, what was said was quite different from our common experience of things. (These three talks happened to be framed by a breakfast meeting

229. A talk given in a Jurisprudence course, The School of Law, Loyola University of Chicago, Chicago, Illinois, October 28, 2002. The original title of this talk was "Twenty-four Hours: Civilization and Its Discontented."

230. ALEXANDER POPE, AN ESSAY ON CRITICISM, II, 215-18.

on Thursday and an address on Saturday, both of which I will refer to briefly.)

Late Thursday afternoon there was a talk by a Princeton University professor, a Nobel Laureate in Physics. His account of research, drawing upon elaborate sets of data compiled by teams of investigators, suggested possibilities about the movements of very small particles.

It was true on this occasion, as is usually the case in the weekly University of Chicago Physics Department Colloquium, that very few of the physicists present (faculty as well as graduate students) could follow much of what was said. The research in such a distinguished department today is highly specialized, so much so that only a small part of an audience is expected to grasp most of what is said, however important it may be for the morale of the department that its members show up.[231]

One could well wonder what "understanding" means in this context—that is, when the "things" studied are not only to some extent conjectural (or hypothetical) but are also described in a most limited fashion. Thus, a student of these matters has observed, "I don't know what an electron is if I don't describe it mathematically."[232] This suggests, among other things, that electrons cannot be visualized. (Would a poet be better able to describe electrons and other such things? There do appear to be tiny things there that can collide and break up.)

A mature physicist present, with whom I walked out of the Colloquium, said that I had just witnessed some "heavy stuff," conceding thereby that I was not the only one present who had difficulty following what had been said. I responded that I did learn something valuable from the speaker: "Correlation is everything."

I was then told that Niels Bohr had once said, "The contrary to a deep truth is another deep truth." Whether this is generally true can be debated, but it does seem to be characteristic of modern physics that the heresy of one generation becomes the orthodoxy of the next, only to be replaced in turn by another heresy.[233]

At noon on Friday there was a talk by a New York City law professor. Same-sex marriages were discussed at a Gender Studies Colloquium. Marriage itself was called into question as an institution that is really coercive, especially for women. Particularly instructive was how virtually everyone present seemed to accept the argument that the state is not entitled to make as much as it does of marriage.[234]

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231. *See Colloquium*, *supra* note 64.

232. ALAIN CONNES ET AL., TRIANGLE OF THOUGHTS 35 (Jennifer Gage trans., 2000).

233. *See supra* note 62.

234. *Compare, e.g.*, ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 349

I was the only one there to suggest that the community is entitled to supervise families in the having and raising of children, and that there is much to be said for children having two parents. The critical issues with respect to the status and promotion of marriage by the community may not have much to do with whether or not same-sex marriages should be permitted. The massive problems confronted today are from those many opposite-sex relations which produce children for whom only the mother is responsible. And, I ventured to suggest, most of us present had benefited from having been reared by conventional families, however poorly in some cases. (I was immediately reminded that domestic violence is a serious problem, as if that obviously called into question the very institution of marriage.)

Thus, I argued, the state may not only have the right but even the duty to supervise these matters. But, it seems, civilization itself is very much taken for granted these days, as if it naturally sustains itself without deliberate efforts or coercive measures on the part of communities. The address I heard the following day can be understood to have used Plato's *Republic* in support of this argument, whatever reservations one might have about the care in reading displayed on *that* occasion.

Later on Friday afternoon there was a talk by a distinguished sociologist from a British university. He identified himself as an old-time Marxist who decried the shortcomings of capitalism, particularly in the United States. He endorsed an observation attributed by him to F. Scott Fitzgerald (early in the Twentieth Century) that America is a place where one does not get "a second chance." He also observed that our capitalist economy is now in recession, so much so that it is on the verge of plunging into a depression.

I began my remarks by saying that anyone who considers the present situation in the United States as verging on a depression simply does not know what a depression looks like. I was the only one present talking this way, which led to my further comment that the Fitzgerald lament was simply wrongheaded. Indeed, I suggested, many if not most families in America have had the experience of second and even third chances, reinforced by the easy availability of bankruptcy in this country. This openness of the system is reflected in the efforts made by immigrants to come here in the large numbers that they do. Few people have ever made desperate attempts to emigrate to thoroughly Marxist regimes.[235]

The speaker granted that immigrants do well in this country, but he argued that it is the middle class that now routinely has the experience of

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("Women and the Law"); LIBERTY, EQUALITY AND MODERN CONSTITUTIONALISM, *supra* note 31, at II, 161.

235. On opportunities in the United States (both taken advantage of and missed), see THE AMERICAN MORALIST, *supra* note 3, at 15.

falling from prosperity and never recovering. Had I had the opportunity to say more I would have questioned the toughness of those in the middle class who may be immobilized by what should be temporary adversities. The criticism that *can* be made of capitalism (or more precisely, of modernity) is that it can lead to such a heightening of expectations, if not also to a softening of character, as to make setbacks seem both more serious and more enduring than they need be. But such defects are due to the long-term successes of the economic system, of which too much can then be made by afflicted participants. Even so, I notice in passing, these encounters were preceded by the breakfast meeting I have referred to, during which a determined free-marketer vigorously questioned both the right and the capacity of the community, acting through its political agents, to place aesthetically-based restraints upon what "the market" might do with the uses of private property. (It does not seem to be appreciated by such free-market advocates how much the definition, allocation, and protection—that is, the very existence—of property have always depended upon the community.[236])

One remarkable feature of this series of chance encounters was the repeated exhibition of how doctrinaire our specialists are apt to be. They were reinforced in this tendency by the bulk of the quite different audiences that turned out to hear each of them. "Outsiders" in their usual audiences, including among their readers, are rare. Thus, speaker and audience tend toward mutual reinforcement, with bad as well as good consequences.

To be doctrinaire is to be, in some respects, quite naive. Perhaps this is related, however, to attributes that make specialists as successful as they are, especially endearing them to the like-minded audiences upon whom they depend for support. Somewhat worrisome here is how reluctant people are (have they always been?) to question the authorized presuppositions and methods of their discipline.

Not that this is altogether bad. Respect for what is generally accepted in one's immediate association, or community, contributes to the stability of the arrangements upon which people do have to depend. Thus, although particular allegiances might be questioned, with a view to their modification, care should be taken not to disparage the very idea of allegiance, for it is that upon which civilization does in part depend.

It is particularly important to be aware of one's obligations here, inasmuch as it *has* become fashionable to take civilization for granted. It is such thoughtlessness which leads to the questioning of the intellectual, social, and economic institutions upon which we must depend, institutions which have helped shape us into the kind of people we are and indeed want to continue to be.

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236. *See* Parts 2 and 3 of this Article.

Underlying the proper questioning called for in these matters is an inquiry into the suppositions relied upon, especially by specialists, about what can be known and how. Fundamental here is the question of what it means *to know*,[237] keeping in mind what is generally (if not even naturally) relied upon by a community. Correlation, even if it should not be "everything," is very much to be respected, including that correlation which tries to weave together the old and the new, the high and the low, the many and the few. Another way of putting all this is to say that there is a need, here and there, for responsible skepticism, not only about institutions, which *can* be in disarray from time to time, but perhaps even more, in our circumstances, about those who study our institutions. Still another way of putting these cautions is to say that one should *see* and hence assess what seems to be taken for granted by the influential intellectuals one happens to encounter from time to time.

9. PHILOSOPHY AND THE PROSPECTS AT DEATH[238]

> To an understanding endowed with significance and the contemplation of all time and all being, do you think it possible that human life seems anything good?
>
> Socrates[239]

I.

It is obvious that the significance and consequences of death are of perennial interest to peoples everywhere. That interest can range in its effects from desperate efforts to avoid death for oneself to enthusiastic efforts to inflict it upon multitudes of others. We can be reminded by this date, an anniversary of the 1944 D-Day, that there *are* things worth risking one's life to defend or to eliminate or to establish.[240]

A considerable, if not even overriding, concern with death may be seen in various (not all) of the introductions to non-Western thought I provide in my collection, *But Not Philosophy*.[241] Such introductions may help us know

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237. *See supra* note 65; *see also infra* Conclusion.

238. A talk given at the Seminary Cooperative Book Store, Chicago, Illinois, June 6, 2002. The occasion was provided by the publication of BUT NOT PHILOSOPHY: SEVEN INTRODUCTIONS TO NON-WESTERN THOUGHT, *supra* note 3.

239. PLATO, REPUBLIC 286A.

240. For another D-Day talk, see Anastaplo, *supra* note 38, at 499.

241. On death, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 379.

ourselves better, even as we discover what tends to be common to human beings everywhere. I have found, over the years, that these author "events" arranged by the Seminary Coop Book Store help me get to know my own book better as I prepare for the special audience I can expect here.

Desperation at the prospect of death may be seen in my first introduction, to Mesopotamian Thought, in which the story of Gilgamesh is discussed. An unsuccessful effort is made by the hero to secure for himself deathlessness, or immortality, on earth.[242]

Perhaps the most thorough "handling" of death in these introductions may be seen among the ancient Egyptians, with their considerable interest in and their remarkable expenditures on the proper treatment of corpses. Their massive pyramids stand as monuments to what would today be called an "obsession," but an obsession that evidently did not keep them from being fairly cheerful. If burials are managed properly, it seems to be said, the affairs of the more fortunate dead would be somewhat like their affairs while they were alive.[243]

On the other hand, the Hindus and the Buddhists seem to look forward to the complete extinction of what we call the Self, which would leave the individual human soul assimilated (perhaps after a series of reincarnations) into a universal spirit. Buddhism is said to have emerged from the despair aroused in its Founder upon first encountering distressing evidence of human mortality.[244]

Other schools of thought, such as that of the North American Indians, suggest how death came into the world.[245] Still others, such as the Islamic, provide guidance to the securing of a blissful existence beyond the grave, having been anticipated here by Christian teachings about proper submission to the Divine.[246]

Both the divine and personal immortality are muted in the Confucian teaching, perhaps anticipating somewhat in this respect much of the philosophical tradition familiar to us in the West. But a form of personal immortality, if not also of the divine, may be seen in the considerable deference exhibited among the Chinese to ancestors.[247]

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242. *See id.* at 1.

243. *See id.* at 31.

244. *See id.* at 147. On the Self, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303; ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* 4, at 87.

245. *See, e.g.*, ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 232.

246. *See, e.g., id.* at 175.

247. *See, e.g., id.* at 99.

II.

The title of my collection, *But Not Philosophy*, reflects the opinion that Western thought, however varied it may be, is likely to have intrinsic to it something critical which is not indigenous to non-Western schools of thought. That is philosophy, in its explicit, self-conscious form.[248] To recognize this is not to deny that various non-Western schools make much of distinctive cultural elements that their champions consider far more enriching for human life than what is available in the West.

The philosophic tradition is so much a part of the Western way of life that even the non-philosophical among us (that is, most of us) are shaped by it to a considerable extent. Vital to the emergence and development of philosophy is an explicit grasp of the idea of *nature*, something that was once available only in the West (and thereafter also among those exposed to Western thought).[249]

Nature means, among other things, a principle of order and change independent of any will. As such it is a term not to be found either in the Hebrew Bible or in the Christian Gospels, coming into the Greek Bible (or New Testament) with the writings about, and of, that Hellenistic Jew, Saul of Tarsus.[250] The discovery of nature in ancient Greece, and incorporated thereafter in the languages of the West, contributed significantly to the emergence of the modern natural sciences.

The lack of systematic philosophic inquiry has its consequences, whatever the limitations (including, perhaps, the illusions) of philosophy. It should at once be added that although there was no serious, or systematic, philosophical inquiry among the better known non-Western thinkers not in contact with the West, this does not mean that some of the lessons of philosophy were not learned by them. Similarly, nature can have its effect even among those who do not grasp the idea of nature explicitly.[251]

If a knowing grasp of nature is necessary for truly grasping things as they are, it may not be possible for the unphilosophical to see and to know themselves as well as they can be seen and known by the truly philosophical.[252]

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248. *See, e.g.*, *id.* at xvi-xvii. *See also* the Conclusion of this Article.

249. On the importance of nature, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 387.

250. On the Bible, see Anastaplo, *supra* note 127. On St. Paul, see George Anastaplo, *Rome, Piety, and Law: Explorations*, 39 LOY. L. REV. 1, 39 (1993).

251. On what it is salutary to stand for here, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 322-23.

252. *See, e.g.*, *supra* note 65.

III.

Among the things that human beings "naturally" want to know about themselves is what becomes of them at death. The most dramatic philosophical responses to death (or, rather, to dying) may be found in Plato's *Phaedo*. This can be said to be one of the more "practical" Platonic dialogues, having been conducted on the brink of Socrates' dying.[253]

Socrates considers himself obliged to minister to the profound sense of impending loss that his companions feel on this occasion. This leads to a series of arguments developed by him in support of the proposition that the human soul (if not also the souls of other living earthly beings) is immortal. Indeed, arguments are even made that the human soul is so enduring that it exists both before and after one's life on earth.[254]

Doubts have been expressed ever since the days of Socrates as to the soundness of these arguments, some of which doubts are evident in the dialogue itself.[255] In fact, Socrates' companions are not so persuaded by his arguments for the immortality (or non-dissolution) of the soul, that they can restrain their grief at the end, however serene their master is when he drinks the poison.

Certainly, there is not among the companions of Socrates the kind of celebration, of a release from earthly bonds and an expectation of glorious rewards, associated with, say, early Christian martyrdom.[256] Even in ordinary circumstances, the tombstone of a departed Christian (as in a Canadian graveyard I visited recently) can speak of him as having been freed from "Nature's Toils."[257]

IV.

The emphasis in Plato's *Phaedo* is not placed on the survival and future career of the particular soul, although Socrates can speak of conversing thereafter with the blessed. Rather, the emphasis seems to be placed, in large

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253. On death and dying, see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 214; *see also infra* text accompanying note 259.

254. *See also* PLATO, REPUBLIC, Book X. Compare this with the end of Plato's APOLOGY OF SOCRATES where Socrates is uncertain whether the human soul survives the dying of the earthly being.

255. See the articles on "Immortality" in 4 ENCYCLOPEDIA OF PHILOSOPHY (Paul Edwards ed., 1967).

256. On the martyrdom of Joan of Arc and of Thomas More, see Anastaplo, *supra* note 108, at 919, 950; *see also* George Anastaplo, *Law & Literature and the Christian Heritage: Explorations*, 40 BRANDEIS L. J. 191, 298 (2001).

257. *See* PLATO, PHAEDO 114C.

part at least, on demonstrating the survival of something that we can call "soul-stuff."

The key question for most of us here is whether the individual or personal soul continues to live beyond the grave. We are far less concerned, except perhaps as students of the theory of souls, about whether one's soul existed prior to one's birth. The soul we tend to care most about is the soul as it has been shaped by its particular associations "this time around." This is related to the problem of individuation.[258]

It may be, on the Socratic premises, that it is not the individual, as individual, who survives death. Individuality is intimately linked to the body. Although the intellect may be the element in the soul least connected to bodily activities, it can be wondered whether even the intellect could continue to operate, or at least to observe and to learn, without whatever it somehow derives from bodily associations.

Another way of putting the reservations that most of us (at least in the West) have with the principal arguments in the *Phaedo* is to return to the notion that the soul exists before its life on earth *and hence* after its life on earth. But we know from experience that we know now little if anything about existence before life on earth. And it seems that we know now little more, if anything, of existence after life on earth. If we, during pre-life and post-life existence, should know as little in turn of life on earth, what can "personal immortality" mean?

Still another way of expressing these reservations is to observe that since people (in the West) do not lament not-being before birth, why should they be troubled by the prospects of not-being after death, however troubled and troubling the *process* of dying may sometimes be?[259]

V.

The conversation that we are told about, in considerable detail, in the *Phaedo*, is that between Socrates and his companions. This remarkable conversation about the nature of the soul, to which considerable attention has been devoted for more than two millennia now, was both preceded and followed by the exchanges Socrates had that fateful day with members of his household, exchanges which are barely reported in this dialogue.

Perhaps the most remarkable thing to be noticed about *those* exchanges is what Socrates' wife says when his companions enter for hours-long

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258. "The quarrel between the ancients and the moderns concerns eventually, and perhaps even from the beginning, the status of 'individuality.'" STRAUSS, *supra* note 171, at 323.

259. On the doctrine of reincarnation, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 390.

conversation with him: "Socrates, now's the last time your companions will talk to you and you to them!"[260] She does not seem to have been resentful of his way of spending so much time with others of like mind. Indeed, she may even sense that Socrates is better for such conversations—or, at least, that there are people of talent and distinction who treasure such conversations. But she says nothing to suggest that Socrates would someday, after all their deaths, be able to talk again with his companions.

This reminder of family associations—Xanthippe is first seen here with a child in arms—should suggest the importance of the body in helping to make us what we are. The role of the body may be seen both in the family which contributes to our shaping and in the community which authorizes, protects, and guides the family.

VI.

However much is said in this dialogue about the immortality of the human soul—and especially about the interference of bodily associations with the liberation and full development of the soul—the sight of Socrates' family reminds us of the importance of various bodily associations for the development of the better souls we do have access to. Even the language upon that understanding itself very much depends is provided us by some community.

Indeed, we can wonder whether any substantial, secure knowing is possible without the guidance to what it means to know which is provided by the apprehension of material things by our bodily senses. It is revealing that we say, perhaps instinctively, "I see" when we come to understand something that is being explained to us.

Is there, then a problem with Socrates' seeming disparagement of the body and of particulars? Is there something merely ritualistic about this disparagement in the somber circumstances in which his distraught companions find themselves? Is it not significant that Plato makes a point of having it recorded that he was not present for this conversation?[261] Would he have been obliged, or at least equipped, to raise objections to Socrates' arguments that the others did not raise?

Other well-known arguments found in the Platonic dialogues tend to be better regarded by students of these matters than those recorded in this dialogue. These include arguments about the relation between knowledge and virtue or between ignorance and vice.[262] Should it even be regarded as

260. PLATO, PHADEO 60A.

261. *See id.* at 59B.

262. *See* PLATO, MENO (George Anastaplo & Laurence Berns, trans.) (forthcoming),

virtuous to display, on such an occasion as this, more assurance about the prospects of the human soul at death than the available evidence can support?

VII.

It may be true, as the Homeric gods (as well as others) can say, that human beings are but creatures of a day. But it may also be true that (so far as we can know) only such creatures of a day truly live, however briefly—and however limited and even self-deceptive human life can be.

Indeed, it can be argued that beings such as the Greek gods do not truly live on their own, even if they have the exalted existence assigned them by a Homer. Do not they depend for the meaningfulness of what they do upon the human beings with whom they are somehow associated?

May we go even further by saying that one does not truly live unless there is an awareness of the death in one's future, however much the body may be needed for the full workings of the soul? Or is this kind of talk merely a rationalization, as we try to make the best of our natural limitations, moving us to argue that the prospect of death contributes to the meaning and hence richness of life? Certainly, what *life* is may be difficult, if not impossible to grasp, without an awareness of that form of *not-life* known as death.

Be all this as it may, the prospects at death do look in at least two directions: life, "always" on the threshold of ever-present death, may be best seen not only by looking forward to something somewhat uncertain and perhaps unknowable, but also by looking backward to something more or less certain and hence somewhat knowable. By thus looking backward, well before our deaths, we can grasp things in our everyday lives which help us learn and know what it means *to know*.[263]

10. AMENDING THE CONSTITUTION TODAY[264]

How far your eyes may pierce I cannot tell;
Striving to better, oft we mar what's well.

Introduction.

263. Consider, for example, how the fortunes of a dead man's descendants affect "him." *See* ARISTOTLE, NICOMACHEAN ETHICS 1100a10-14.

264. These remarks (of 2001) were originally entitled, "On Amending the Constitution: Merits, Temptations, and Perils." The journal which contracted for those remarks, *Law and Contemporary Problems*, proved to be unable to publish them as written. On the Sabbath, see *infra* note 302.

The Duke of Albany[265]

I.

The point of departure for this inquiry is the booklet, "'Great and Extraordinary Occasions': Developing Guidelines for Constitutional Change," issued in 1999 by the Constitutional Project.[266]

This laudable project of The Century Foundation was prompted in large part by that remarkable flood of proposed constitutional amendments encountered a decade or so ago which threatened to drown the Constitution itself. Eight "Guidelines for Constitutional Amendments" are offered in that 1999 booklet, guidelines which presuppose that amendments should be reserved for "great and extraordinary occasions."[267]

I have, in the course of my commentary on the Constitution of 1787, discussed the provisions for constitutional amendments in Article V.[268] My

265. WILLIAM SHAKESPEARE, KING LEAR, act I, sc. iv, 345-46.

266. This booklet, GREAT AND EXTRAORDINARY OCCASIONS, was published in 1999 by The Century Foundation Press of New York City. It has been identified as "A Publication of Citizens for the Constitution, A Project of The Century Foundation." I am privileged to have been listed as one of the six dozen "Endorsers" of the booklet. *See id.* at xii-xvii. See, for the distinguished leadership of this Project, *infra* note 300.

267. The "Guidelines for Constitutional Amendments," *id.* at 7, are the following:

1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?

2. Does the proposed amendment make our system more politically responsive or protect individual rights?

3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?

4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?

5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?

6. Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?

7. Has there been full and fair debate on the merits of the proposed amendment?

8. Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

268. *See* ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 179-95. The uses that have been made, for two centuries now, of Article V of the Constitution are discussed in THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2.

discussion on this occasion, working from the 1999 booklet, has been supplemented by discussions developed by me on other occasions during the past decade.[269]

Controversies about proposed amendments encourage, and sometimes even oblige, us to reconsider first principles. The Constitution Project has served nobly to enhance public awareness of the issues we face when a multitude of amendment-proposals threaten a secure constitutionalism.

Such proposals, expressing considerable passion (including unease about what is happening nationwide to familiar standards and practices), can be hard to resist, but perhaps even harder to accept. Each of the recent amendment-proposals has been dedicated to a good cause.

It is difficult in these situations to separate "constitutional" issues from "political" issues. This is a variation of the problem encountered when Federal Courts undertake to decide whether Acts of Congress pass constitutional muster.[270]

Much of the alarm about our most recent amendments-craze was due to concerns in some quarters about the particular amendments being proposed. One may have pet projects of one's own even as one laments the ready recourse to constitutional amendments by one's fellow-citizens. One of my own pet projects, for example, is implicit in the following Letter to the Editor I prepared in 1992:

> It is not too early for political scientists in this country to think seriously about the 1996 Presidential election.
>
> For example, it is not improper to continue permitting the Presidential candidate of each political party to select a Vice Presidential running mate alone? That is, is not this a practice that is not only subject to grave abuses, but also runs counter to the spirit of the Republic? Would it not be prudent instead to make routine use of the Twenty-fifth Amendment for this purpose?
>
> The Twenty-fifth Amendment provides a simple way for filling the office of Vice President when it is vacant: the President sends a nomination to Congress for examination and approval. Why should not all Vice Presidents be chosen in this way? It is not possible to have this happen even without another constitutional amendment if Congress and the major parties agree? Would we not be apt to get sounder choices fro Vice President if a newly-elected President had to submit a Vice Presidential nomination for deliberate consideration by Congress, as was done with Gerald R. Ford in 1973 and with Nelson A. Rockefeller in 1975? Our desire to do something

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269. Other discussions by me of these, and related, matters may be found by consulting the bibliographies cited in *supra* note 7. *See also infra* note 346.

270. On judicial review, see ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 816 (Index); ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 335 (Index); ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 460 (Index).

> should be intensified when it is remembered how many of our Vice Presidents have become Presidents during the past century.
>
> This kind of reform would increase confidence in our political institutions and move us closer to the mode of Presidential and Vice Presidential selection originally provided in the Constitution.[271]

Of course, there are problems even with this modest proposal, however useful it may be in suggesting instructive political issues. It can be even more instructive to return to the Constitution Project booklet, for it can help us notice and investigate enduring questions in constitutionalism.

The booklet's distinctive title, "Great and Extraordinary Occasions," is taken from *Federalist No. 49*. The importance of *The Federalist* for the drafters of this 1999 booklet is testified to by their use, in a prominent appendix therein, of the concluding remarks in *Federalist No. 85*, the final number of that 1787-1788 series.[272]

It is recognized in *Federalist No. 49* "that a constitutional road to the decision of the people, ought to be marked out and kept open, for certain great and extraordinary occasions." It is the ultimate authority of the people in a republican regime that I invoked in a Letter to the Editor (of November 4, 1998), "Why Should Not the Majority Rule?" Here is the text of that 1998 letter:

> A perverse use of party discipline in this country in recent years has been the repeated recourse to threats of filibustering in the United States Senate, thereby subverting the duty of the majority to rule. The November 3rd election returns mean, among other things, that there is still no filibuster-proof margin enjoyed by the dominant party in the Senate.
>
> The proposals for constitutional amendments submitted to the First Congress in 1789 included many suggestions that a "supermajority" (as we call it) be required on one issue after another. The First Congress refused

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271. *See* George Anastaplo, *Involve Congress in Vice Presidential Choice*, N.Y. TIMES, September 20, 1992 (Letter to the Editor); *see also* George Anastaplo, Letter to the Editor, CHICAGO TRIBUNE, August 8, 2000, *Commentary* section, at 14.

272. The concluding remarks in *Federalist No. 85*, which are reproduced in the booklet (Appendix C, at 33-37) begin,

> Let us now pause and ask ourselves whether, in the course of these papers, the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it; and whether it has not been shown to be worthy of the public approbation, and necessary to the public safety and prosperity.

The other appendices in the booklet are Appendix A (pp. 27-30), "A Compendium of Constitutional Amendments"; Appendix B (pp. 31-32), "Constitutional Amendments Considered in the 104th and 105th Congresses"; and Appendix D (pp. 39-43), "What's Wrong with Constitutional Amendments?" (by Kathleen M. Sullivan). *See also supra* Part 13 of this Article, notes 19, 295 and accompanying text.

> to change what the Framers had done in limiting severely—that is, to a half-dozen instances—the occasions on which more than a majority is needed to resolve questions in either House of Congress.
>
> The current Senate rule that keeps a bare majority from ending debate, even after a reasonable time for discussion of the relevant issues, is probably unconstitutional. A self-respecting Senate majority, with the cooperation of the presiding officer, should some day be able, by the use of well-reasoned points of order, to correct both the Senate filibuster rule requiring a three-fifths vote to end debate and the Senate rule requiring a two-thirds vote to change the rules of that body.
>
> The restoration of majority rule in the Senate probably depends upon an informed public opinion. A truly self-respecting people would demand that their legislatures should always be free to act efficiently, making due allowances for adequate discussion, for fair procedures, and for traditional privileges.
>
> In short, We the People have to revive, and to insist upon, a reliable standard of constitutionalism in this Country.[273]

Publius,[274] as author of *The Federalist* series, has one critical concern, in closing out these celebrated newspaper articles: the suppression of the amendments-craze of *his* day.

The amendments-craze on that occasion made much of the fact that the proposed Constitution did not have a Bill of Rights. Critics of the proposed Constitution had lamented this, insisting that the Constitution should not be ratified until the lack of a Bill of Rights had been remedied.[275]

Publius recognized, of course, that attempting to supply a Bill of Rights before ratification of the Constitution would put the entire effort in jeopardy, which was what *some* of the advocates of a Bill of Rights hoped for. That is, another constitutional convention would have had to be called; the State ratifications already secured would have had to be repeated.[276]

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273. *See* George Anastaplo, *Letter to the Editor*, CHICAGO SUN-TIMES, Nov. 11, 1998, at 18; George Anastaplo, *Letter to the Editor*, HICKORY (North Carolina) DAILY RECORD, November 15, 1998, at A4; *see also supra* notes 293, 299. A recent Chicago Tribune editorial endorsed the usefulness of the filibuster in the Senate. On why we need the filibuster, see CHI. TRIB., May 27, 2003, at 18.

274. "Publius" should be distinguished, at least for the authorial stance taken, from Alexander Hamilton, John Jay, and James Madison, the creators of this "author." *See, e.g.*, Martin Diamond, *The Federalist*, *in* STRAUSS & CROPSEY ET AL., *supra* note 66, at 659; *infra* notes 281 and 372.

275. *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 39-41. The attempts made in the Constitutional Convention to include a bill of rights in the proposed Constitution came too late in the summer for its few advocates to develop much support for it among the by-then weary delegates. *See supra* notes 281 and 292.

276. By the time the People in New York ratified the proposed Constitution on July 26,

So desperate is Publius's concern here that the argument is developed, in *Federalist No. 84* and *No. 85*, that a Bill of Rights is not only unnecessary but perhaps even harmful. We can see here what is encountered again and again thereafter in American struggles, the tailoring of constitutional arguments to political concerns.[277]

We are "naturally" encouraged, therefore, to dig deeper into this matter than we otherwise might. At the very least, we can be reminded of the limited reliability of *The Federalist* for constitutional interpretation, however useful it continues to be for political instruction.[278]

II.

The concluding paragraph of *Federalist No. 85*, and hence of the entire *Federalist* series, draws upon David Hume to buttress the argument against suspending ratification of the proposed Constitution until a Bill of Rights should be added to it.[279]

1788, ten other states had ratified. The remaining two, North Carolina and Rhode Island, ratified on November 21, 1789 and May 29, 1790, respectively. *See* ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 286-87; *see also infra* note 378.

277. The most notorious instance of this remains *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *See* ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 363. *See also* note 90 and accompanying text.

278. On *The Federalist*, see the index in each of the volumes cited in *supra* note 2; *See supra* note 2; *see also* Part 13. In these matters (including questions about the extent of Congressional powers and about the status of judicial review), I continue to find the work of one of my law school teachers, William W. Crosskey, to be most illuminating. *See* Anastaplo, *Mr. Crosskey, the American Constitution, and the Natures of Things*, 15 LOY. U. CHI. L.J. 181 (1984).

279. This is the concluding paragraph of FEDERALIST 85, which includes this quotation from David Hume:

> The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and igneious: "To balance a large state or society [says he], whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into in their first trials and experiments." These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a defect of political fortitude but I acknowledge that I

Much is made here by Publius of the need to rely upon Time and Experience in deciding what changes might be needed in the proposed Constitution. Ratify first, it is urged, and then amend. Experience, it is argued, must be drawn upon, not just what Hume properly disparages as "the mere dint of reason and reflection."[280]

It is startling to notice here (in the very last paragraph of *The Federalist*) what it is that can seem, in effect, to have been thereby qualified, if not even repudiated–to wit, that stirring invocation, in the very first paragraph of *The Federalist* series, of the unprecedented reliance upon "reflection and choice."[281] What, then, is to be taken as Publius's true sentiment, with

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> cannot entertain an equal tranquility with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle. The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen States, and after having passed over so considerable a part of the ground, to recommence the course, I dread the more the consequences of new attempts because I know that POWERFUL INDIVIDUALS, in this and in other States, are enemies to a general national government in every possible shape.

Publius cites here David Hume, *The Rise of Arts and Sciences*, *in* ESSAYS, v. 1, p. 128.

280. On David Hume, see Robert S. Hill, *David Hume (1711-1786)*, *in* HISTORY OF POLITICAL PHILOSOPHY, *supra* note 66, at 535.

281. The opening paragraph of *Federalist No. 1* (first published on October 27, 1787), reads,

> After an unequivocal experience of the inefficacy of the subsisting Federal Government, you are called upon to deliberate on the new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences, nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed, the fate of an empire, in many respects, the most interesting in the world. It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. If there be any truth in the remark, the crisis, at which we are arrived, may with propriety be regarded as the area in which that decision is to be made; and a wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind.

Scholars consider both FEDERALIST 1 and FEDERALIST 85 to have been "actually" written by Alexander Hamilton. *Compare supra* note 274.

Federalist No. 85 was first published on May 28, 1788. Not long after, James Madison was to assure his Virginia constituency that he would, if elected to the First Congress, press for a Bill of Rights. Madison is often spoken of, mistakenly, as "the Father of the Constitution." He can properly be spoken of as "the Father of the Bill of Rights" (with George Mason, also of Virginia, being its "Grandfather"). *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION,

respect to the status of reason in public affairs—the celebration of reason at the outset of *Federalist No. 1* or its apparent subjugation at the end of *No. 85*?

Or should it be said that each sentiment was "believed" when it was said? Is not that the way of the statesman, and properly so? Besides, circumstances may alter cases. We should be reminded, in any event, that *The Federalist* is not "objective" or "dispassionate" political philosophy, nor was it meant to be. All this should remind us as well how difficult it can be to distinguish between "constitutional" issues and "political" issues.[282]

However much "reason and reflection" may seem to be played down in *Federalist No. 85*, in order to discourage immediate reliance upon what we might call "utopian projects," would not Publius have conceded that whatever Time and Experience reveal should itself be subjected to "reflection and choice?"[283]

Publius, we have noticed, was concerned about any measure, advocated (whether or not in good faith) by those considering the proposed Constitution, which might threaten the immediate ratification of the Constitution. This would threaten, in turn, the development of a National Government able to keep the new Nation together.

Besides, it can also be noticed, the principal opponents of the proposed Constitution were far less concerned about the lack of a Bill of Rights than they purported to be. Thus, their use of the Bill of Rights issue was no less "rhetorical" than Publius's disparagement at that time of bills of rights. Indeed, we suspect, if a Bill of Rights had originally been included in the proposed Constitution, Publius would have had no difficulty justifying it.[284]

The more or less "conservative" approach taken by Publius in *Federalist No. 84* and *No. 85*, discouraging amendments-before-ratification, is no doubt defensible. But it, like much else in *The Federalist*, *is* crafted for the situation. That same "conservative" approach, if used more or less

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supra note 2, at 13-21, 315-20; *infra* notes 308 and 382.

282. One of the earliest instances of such difficulty may be seen in the Bank Bill Controversy of 1791. *See* George Anastaplo, *Abraham Lincoln and the American Regime: Explorations*, 35 VAL. U. L. REV. 39, 151 (2000); *see also supra* note 277.

For a recent instance of this difficulty of distinguishing between "constitutional" and "political" issues, see Barbara Crossette, *U.S. says UN arms proposal tramples 2nd Amendment*, CHICAGO TRIBUNE, July 10, 2001. *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 463 (index on the Second Amendment); *see also* ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 367-74; Editorial, *An American Retreat on Small Arms*, N.Y. TIMES, July 11, 2001, at A20.

283. In these matters must there not be recourse ultimately to what was drawn upon by the Declaration of Independence when it invoked "the Laws of Nature and of Nature's God"? On our natural grounding in nature, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303.

284. *See supra* note 281. A model of adaptability in these matters is provided by Shakespeare's Falstaff. *See* Anastaplo, *supra* note 142, at 202.

mechanically, would have questioned the principles and stymied the progress both of the movement to Independence and of the recourse thereafter to the Constitutional Convention.[285] It was such a "conservative" approach that may

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285. The principles of the movement to Independence are drawn upon in remarks I had occasion to prepare for a recent Fourth of July gathering, "On Reading, Once Again, the Declaration of Independence":

> It is again that time of year for celebrating the birth of the United States of America, a celebration which often includes public readings from the Declaration of Independence. Most professional speakers on such occasions recognize that the typical audience is likely to respond favorably only to the opening and closing passages of the Declaration. It is there that general principles are stated and that decisive actions are announced.
>
> Thus, at the outset of the Declaration there is this solemn invocation:
>
> > When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.
> >
> > 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 . . .
>
> And at the conclusion of the Declaration it is announced:
>
> > That these United Colonies are, and of right ought to be, Free and Independent States . . . and that [as such] they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.
>
> The Declaration of Independence gets to this fateful announcement only after having drawn upon that great political remedy which we know as "the right of revolution." It had been said in the Declaration, immediately after it was argued that Governments derive "their just Powers from the Consent of the Governed," "that whenever any 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 . . ."
>
> The venerable right of revolution can be both threatening and reassuring. It is threatening because it can seem to undermine long-established ways of life. This can disturb those conscientious citizens who are concerned, as all everywhere should be, about Law and Order. But it is reassuring in that it reminds everyone of the natural, if not even the divinely-ordained, right of a people to good government and of their right as well to get rid of bad government.
>
> Above all, the right of revolution is an authoritative confirmation that there are indeed principles of proper government and a good life. It is thereby insisted, in effect, that there naturally exist standards of good and bad, of right and wrong, which are ultimately independent of what any particular government might happen to acknowledge, to endorse, or to act upon.
>
> Often overlooked during ceremonial readings of the Declaration of Independence is the

be seen in the defective Articles of Confederation as well as, some might say, in the near-fatal compromises with respect to slavery made in the closing decades of the Eighteenth Century.[286]

The tendency—an almost natural tendency—to elevate our paritisan positions to constitutional stature was most recently dramatized for us during the *Bush v. Gore* election litigation.[287] The arguments made on each side, in November and December 2000, shifted as circumstances changed. This sort of accommodation to circumstances can sometimes be deliberate and hence shameless, but more often it is charmingly unconscious.[288]

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array of two dozen grievances literally at the core of the document. It is "natural" enough that this array should be skipped today: many of these grievances are not rhetorically appealing; some of them seem outdated and otherwise hard to understand. But it is in that array of grievances that one sees now, as one could see then, how the fundamental principles invoked at the outset of the document had been violated.

It is important to be reminded that the invocation of principles is not enough: such invocations have to backed up by facts. Individuals may have rights, of course, but so does the community at large, including the vital right not to have a decent government disturbed for "light and transient Causes." It is this distinction that President Lincoln insisted upon, in 1861, when he argued that the South simply did not have at that time just cause for invoking any right of revolution. It is never enough to say, "We don't like what is happening–and so we quit!"

Thus we can see both in the beginning and in the ending of the Declaration of Independence the elevated heights to which the proclamation of liberty and the cause of legitimate government can soar. But we can see at the heart of the Declaration that disciplined respect for relevant facts upon which a decade of struggle had been grounded prior to that memorable Fourth of July in 1776.

It is such discipline that political life is always in need of, especially at a time when there can be a lot of loose talk, some of it even highminded talk, taking the place of informed and reasoned discourse. The salutary rigor of the authors of the Declaration of Independence is testified to, therefore, by their allocation of more than half of their founding constitutional statement to a recital of the grievances which would provide "the Facts" necessary to "be submitted to a candid World."

On the guidance provided by nature, see *supra* note 283.

286. John Woolman's gallant career can remind us of what could be said, and said well, against slavery at that time. *See* Anastaplo, *supra* note 26, at 253-95; *see also*, John Wesley, *Thoughts Upon Slavery*, in LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 31, at I, 252-66. For an instructive account of the virtual abolition of slavery and serfdom worldwide, see J.R. MCNEILL & WILLIAM H. MCNEILL, THE HUMAN WEB 252-58 (2003).

287. *See* Bush v. Gore, 531 U.S. 38 (2000). *See also* SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001); *Conference on Bush v. Gore: A Constitutional Retrospective*, 34 LOY. U. CHI. L.J. 1-234 (2002); *supra* note 47; *infra* note 289.

288. *See, e.g.*, James A. Baker III, Letter to the Editor, Bush v. Gore: *The Fateful Readings*, N.Y. TIMES, July 7, 2001, at A24. Consider the following response by Steven Shabad:

This may be seen also in the scholarly commentary upon this litigation.[289]

III.

The minority of citizens nationwide (sometimes the majority, perhaps, as at times in New York State), which wanted substantial changes in the proposed Constitution before its ratification, sensed that it could not get the amendments it really wanted once the Constitution was ratified. The amendments "really wanted" by the minority concede, by implication, how broad and deep the powers of the National Government were intended to be under the proposed Constitution.[290]

The plight of this minority may be gauged by noticing what was and *what was not* included in the first set of amendments proposed by Congress to the States in 1789, that set which we know as the Bill of Rights. The scope and the limitations of the national Bill of Rights we now have are markedly more modest than those proposed by the original critics of the Constitution.[291]

That is, those who wanted amendments prior to the ratification of the proposed constitution were right about one critical matter: the amendments that would follow upon ratification would *not* be fundamental. Almost all of the Bill of Rights provisions were already, and had long been, the effective

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> I am gratified that even James A. Baker III, a Bush partisan, now implicitly acknowledges the political bias of the Supreme Court's decision in *Bush v. Gore* (letter, July 7). Mr. Baker's remarks that one of the court's two critical decisions was decided by a 7-to-2 vote, "with one of two Democrats joining six of seven Republicans."
>
> Let's put aside his interesting insight into the party affiliations of all nine justices, although I'm not aware that they are publicly known. More to the point, I find it both remarkable and sadly accurate that Mr. Baker cavalierly describes what was supposed to be a purely legal decision as if it were just another party-line vote—by a politically lopsided court.

Letter to the Editor, *Politics of* Bush v. Gore, N.Y. TIMES, July 10, 2001, at A22.

289. *See, e.g.*, the collection in 68 U. CHI. L. REV. 613-791 (2001). *See also supra* note 287. It seemed to me, soon after the balloting closed on November 7, 2000, that the Presidential election was, and would continue to be, essentially a draw–and that the best thing for the country would be an immediate recourse to lots. I made this suggestion in Letters to the Editors of November 10, 2000. *See, e.g.*, CHICAGO DAILY LAW BULLETIN, Nov. 13, 2000; CHICAGO TRIBUNE, Nov. 15, 2000; *see also* Anastaplo, Bush v. Gore *and a Proper Separation of Powers*, *supra* note 47, at 132.

290. For the amendment-proposals that came out of the Virginia and New York ratification conventions, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 298-314; *see also* CROSSKEY, POLITICS AND THE CONSTITUTION, *supra* note 12; *supra* notes 276, 278; *infra* note 293.

291. On the Bill of Rights, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 11-106, 315-329. *See also* Parts 2 and 11 of this Article.

law of the land among Americans.[292]

That the amendments proposed by Congress in 1789 were not fundamental should be apparent upon examining the proposed amendments generated by the opponents of the Constitution in Virginia and New York, the proposed amendments that were submitted to Congress along with the required unqualified ratifications of the Constitution out of those State conventions. Not one of the scores of proposals from various States that threatened in any way to reduce the powers granted to the National Government got far in the First Congress.[293]

In fact, there has never been any amendment to the Constitution that has reduced, or hedged in, any substantial power that the Framers of the Constitution intended the Government of the United States to have. If anything, the powers of the National Government have been magnified because of the substantial restrictions that have been placed upon the States, most obviously by means of the Fourteenth Amendment.[294] The futility, if not the folly, of the measures recently incorporated in amendment-proposals should be evident to anyone who is familiar with how complicated and somewhat unpredictable the effects of amendments can be.

A substantial anti-Nationalist minority in the Country was outmaneuvered, if not even suppressed, in 1787-1789. This was anticipated in how the Constitutional Convention was made up and controlled—and even in how the pro-Constitution people captured and exploited thereafter the name of "Federalist."[295] That there did remain considerable anti-Nationalist

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292. Thus, little changed when the Bill of Rights was ratified on December 15, 1791 – except perhaps for the obviousness of the constitutional principle (antedating the Constitution itself) that the aggrieved party later invoked (unsuccessfully) in *Barron v. Baltimore*. That principle, properly understood, could lead one to wonder whether *Barron* was correctly decided. *See infra* note 294; *see also* Anastaplo, *Law, Judges, and the Principles of Regimes*, *supra* note 38, at 519.

293. *See supra* note 290. The Virginia and New York proposals drew upon proposals made by opponents of the Constitution in other State Ratifying Conventions (such as Massachusetts). All but a dozen or so of those proposals were set aside by the First Congress. The politicians who controlled the 1787 Constitutional Convention, and thereafter the ratification process, were also in control of the First Congress–and they had no intention of surrendering by amendments what they had secured in the Convention and during the Ratification Campaign. Certainly, they believed that the majority should be able to rule–and to rule effectively. *See supra* note 272.

294. In effect, the Fourteenth Amendment reversed *Barron v. Baltimore*. *See supra* note 292.

295. The term "federal" is never used in the Constitution of 1787. It *is* used in the Confederate Constitution of 1861, beginning with its significant use in the revamped Preamble:

> We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice,

passion to be dealt with eventually may be seen in the recourse that the successors to the "Anti-Federalists" have had to constitutional restructuring, first by way of constitutional interpretation, then, by way of attempted Secession, and thereafter again by way of constitutional interpretation.[296]

Indications of the kind of amendments sought by some in 1787-1789 may be seen in the changes made, in 1861, when the Confederate States adapted to their use the Constitution of 1787.[297] Something of that 1861 spirit, without the underlying dedication to the cause of slavery, may be seen in recent judicial attempts to curb the powers of the National Government under the Commerce Clause.[298] But these attempts are likely to be superseded or made obsolete by global technological and social developments that will make it generally obvious (if it is not already apparent) that the American economy has to be subject, as much as possible, to the *discretion* of the National Government.[299]

Critical to our approach to these matters should be a recognition of the difficulty, several times referred to on this occasion, of distinguishing constitutional judgments from political judgments. Our periodic amendment-proposals agitations remind us that constant efforts do have to be made to distinguish the constitutional from the political. These worthy efforts have been enhanced by the Constitution Project, with its salutary advocacy of restraint upon recourse to constitutional amendments.[300]

It should also be recognized, however, that even the recent amendment-proposals agitation is a perverse tribute to the Constitution itself, however much that document might seem to be assaulted by so many campaigns for "reform." It seems to be assumed, that is, that if one's moral or political position can somehow be incorporated in the Constitution, then that position

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insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity–invoking the favor and guidance of Almighty God–do ordain and establish this Constitution for the Confederate States of America.

See infra note 297.

296. The Flag can stir emotions–but not as deeply as slavery once did (pro and con) and as abortion can still do (again, pro and con). *See* Part 12 of this Article.

297. On the Confederate Constitution, *see* ANASTAPLO, THE CONSTITUTION OF 1787, at 125-34, 341-61.

298. *See* United States v. Lopez, 514 U.S. 549 (1995); *see also* Anastaplo, *"McCarthyism," The Cold War, and Their Aftermath*, 43 S.D. L. REV. 103, 152-53 (1998).

299. This is not to deny that the National Government, and especially the Congress which is ultimately in control when it wants to be, may make mistakes. One mistake to be guarded against is that of keeping a properly-constituted majority from ruling. *See supra* note 273 and accompanying text; *see also supra* note 293.

300. *See supra* note 267. Particularly to be noticed, among the "Members of Citizens for the Constitution," are the Co-Chairs, Mickey Edwards and Abner J. Mikva; the Legal Advisor, Louis Michael Seidman; and the Executive Director, Virginia E. Sloan.

is bound to be generally accepted as truly good.[301] Of course, one does tend to want one's own fundamental revision of the Constitution to be the last.[302]

11. NATIONAL COURTS AND THE BILL OF RIGHTS[303]

> All that is valuable in the United States Constitution is one thousand years old.
>
> Wendell Phillips [304]

We are again challenged to think about what we have "always known," or have long believed ourselves to know, about the courts and the Bill of Rights.[305]

The First Congress drafted and circulated among the State legislatures the initial constitutional amendments primarily in response to demands that had been made in some quarters during the Ratification Campaign for a bill of rights. Even so, some critics of the Constitution, including a few who had been the most outspoken about the need for a bill of rights, were anything but happy with the amendment-proposals that Congress turned up with in 1789. What Congress supplied simply did not provide these critics what they really

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301. On the aspirations and follies of relying upon a constitutional amendment to promote Prohibition, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 195. *See also* WILLIAM SHAKESPEARE, MEASURE FOR MEASURE.

302. All men, Aristotle has taught us, aim for the good. *See* the Conclusion of this Article. But, we know from experience (as Aristotle did also), the aim of some is better than that of others. It can be instructive to compare the aim of the drafters of the Fourteenth Amendment with the aim of the drafters of the 1861 proposal by Congress which *would* have been the Fourteenth Amendment had it been ratified: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 299. This proposed amendment of 1861 was intended to assure the Southern States, who were then attempting to leave the Union, that there would never be any fundamental revision of the Constitution that would put their institution of slavery in jeopardy. But astute Southerners recognized that no form of words, even if incorporated in the Constitution, would suppress for long the steadily growing moral condemnation of slavery in the United States. Or, to paraphrase something once said about the Sabbath, "The Constitution was made for Man, not Man for the Constitution." *See infra* note 385.

303. A paper prepared for the Georgetown Institute for the Study of Politics Panel (*The Justiciability of the Bill of Rights*), Annual Convention, American Political Science Association, Washington, D.C., August 31, 1991.

304. Wendell Phillips, *Speech*, Boston, Mass., (Feb. 17, 1861).

305. On the Bill of Rights, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 11-46; Parts 2 and 3 of this Article.

wanted, which was (it became evident) not so much a bill of rights as it was a curtailment of the substantive powers of Congress, something that the First Congress had no intention of permitting.[306]

Once the Bill of Rights we now have was ratified, public complaints about the lack of a bill of right, naturally subsided. The political energies that had been expended on the curtailment of the much-enhanced powers of the new National Government were then directed to political, as distinguished from constitutional, issues. This can be said to have led to the electoral "revolution" of 1800, helped along by Federalist miscalculations with respect to the 1798 Alien and Sedition Laws.[307]

The more astute political observers between 1787 and 1791 seem to have anticipated that the drafting of a Bill of Rights would change nothing but the form of organizing some of the opposition to the Constitution of 1787. My impression is that few if any citizens noticed a difference, once the Bill of Rights *was* ratified,[308] especially since almost all of its provisions confirmed rights, privileges, and immunities that had been long recognized in America. The effects of such provisions had been expected and enjoyed for decades in America, as in Great Britain, sometimes without the authority of formal written declarations.[309]

Most of the Bill of Rights was intended to guide and limit the courts. That is, the amendments recognized (in some cases refined) rights and practices that *all* courts in the United States, not only the national courts, had previously respected. Such guidance for and by the courts did not depend on or require judicial review as we know it. When judicial review does appear in its 1803 *Marbury v. Madison* form,[310] the Supreme Court did not rely on any provision of the Bill of Rights. I mention in passing that the reading in *Marbury* of the "original jurisdiction" provision in Article III of the Constitution may be mistaken.[311] I also venture to notice that what I have said thus far can even be taken to suggest that *Barron v. Baltimore*[312] may be far

306. On the more substantial amendments sought for by some, *see supra* notes 290 and 293.

307. On the Alien and Sedition Acts, see 2 LIBERTY, EQUALITY, & MODERN CONSTITUTIONALISM, *supra* note 31, at 26. Those laws, which did have an expiration date, were repudiated at the polls rather than in the courts or by constitutional amendments.

308. Ratification was completed on December 15, 1791, appropriately enough by James Madison's State of Virginia. *See supra* note 281.

309. Of course, some of those rights *could* be found by the British in documents such as Magna Carta (1215), The Petition of Right (1628), and the English Bill of Rights (1689). *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 244, 259, 263; *see also supra* note 48.

310. 5 U.S. 137 (1803).

311. *See, e.g.*, ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 139-43.

312. 32 U.S. 243 (1833). *See* Part 2 of this Article; Anastaplo, *supra* note 38, at 519.

more questionable then it is generally taken by legal scholars to be.

Gary Glenn has pointed out for us that the United States Supreme Court did not begin to talk much about the Bill of Rights as an entity until late in the Nineteenth Century.[313] This is approximately the same time that the Fourteenth Amendment began to emerge as a powerful constitutional provision.[314] Once people had gotten used to the notion that the Fourteenth Amendment brought privileges and immunities, or liberties, to bear upon the States, they were able to regard the initial amendments as a body—and so the term "Bill of Rights" appeared in judicial opinions. In common discourse, including political talk, that term had been used for almost a century to refer to those initial amendments. It may be that judges also began to use the "Bill of Rights" term as a way of introducing the question of what was to be "incorporated" into the Fourteenth Amendment Due Process Clause.[315]

The growing judicial emphasis upon the Bill of Rights after passage of the Fourteenth Amendment may also reflect a shift in the status of the rights it protects. Just as the English Bill of Rights of 1689 confirmed what had been developed over centuries,[316] so the national Bill of Rights in the United States confirmed protections that Americans already expected. The great rights and immunities had been developed in large part by the workings of common-law judges. Additionally, the growing judicial emphasis, since the late Nineteenth Century, upon the Bill of Rights is related to that steady depreciation of the National Courts as common law tribunals.[317]

It is possible that the growing judicial emphasis on the Bill of Rights may reflect a shift toward a positivistic orientation in jurisprudence. The great rights of the English-speaking peoples were once important, and had their effects, not primarily because of the occasional formal enactment that confirmed them. Rather, those rights had been developed by the courts and by legislatures sitting as constitution-shaping assemblies. When rights are developed in this way, they are much more likely to be thought of as natural or, at least, as intrinsically related to a particular kind of regime. If positivism[318] becomes the mode of the day, much more is apt to be made of

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313. Professor Glenn is a member of the Political Science Department at Northern Illinois University. *See* Anastaplo, *Law, Judges, and the Principles of Regimes*, *supra* note 38, Part 4 (discussing another paper by Professor Glenn).

314. *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 458.

315. *See id.* at 457 (on the dubious readings of the Due Process Clause resorted to, somewhat out of necessity).

316. *See supra* note 309.

317. On *Erie Railroad Co. v. Tompkins*, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 458; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 333; Anastaplo, *Law, Judges, and the Principles of Regimes*, *supra* note 38, Part 8.

318. On positivism, see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 329; *see also* Part 8 of this Article, Appendix A.

particular enactments that seem to legitimize them.

But even the positivists, in making as much as they do of specific actions as the basis of authority, somehow rely upon principles which cannot themselves rest upon positive enactments. Or, to put all this still another way, virtually everyone relies upon some form or another of natural right in his calculations—with the critical difference here being between those who know what they are doing so and those who do not know.[319]

12. THE FLAG DESECRATION AMENDMENT[320]

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.
>
> United States Constitution[321]

I.

Once upon a time Robert R. McCormick, publisher of the *Chicago Tribune*, was perhaps the most influential journalist in this country and a leading figure in the conservative wing of the Republican Party, perhaps even as conservative at times as the Politics Department of this University. He was in unquestioned command of the *Tribune*, then as now one of the great newspapers in the United States. So firm was his control that he could even institute unilateral reforms in the spellings of words used in his paper,[322] at least so long as he lived.

One day (I have heard) Colonel McCormick, while presiding over an editorial board meeting at the Tribune Tower on North Michigan Avenue in Chicago, became so incensed with something one State's Legislature had done that he ordered that State's star to be immediately cut out of the

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319. On natural right, see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 323.

320. A talk given at the Constitution Day Banquet, Politics Department, The University of Dallas, Irving, Texas, September 17, 1995. *See* 141 CONG. REC. E1956-57 (Daily Ed. October 18, 1995) (statement of Rep. Jacobs); 141 CONG. REC. S16676 (Daily Ed. November 3, 1995) (statement of Sen. Simon).

321. U.S. Constitution art. VI.

322. Since Colonel McCormick's death, the *Chicago Tribune* has reverted to the use of conventional spellings.

American flag in the main lobby of the Tribune Tower.[323] Of course, the Colonel's editors were disturbed by this turn of events, but they knew he was not a man to be contradicted when his passions were aroused.

Still, one of them did venture to wonder out loud, however deferentially, whether there was a law against thus evicting a State from the Union. The Colonel, upon hearing the query about the relevant law, ordered the newspaper's lawyers to be consulted right on the spot.

All of them, including the Colonel, could of course hear the critical question asked from their end of the telephone conversation that followed: "Is there any law against cutting a star out of the Flag?" The senior partner at the other end of the line, who must have suffered considerably at times as one of the Colonel's lawyers, was so agitated by this unexpected question that his shouted response could be heard by everyone in the room: "Oh, for Heaven's sakes, what blasted fool would want to cut a star out of the Flag?!"[324] I do not know what happened thereafter either to that lawyer or to the flag in the *Tribune* lobby at the hands of Colonel McCormick. I do know that this episode can serve to remind us that the Flag can be abused in a variety of ways, most if not all of them well-intentioned.

The Constitution, too, can be abused at times. Particularly notorious have been the decisions by the United States Supreme Court in the pre-Civil War *Dred Scott* case,[325] in the post-Civil War pro-segregation cases,[326] and in a century of challenges to Congress's power to regulate commerce among the States.[327] Many today would add to this list the Court's abortion decisions in recent decades.[328]

We should not be surprised that the Supreme Court makes mistakes. We all do, not least when we act through one or another of the branches of our governments. It has always been difficult to determine what should be done about misinterpretations by the Supreme Court. This question includes the issue of what the authority of the Court should be when it reads the Constitution differently from the other two branches of the National

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323. There is an ironic touch to this story that probably no one noticed at the time. The Colonel's grandfather, who founded the *Chicago Tribune*, had been a supporter of his fellow Illinoisan, Abraham Lincoln, a champion of keeping *all* States in the Union.

324. The language used by the lawyer in conveying these sentiments was much stronger than this.

325. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). On *Dred Scott*, see *supra* note 90; *infra* note 336.

326. *See Plessy v. Ferguson*, 163 U.S. 3 (1883); *The Civil Rights Cases*, 109 U.S. 3 (1883); ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 456, 462.

327. On commerce and the commerce power, see ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 332.

328. On the abortion decisions, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 455.

Government.[329] Far less difficult to determine is what should happen when the Supreme Court's reading of the Constitution differs from the reading by any State government.[330]

The American people have, at least until quite recently, been reluctant to resort to constitutional amendments in order to correct even obvious judicial misinterpretations of the Constitution. Of the twenty-seven amendments which we have had, only four of them represent (at least in part) Congressional efforts to reverse judicial interpretations: the Eleventh Amendment (of 1798) with respect to the judicial power of the United States, the first sentence in the Fourteenth Amendment (of 1868) with respect to a critical *Dred Scott* ruling, the Sixteenth Amendment (of 1913) with respect to the power of Congress to levy an income tax, and the Twenty-sixth Amendment (of 1971) with respect to eighteen-year-olds suffrage. The attempt to ratify an amendment (proposed in 1921) empowering Congress to regulate child labor proved unnecessary when the Supreme Court reversed itself on this issue.[331] A related, but far more important, reversal came with the Court's eventual recognition of a Congressional Commerce Power which resurrected the expansive spirit of Chief Justice Marshall with respect to this issue.[332]

During the first decade after the 1973 *Roe v. Wade*[333] abortion decision, there was serious talk about a constitutional amendment reaffirming the long-accepted powers of the States to regulate abortions. But it soon became evident that such an amendment could not muster the support it would need either in Congress (two-thirds of each house) or in the States (three-fourths of their legislatures). It has also become evident that a constitutional amendment would have little effect on the abortion rate.[334] The sustained outbreaks of abortion, as well as illegitimacy, worldwide should remind us that neither the Constitution nor the Supreme Court's reading of it is ultimately responsible for such problems in our time.[335]

One consequence of a technology-based nullification of government power to supervise abortion and birth-control measures may be the involuntary liberation of those troubled souls who have long felt, understandably enough, that they should dedicate themselves wholeheartedly to political and social actions (including constitutional amendments) so long

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329. Consider the care with which the Veto Power of the President is provided for. *See* ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 339.

330. On the Supremacy Clause, see *id.* at 338.

331. These are the Eleventh, Fourteenth, Sixteenth, and Twenty-sixth Amendments.

332. For the 1924 proposals, see ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 299.

333. 410 U.S. 113 (1973). *See supra* note 328.

334. *See, e.g.*, ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 399.

335. On abortion, see *id.* at 603.

as it seemed possible to do something about what they consider terrible deeds.[336] Now these latter-day Abolitionists will have to devote themselves almost exclusively to education and social programs, to persuasion, and perhaps above all to prayer, in order to deal responsibly with what they must still consider a desperate situation.[337]

II.

Even so, there is something touching in the form that the faith which many have in the Constitution can take; a change in the Constitution, they seem to believe, can cure this or that distressing problem.[338] They do not realize that if the Constitution should come to be readily adapted to changing circumstances it would lose much of its dignity and power. That is, there may well be something to the recent complaint (albeit by a partisan Democratic member of the House of Representatives) that some of her colleagues are treating the Constitution as though it were "a rough draft."[339]

It can be instructive as well as troublesome to confront the recent indulgence in attempts at constitutional amendments. In virtually every instance since the 1971 eighteen-year-olds-vote amendment (the Twenty-sixth Amendment), the more strenuously advocated amendments, if ratified, either would have had no appreciable effect or would have done considerable harm (in addition to the danger of teaching people to treat the Constitution like a mere statute).

The most illustrious thus far of these recent exercises in constitutional frivolity is one that has been enshrined in the Constitution, the Twenty-seventh Amendment "ratified" in 1992, only two hundred and three years after it was originally sent out to the States for ratification by the First Congress. It provides: "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened."[340] The mode of completing ratification of this amendment, so long after its original submission to the

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336. They are, in some respects, in the same "situation" in which the early Nineteenth Century American Abolitionists found themselves. Certainly, the use of the courts by Abolitionists seemed to make matters worse. *See supra* note 325.

337. On the anti-slavery abolitionists, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 361.

338. *See, e.g.*, Part 10 of this Article.

339. Richard E. Cohen, *In Charge of Constitutional Change*, THE NAT'L J., June 24, 1995, at 1669 (quoting Patricia Schroeder).

340. This had been one of the twelve amendments proposed by Congress in 1789, ten of which became the Bill of Rights. *See, e.g.*, ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 326-29.

States, was rather dubious.[341] The official acquiescence in this "ratification" reflected an awareness of the popular discontent with Congress at the time. The rule laid down in this amendment is defensible—but it was hardly needed in the light of the general practice of Congress for two centuries now of having its pay increases take effect for the succeeding Congress. Even the Equal Rights Amendment proposed in 1972, which would have served as a grace note for the Constitution, now seems superfluous also. It has been virtually implemented in effect by many statutes and judicial interpretations on behalf of women. Our experience with the proposed Equal Rights Amendment has been somewhat like that with the proposed Child Labor Amendment more than a half century before.[342]

I have suggested that an Abortion Amendment would not "work," even if it could be ratified. The same should be said about the proposed Balanced Budget Amendment.[343] Whether a balanced budget is a good thing for the country depends in part upon circumstances—but it has long been hard for me to see how a constitutional amendment would bring about such balancing.[344] (I have discussed this matter at length in my constitutional commentaries. The best argument for such an amendment that I know is that Senator Paul Simon, who grew up as I did in southern Illinois, has advocated it.)

So much, at least for the time being, for the amendments that would not work. Then there are the proposed amendments that *could* "work"—and that we would come to regret in their operations. First, there is a School Prayer Amendment. The Supreme Court may well have been mistaken in its interpretations here and elsewhere of the Religion Clauses of the First Amendment since the Second World War.[345] But, in our present circumstances, legislative or other official battles over the appropriate prayers for school children are not likely to be edifying, especially as demands come to be made for equal time for all kinds of bizarre cults. When Johnny comes home with a heretical prayer he has been taught at school, to

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341. Such frivolity is prevented by the Congressional practice, initiated in the Twentieth Century, of providing a period in which the ratification of a proposed amendment must take place to be effective.

342. *See supra* note 322.

343. *See* ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 206 (for excerpts from the version of the Balanced Budget Amendment approved by the House of Represenatives on January 26, 1995); *see also infra* note 346.

344. On balanced-budget amendments, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 455; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 331; *see also infra* note 346.

345. On religious liberty and the Constitution, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 463; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 337.

say nothing of a blood-curdling Satanic incantation, his parents' enthusiasm for school prayers is likely to be moderated.

Also likely to be moderated is the enthusiasm of citizens for term limitations once they see what happens when Congress (and hence the country) comes to be run by amateurs—or by the bureaucrats and lobbyists upon whom desperate amateurs will have to rely for guidance.[346] It is

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346. The following Memorandum, "To Amend Means to Improve," which I prepared a decade ago, examines the limits and risks of constitutional amendments:

"To Amend" Means "To Improve"

The considerable talk we hear these days about a balanced-budget amendment and about a legislative term-limitation amendment challenges constitutional scholars and other citizens respectful of the integrity of the Constitution.

Both amendments would probably be troublesome if ever ratified. The first would be troublesome because it is an exercise in constitutional frivolity that is not likely to work and may thereby disillusion and demoralize people. The second is troublesome because it *is* likely to work, thereby crippling the Government of the United States. It does not help matters that the principal balanced-budget proposal currently before Congress contains language that invites confusion and litigation. It is also language that is singularly unfelicitous for permanent enshrinement in the Constitution.

Those who recognize how a balanced-budget amendment could readily be circumvented by both the Congress and the Executive suggest other ways of accomplishing such an amendment's proper purposes. One suggestion is that a limitation be placed upon the amount of taxation that is permitted annually. But circumvention is likely here also, as may be seen in how State governments have had to work their way around such limitations. In fact, no mechanical rule or formula can take the place of sound political judgment by both the people and their governments, National as well as State, if there is to be sound guidance of the economy and of social relations in varying circumstances. Such guidance depends upon sensible assessments not only of the causes and consequences of deficits but also of the costs, consequences, and desirability of balancing the national budget at any particular time. Here, as elsewhere, myths and misinformation have to be reckoned with. Many of these questions about economic and fiscal (and hence social) policies are better addressed directly, and preferably by legislators, as circumstances change.

A curious aspect of any balanced-budget debate always is that two-thirds of each House of Congress can be pressed to vote for a constitutional amendment that might eventually "require" a balanced national budget, while at the same time a simple majority of each House could at once vote for a balanced budget during any session of Congress if so minded.

Those who recognize that term limitations for legislators can truly be crippling look to other remedies to deal with what they conceive to be the underlying problems. One set of remedies has to do with changes that could reduce the advantages of incumbency, including severe limitations upon political contributions and campaign expenditures. (A reconsideration by the United States Supreme Court of its unfortunate First Amendment rulings with respect to these matters should be encouraged. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 [1976].) Most of these remedies, too, are more appropriate for legislation than for constitutional amendments, especially since occasional experiments and periodic

somewhat reassuring that the Republican leadership of the current Congress has had enough sense to reconsider its 1994 campaign promises with respect to term limitations. This reminds us how maturity and self-interest can sometimes work together for the common good.

III.

The proposed Flag-Burning Amendment, which has been advocated at one time or another by forty-nine state legislatures, is another example of an amendment that falls short of great and extraordinary occassions.[347] The proposal for such an amendment arose after the Supreme Court released its opinion in *Texas v. Johnson*.[348] That case originated with a deplorable political protest by one Gregory Lee Johnson here in Dallas during the 1984 Republican National Convention. The Court divided 5 to 4, holding that states cannot make flag-burning illegal.[349] Still, I should say that certain public acts—like burning flags, conducting street marches, and spending large sums of money on political campaigns—are more than the speech

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revisions are apt to be needed.

It is often said that those who hold legislative offices today are virtually impossible to remove. But this is not, as many seem to believe, because incumbents are immune from public scrutiny and control. On the contrary, incumbents these days tend to be very sensitive, perhaps unduly so, to the opinions of their constituents. Indicative of what has long been happening is the fact that incumbents do say quite different things about the issues of the day, depending on precisely where they happen to be from and what part of the electorate they rely upon. Public-opinion polling makes it easier for each incumbent to tailor his words and deeds to the opinions and immediate desires of his constituents. Would members of Congress, knowing that they can serve for only a few more years once they finally manage to "learn the ropes," be inclined to devote themselves wholeheartedly to their demanding duties, unconcerned about preparing the way for their subsequent careers? And do we truly want amateurs in charge of our affairs?

It is likely, in any event, that most if note all of the constitutional amending agitated for from time to time (including such things as the line-item veto) would be much better dealt with through legislation which can be readily adjusted and, if need be, improved or even repealed as circumstances change.

See 141 Cong. Rec. E739-40 (Daily Ed. Mar. 30, 1995) (statement by Rep. Patsy T. Mink); CHI. DAILY L. BULL., April 22, 1995, at 26. It is somewhat reassuring that the Republican Party leadership in Congress has had enough sense, in recent years, to reconsider its 1994 campaign promises with respect to term limitations. This reminds us how maturity and self-interest can sometimes work together for the common good. *See supra* note 94.

347. *See supra* text accompanying note 272.

348. 491 U.S. 397 (1989).

349. The vigorously conservative Justice Scalia voted with the majority to invalidate the State law in this case. *Id.* at 398. On this Justice, see George Anastaplo, *In re Antonin Scalia*, 28 PERSPECTIVES IN POLITICAL SCIENCE 22 (1999).

protected by the First Amendment, however much they are intended to support or even to express political sentiments. Such conduct can be highly provocative and otherwise disruptive, and as such should be subject to regulation by any government properly concerned about domestic tranquility and political propriety. The flag-burner, in any event, should not be surprised by the passions he arouses.

However well-intentioned those citizens may be, the effect of such amendments can be that of desecrating the Constitution. The proposed Flag Desecration Amendment proposal read, "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."[350] An inventory of the difficulties with this proposal can well begin with the observation that heretofore the Constitution has been the only thing held up in the Constitution itself as virtually sacred, with even an oath to support it prescribed by the Framers.[351] Certainly, the Flag was never thus provided for, however unfortunate (if not even insulting and otherwise despicable) certain conduct directed at the Flag may be.

IV.

There are a number of serious problems with various proposed Flag Desecration Amendment. The most serious problem is that the proposed amendment virtually implies that all other forms of desecration are to be considered generally immune from any governmental supervision.[352] The amendment could inadvertently confirm a long-term tendency to deprive the sacred of all government support and protection. That is, the amendment effectively tells us that unless government is explicitly authorized by the Constitution to prohibit a particular form of desecration, it cannot act without some other reason, such as injury to property or a breach of the peace. We certainly do not want to immunize those that desecrate through hate speech, cemetery vandalization, or defacing of religious symbols.[353]

V.

One question that the prudent citizen should be asking here is whether

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350. Flag Desecration Resolution, H.R.J. Res. 79, 104th Cong. (1995). Is the Eighteenth Amendment the only amendment which explicitly empowers both Congress and the States with respect to any matter?

351. U.S. CONST. art. II, § 1, art. VI.

352. Thus, an intriguing exercise in documentary interpretation can be developed here. Would it then be understood, for example, that the desecration of the Constitution, despite its required support by various officers of government, could *not* be legislated against?

353. On hate speech and related matters, see GEORGE ANASTAPLO, CAMPUS HATE SPEECH CODES, NATURAL RIGHT, AND TWENTIETH CENTURY ATROCITITES (1999).

there is a serious problem deserving the attention of a constitutional amendment. What is the harm being addressed by such an amendment? Perhaps no more than a dozen flag-burnings in a bad year. Whether it is a bad year depends, in large part, upon the publicity available for flag-burners—and that depends, in turn, upon whether a burning is apt to provoke an indictment and then a prosecution. The Supreme Court's decision in *Texas v. Johnson* already serves to discourage flag-burning. If nothing is done to amend the Constitution here, things will probably remain as they are now. It should be recognized, by the way, that the deliberate flag-burner these days runs the risk these days of being immediately manhandled by the citizens in his vicinity that he dares to offend.

It is odd in any event to be as concerned as we can be about something so rare and usually so inconsequential as flag-burning when so much else is permitted to corrupt us unimpeded, beginning with the blatant sexual and violent indulgences portrayed by the mess media.[354] Symptomatic of this deterioration is the headline in this morning in a local paper: "TV, movies test sex's appeal to mainstream audiences: As barriers fall, many wonder, what's next?"[355] Constitutional government cannot be expected to prosper if our citizen body should be rendered unfit by having its passions and sensibilities twisted out of shape. Once this happens it will not do much good—and indeed may even make matters worse—to rely more and more upon our criminal justice system to subject ourselves once again to a proper discipline (especially when, as now, that system is overworked because of a deeply-flawed drugs-control policy).[356] Nor will it do any good, and may make matters even worse, to rely more and more upon private arsenals to protect ourselves from the consequences of the degradation of all too many of our fellow citizens.[357]

In critical respects the Pro-Choice people and the Pro-Guns people share a somewhat naive reliance upon extremist self-help principles grounded in uninhibited property rights.[358] This sort of thing is reflected as well in such displays as the shameless advertisements by tobacco companies which are designed to trap impressionable youngsters in a deadly addiction.[359] A self-respecting and self-confident community should be able to supervise, with a view to the common good, the uses (private as well as public) of all of the

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354. *See* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 117-38 (discussing obsescenity).

355. Tom Maurstad & Beth Pinsker, DALLAS MORNING NEWS, Sept. 17, 1995, at 1A.

356. *See, e.g.*, George Anastaplo, *Governmental Drug-Testing and the Sense of Community*, 11 NOVA L. REV. 295 (1987).

357. On gun control, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 459; ANASTAPLO, THE AMERICAN MORALIST, *supra* note 4, at 367.

358. *See supra* Parts 2 and 3 of this Article; *infra* note 360.

359. *See, e.g.*, *Your Basic 3-Piece Suit*, PARADE MAGAZINE, Sept. 17, 1995, at 20.

property that it makes possible and protects.[360]

VI.

The *Texas v. Johnson* decision turned on a reading of the First Amendment. Although I continue to have reservations about that reading, it should be acknowledged that there was something valid in what the majority of the Supreme Court said on that occasion. There *is* a serious First Amendment problem whenever only a few of many instances of any type of offensive action are selected for prosecution—those few which are accompanied by, or are understood to convey, sentiments particularly disliked by the local prosecutor or by his constituents.

There are lots of offensive things done with the Flag these days, most of them much more serious, if only because they are much more pervasive, than what results from a rare flag-burning. We have learned to put up with considerable routine abuse of the Flag, much of it for commercial purposes. This epidemic of flag abuse is rather sad, especially when I remember how we used to cheer the Flag when it appeared in movie theatre newsreels during the Second World War.[361]

Be that as it may, the Congressional proponents of the contemplated Flag Desecration Amendment assure us that it is not intended to repeal the First Amendment. This means that critical freedom-of-speech challenges will be posed whenever prosecutors can be shown to ignore almost all flag desecrations but those accompanying or expressing political sentiments they find personally offensive. Equal protection challenges can also be expected to highly selective enforcement of State laws.[362]

Traffic laws, for example, are clearly constitutional. Yet the policeman who stops only those speeders displaying bumper stickers he does not like can expect to have his policy of selective enforcement seriously challenged on several constitutional grounds. The fact that there is a constitutional amendment authorizing a general enforcement policy may not matter. We once had a Prohibition Amendment—but if a prosecutor had enforced prohibition laws only against his political opponents, substantial constitutional challenges should have been expected.[363]

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360. *See* ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 2, at 819; Parts 2 and 3 of this Article.

361. *See* ANASTAPLO, THE AMERICAN MORALIST, *supra* note 4, at x, xiii.

362. On the equality principle and the Equal Protection Clause, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 458; ANASTAPLO, THE AMERICAN MORALIST, *supra* note 4, at 609.

363. All this is aside from the technical problems of what "the flag of the United States" should be taken to mean and how "physical desecration" should be understood. What, for

VII.

I have used the current Flag Desecration Amendment campaign to suggest what the Constitution should mean to us. In this way, at least, even this misguided campaign can be put to salutary use. Much of what I have said about how the Constitution needs to be treated should be apparent to more mature members of Congress. They should know that a cheap form of patriotism is being indulged in by some of their amendments-hungry colleagues at the risk of disfiguring the Constitution itself. All this should remind us of how a disciplined and sensible legislative body operates. For one thing, it keeps many excesses safely under control in its committees, having learned long ago how public opinion can be misled.[364]

I should like to pay special tribute to one member of the House of Representatives, a Democrat from Indiana, Andrew Jacobs, who tried to salvage something from his colleagues' recent stampede by offering to add to the Flag Desecration Amendment the provision that the spending of money for the election of public officials no longer be considered constitutionally-protected speech either.[365] He reminded us thereby of still another unfortunate First Amendment reading by the Supreme Court, its 1976 ruling in *Buckley v. Valeo*.[366] That ruling undermined what Congress had tried to do, a generation ago, to control campaign financing in this country. I continue to believe that the First Amendment should not be understood to keep us from experimenting with reasonable measures to prevent our elections from being bought[367]—or from seeming to be bought by excessive expenditures of funds, whether by private persons, by corporations, unions, and other organizations, or by the government itself.[368]

But even the serious mistake by the Supreme Court in the *Buckley* does not warrant a constitutional amendment. Rather Congress should try again and again—and we in turn should all try to help the Court to recognize what

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example, can be done with a protestor who displays a flag that is cancelled like the flags we are accustomed to seeing on postage stamps—or with a protestor who burns publicly a blow-up of *cancelled* flag-decorated postage stamps. Would it matter if the burning was of a blow-up of *uncancelled* flag-decorated postage stamps?

364. On the uses of prudence, see ANASTAPLO, THE AMERICAN MORALIST, *supra* note 4, at 618; *infra* note 418. See also the Introduction and the Conclusion of this Article.

365. *See* 141 CONG. REC. H176 (January 4, 1995).

366. 424 U.S. 1 (1976).

367. For recent experiments here, see the Bipartisan Campaign Finance Reform Act of 2001. It may be that such measures are not apt to be effective until the general political morale in this country is elevated—and then, it can be argued, such measures would not be needed.

368. One can be reminded of governmental excesses here when one sees how the hearts and minds of American citizens can be recruited in the promotion and conduct of dubious military campaigns.

it too should want to recognize: the true reading of the Constitution.

13. THE USE AND ABUSE OF *THE FEDERALIST*[869]

> The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.
>
> Salmon P. Chase [370]

The Federalist is a much-praised book, the importance of which is hard to exaggerate.[371] It can even be argued that Publius,[372] the author of this collection of eighty-five newspaper articles, is our first great political scientist. That Publius is obviously partisan in "his" discourses does not detract from "his" stature as a student of politics, for it can be suspected that the political observer who is completely neutral (or, as we say today, "non-judgmental") in his accounts is not a reliable participant in serious political affairs.

It is only after we recognize that Publius was truly political, and hence partisan, that we can make proper use of *The Federalist*. A significant clue to the "situation" in New York in 1787 is provided by the array of signatures appended, on September 17, 1787, to the final draft of the Constitution prepared by the Constitutional Convention. The signatures are presented as those of witnesses. Since the delegates did not sign on behalf of their States, the signatures do no more than testify that this is indeed the document that had been consented to by all of "the States present" on this occasion.[373] The primary purpose for choosing this form for signatures seems to have been that it permitted delegates to sign, even if they did not fully endorse the text of the Constitution. Another consequence of this form is of immediate interest for us: it permitted someone—in this case Alexander Hamilton—to sign *as a delegate from* New York.

Hamilton could not have signed *on behalf* of New York, however his signatures may have appeared to many casual readers of the Constitution. For the last two months of the Convention, New York had not had a sufficient

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369. A talk given to Professor Thomas Engeman's class in the Political Science Department of Loyola University of Chicago, Chicago, Illinois, February 22, 2001.

370. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) (Chase, C.J.). Compare the Calhoun sentiment in *infra* note 385.

371. For discussions of *The Federalist*, see George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1042-53 (1991); *supra* Part 10 of this Article.

372. *See supra* note 274. Publius, it can be said, makes some arguments that Alexander Hamilton, John Jay, and James Madison would not be apt to make in their own name.

373. *See* ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 219-21.

number of its three-member delegation present for the vote of that State to be cast.[374] Delegates could speak on the floor of the Convention, even when their State delegation was divided or could not vote for lack of a quorum. Delegates could also serve as witnesses at the end of proceedings, no matter what the status had been of their States' votes in the Convention.

The lack of New York votes, after July 10, reflects the opinion of the dominant political organization in that State, led by Governor George Clinton that the document that was likely to emerge from the Convention would not be in conformity with the organization's support for limited-government and what we now know as "States' Rights."[375] The withdrawal from the Convention by the majority of the delegates from New York anticipated the difficulties there would be in their State when the time came to ratify the Constitution the following summer.

It was because of these difficulties that *The Federalist* and other pro-Constitution articles were prepared. Publius' overriding purpose in *The Federalist* was to secure votes in New York for the proposed Constitution, not simply to expound the Constitution.

Publius, in order to secure votes in a vigorous political contest, had to adapt "his" arguments to constantly shifting circumstances, especially in New York, during the seven months that *The Federalist* articles were published.[376] *The Federalist* paid special attention to the complaints lodged against the proposed constitution by local politicians who were afraid that an enhanced National Government would diminish their importance and influence. Publius found it expedient, therefore, to play down the centralizing tendencies of the proposed constitution, arguing that concerns about a lack of a bill of rights could be readily ministered to in the first Congress.[377] Those shifting circumstances included the news coming in from other States that the Constitution had been ratified by their conventions. By the time the last number of *The Federalist* was published, eight States had ratified, three of them by unanimous votes in their conventions, four others by margins of two to one or better. It was soon apparent that the Constitution would be set in motion by the requisite nine-State minimum, even if New York and Virginia should refuse ratification.[378]

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374. *See* Dennis J. Mahoney, *Robert Yates (1738-1801)*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2082.

375. Abraham Lincoln and others came to believe that "States' Rights" had degenerated into Secessionism, if not into Treason.

376. They were published between October 27, 1787 and May 28, 1788.

377. On the stages of the Bill of Rights in the First Congress, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 315.

378. Of course, the participation of both Virginia (the tenth State to ratify) and New York (the eleventh) would be needed for the new constitutional system to work properly. It mattered far less that North Carolina and Rhode Island were still holding out in 1789. *See* ANASTAPLO,

This historical context bears upon how we should use *The Federalist*. Those articles are certainly important as indications of American conditions ands interests at that time. They are important also, perhaps even more so, for their perceptive reflections upon human nature and serious politics. Much can be learned from polemical articles such as these that draw upon the experiences and thoughtfulness of remarkably talented men. But, it should be added, these newspaper articles, partly because of their mode of preparation and of their immediate purpose, are not unqualifiedly reliable for constitutional interpretation, however suggestive they may be on various points.

Other advocates for the Constitution, in other circumstances, could readily make quite different arguments based on quite different readings of the Constitution.[379] Of course, this has not prevented politicians of both parties from using *The Federalist* to support their respective positions.[380] In short, with regard to constitutional interpretation as distinguished from political instruction, *The Federalist* should be regarded as a remarkably competent lawyer's brief would be. Such a brief is obliged to take account of circumstances, especially the prevailing opinions of the audience.

The divisions, if not even contradictions, built into *The Federalist* are reflected in what happened shortly thereafter, during the First Congress. The two principal contributors to *The Federalist*, Alexander Hamilton of New York and James Madison of Virginia, divided sharply on the constitutionality of a proposed National Bank measure.[381] In the decade following, Hamilton

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THE CONSTITUTION OF 1787, *supra* note 2, at 328 n.153; *see also supra* note 276.

379. Thus, the reading of the Constitution, by such an opponent as Patrick Henry in Virginia, could be quite different from that of Publius, as may be seen in this excerpt from his June 4, 1788 protest in the Virginia Ratification Convention:

> I would make this enquiry of those worthy characters [here] who composed a part of the late federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That [the government provided by the Constitution] is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, what right had they to say, *We, the People*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorised them to speak the language of *We, the People*, instead of, *We, the States*? States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great, consolidated, national government of the people of all the States.

Id. at 38; *see also infra* note 385.

380. Justices of the United States Supreme Court also draw on *The Federalist*, often without appreciating how *political* a document it properly was. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

381. *See* Anastaplo, *supra* note 282, at 151-71. This can be considered the first major

and Madison would take quite different positions in their readings of the Constitution, no doubt influenced in large part by their quite different circumstances. Madison's sectional loyalties, for example, have been said to have influenced the position he took on the National Bank bill and on other issues.[382]

The dominant New York politicians were so out of step with national sentiment that not one of their amendment proposals calling for a change in the substantive powers of the new national government was taken seriously in the First Congress.[383]

The circumstances in New York, I have suggested, had to be taken into account by Publius: for "him" to have done otherwise would have been foolish and self-defeating. Therefore, Publius was reluctant to acknowledge the full extent of the powers of the proposed national government, powers that would be made much more of in other circumstances. On the other hand, opponents of the proposed Constitution made much of such powers, at times exaggerating them, during the Ratification campaign, even claiming that the States would be reduced to a trivial role in the new constitutional system.[384]

Thus, the 1787-1788 circumstances in New York bear upon how *The Federalist* is now to be read by the explicator of the Constitution. In addition, one must consider the longstanding English constitutional system that the Framers of the Constitution drew upon and carefully modified for American conditions and aspirations.

Finally, one cannot reliably interpret the Constitution of 1787 without being aware of the grand constitutional development, centuries in the making, which its Framers adapted to their special circumstances in North America. This development, it could be said, conquered chance as much as it was possible to do in establishing a political order grounded in "the Laws of Nature and of Nature's God."[385]

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debate in constitutional interpretation once the implementation of the Constitution began.

382. The most challenging appraisal of the career of James Madison remains that of William W. Crosskey. *See supra* note 281.

383. For their proposals, see ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION, *supra* note 2, at 305.

384. *See supra* note 379. Once the Constitution was ratified, many of its former opponents took to arguing that the new National Government was one of very limited powers, while many of its former proponents took to arguing that that Government was one of quite broad power. This means, among other things, that we are obliged ourselves to read the Constitution carefully, using but not altogether relying upon what partisans "naturally" say in various circumstances.

385. The Declaration of Independence. On the Declaration as an authoritative constitutional document, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 11 and 31; *infra* text accompanying note 395; *see also supra* text accompanying supra note 370. Compare John Calhoun's sentiment: "I never use the word 'Nation' in speaking of the United States. I always use the word 'Union,' or 'Confederacy.' We are not a Nation, but a Union, a confederacy of

CONCLUSION: REVELATION, REASON, AND THE GOOD[386]

Aristotle opens the *Nicomachean Ethics* with the observation, "Every art and every inquiry, and likewise every action and choice, seems to aim a some good, and hence it has been beautifully said that the good is that at which all things aim."[387] A comparable observation opens his *Politics* as well.[388]

To recognize that all of us aim at "some good" leaves questions about a possible hierarchy among the goods sought and about better and worse ways of seeking the goods that one settles upon. An overarching question here is whether there is an authoritative account available of the whole in which human action fits. And, pursuant to the guidance provided by any such account, what is the best kind of life for a human being—that characterized by unquestioning obedience (say, as in the case of Abraham[389]) or that characterized by determined questioning (say, as in the case of Socrates[390])?

Less exalted manifestations of these two ways may be seen in the steadfast loyalty of the Orthodox Believer, on the one hand, and in the dedication of the Enlightenment Scholar, on the other.[391] Leo Strauss, when he wrote, seventy years ago, his *Philosophy and Law*[392], understood to rescue the religiously Orthodox from the centuries-old assault of the Enlighteners, an assault (reinforced by the findings and technology of modern science) which had seriously called into question, among educated men and women

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equal and sovereign States." Letter from John C. Calhoun to Oliver Dyer (January 1, 1849); *see supra* note 302.

386. These remarks were prepared for a course on Leo Strauss's *Philosophy and Law* (infra note 392) conducted by Professors Joel Kraemer and Paul Mendes-Flor, in the Divinity School of the University of Chicago. My visit, of March 12, 2003, was to the last class meeting before Professor Kraemer assumed *emeritus* status.

387. ARISTOTLE, NICOMACHEAN ETHICS 1094a-3 (Joe Sachs trans., 2003). Perverse testimony in support of Aristotle here may be found in the Duc de la Roche foueauld observation, "Hypocrisy is the tribute which vice pays to virtue," *Maximes* (1678).

388. Aristotle is quite confident about this at the outset of his treatise:

> Since we see that every city is some sort of partnership, and that every partnership is constituted for the sake of some good (for everyone does everything for the sake of what is held to be good), it is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. This is what is called the city or the political partnership.

ARISTOTLE, POLITICS 1252a1-5 (Carnes Lord trans., 1985).

389. *See, e.g.*, Anastaplo, *supra* note 108, at 854.

390. *See* ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 8.

391. This juxtaposition is anticipated in Moses Maimonides' *The Guide of the Perplexed*. *See, e.g.*, ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 58.

392. LEO STRAUSS, PHILOSOPHY AND LAW: CONTRIBUTIONS TO THE UNDERSTANDING OF MAIMONIDES AND HIS PREDECESSORS (Eve Adler, trans., 1995).

in the West, the received opinions of the religiously-minded.

The Enlightenment came to be questioned further, in Mr. Strauss's time because of social aberrations, if not even political monstrosities, for which the Enlightenment was held at least partially responsible. That is, there may not have been (before the Twentieth Century) the severe questioning of the premises and methods of Enlightenment-sciences that there had been of the doctrines (as distinguished from the social consequences) of religious movements.[393] And so the Strauss rescue of revelation seems to place its emphasis upon restoring the intellectual position of the Orthodox to respectability.

At the heart of this rescue effort is the insistence that if God is omnipotent, the ordinary rules of evidence and of logic cannot be used to assess the claims of revelation. Consider how this insistence is put in the Introduction to *Philosophy and Law*:

> The critical examination of the arguments and counterarguments brought forward in this quarrel [between Orthodoxy and the Enlightenment] leads to the conclusion that there can be no question of a refutation of the "externally" understood basic tenets of the tradition. For all these tenets rest on the irrefutable premise that God is omnipotent and His will unfathomable. If God is omnipotent, then miracles and revelations in general, and in particular the Biblical miracles and revelations, are possible. Of course for orthodoxy, and therefore also for the Enlightenment, it is a question not so much of the possibility or impossibility as of the reality or unreality of the Biblical miracles and revelations; but in fact almost all the Enlightenment's attempts to demonstrate the unreality of the Biblical miracles and revelations depend on the express or tacit premise that the impossibility of miracles and revelations in general is established or demonstrable. Yet in carrying out their critique, precisely the most radical Enlighteners learned—if not as something clearly known, then at least as something vividly felt—that as a consequence of the irrefutability of orthodoxy's ultimate premise, all individual assertions resting on this premise are unshakable.[394]

Thus the path to Goodness charted by Orthodoxy was restored to intellectual respectability, or so it could seem at that time.

It later came to seem in the course of the Strauss career, perhaps in part because of his use of his experience in the United States, that a kind of collaboration, if not even partnership, between the Orthodox and the Enlighteners could come to be noticed, if not even celebrated. This may be

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393. On reason and revelation (or on science and piety), see ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 389-91.

394. STRAUSS, *supra* note 392, at 29.

seen, for example, at the outset of his *Natural Right and History* book, where the Self-evident Truths sentence in the Declaration of Independence can be drawn upon:

> The nation dedicated to this proposition [of the Declaration] has now become, no doubt partly as a consequence of this dedication, the most powerful and prosperous of the nations of the earth. Does this nation in its maturity still cherish the faith in which it was conceived and raised? Does it still hold those "truths to be self-evident"?[395]

It is intriguing that the apostles of Enlightenment (among whom would be numbered the principal draftsman of the Declaration of Independence) can be spoken of here as people of faith.[396]

And so, one of Mr. Strauss' most intimate students could speak of his teacher in this way shortly after his death in 1973:

> The most impressive alternative to philosophy in the life of Leo Strauss is summed up by the name of a city, Jerusalem, the holy city. What if the one thing most needful is not philosophic wisdom, but righteousness? This notion of the one thing most needful, Mr. Strauss argued, is not defensible if the world is not the creation of the just and loving God. Neither philosophy nor revealed religion, he argued, can refute one another; for, among other reasons, they disagree about the very principles or criteria of proof. . . . This mutual irrefutability and tension between philosophy and biblical revelation appeared to him to be the secret of the vitality of Western Civilization.[397]

Thus, the specialness of a particularly-vital West is proclaimed, a specialness which may permit it and it alone, of all the grand regions of the world, truly to understand what has happened elsewhere. Here, as in the *Philosophy and Law* passage from which I have quoted, the Orthodoxy that is relied upon is grounded in Biblical revelation.

I have had occasion to examine in this fashion the presupposition here:

> Leo Strauss has suggested that "the only question which ultimately matters" is whether "the Bible or philosophy is right." *Is* this so? It may depend partly upon what one takes the Bible, or revelation, to include and whether any other (that is, nonbiblical) revelations are to be taken seriously. How are the various schools of non-Western thought, especially when they

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395. STRAUSS, *supra* note 171, at 1.

396. On the Declaration of Independence, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 11, 31.

397. ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 2, at 127 (quoting Laurence Berns).

> invoke revelation, to be regarded vis-à-vis philosophy? Do any of them have pathological features in need of treatment?[398]

Pathological revelations, and pathological features in generally sound revelations, can often be recognized and usually discounted as such, as may be seen in responses to the pronouncements we hear from time to time about UFO visitations and messages.[399] Thus, even the pious can bring the "methods" of the Enlightenment to bear upon not only pathological but also upon primitive religions.

My examination of the insistence by Mr. Strauss that "the only question which ultimately matters" is whether "the Bible or philosophy is right" continues in this fashion:

> Certainly, the Strauss suggestion here seems to depend upon his extraordinary capacity for theoretical pursuits and upon his happening to be personally grounded in Judaism . . . [I]s a reliable thoughtfulness presupposed whenever reason and revelation are placed in juxtaposition, including an awareness (guided by nature) of what the truly divine surely does not call for or permit? That is, should both genuine prudence and an inspired revelation tend to direct one to the same judgment in any particular situation? In any event, the prudent statesman (or responsible prophet) may well emphasize different things to different peoples with respect to the same matter.[400]

Righteousness (a special kind of law-abidingness) *can* be set off against *philosophic wisdom*. But the righteous are not as apt as the philosophic are to want (or perhaps to be equipped) to understand "the other side." The "other side" for the righteous can include not only the philosophic but also other, purported, revelations which may be stoutly repudiated.

But then, it can be said, the desire to understand the other side is a compulsion, perhaps even a suicidal perversion, of the philosophic, not of the righteous.

II.

I have found, upon returning recently to *Natural Right and History*,[401] that the questions I am asking here have been anticipated, at least to some extent, by Mr. Strauss himself. Consider, for example, the following passage:

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398. *Id.* at 373.

399. On UFOs and their reception, see George Anastaplo, *Lessons for the Student of Law: The Oklahoma Lectures*, 20 OKLA. CITY U. L. REV. 19, 187 (1995).

400. ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 2, at 373.

401. STRAUSS, *supra* note 171; *see supra* text accompanying notes 170-71.

> Man cannot live without light, guidance, knowledge; only through knowledge of the good can he find the good that he needs. The fundamental question, therefore, is whether men can acquire that knowledge of the good without which they cannot guide their lives individually or collectively by the unaided efforts of their natural powers, or whether they are dependent for that knowledge on Divine Revelation. No alternative is more fundamental than this: human guidance or divine guidance. The first possibility is characteristic of philosophy or science in the original sense of the term, the second is presented in the Bible.[402]

It is *not* said here that the second possibility is presented *only* in the Bible, but that does seem to me the tenor of much of Mr. Strauss's handling of these matters.

He continues, developing further what the confrontation of the Biblical and the philosphic can mean:

> For both philosophy and the Bible proclaim something as the one thing needful, as the only thing that ultimately counts, and the one thing needful proclaimed by the Bible is the opposite of that proclaimed by philosophy: a life of obedient love versus a life of free insight. In every attempt at harmonization, in every synthesis however impressive, one of the two opposed elements is sacrificed, more or less subtly but in any event surely, to the other: philosophy, which means to be the queen, must be made the handmaid of revelation or vice versa.[403]

There then follows, in *Natural Right and History*, a passage which develops, in an even more subtle way, what had been suggested in the *Philosophy and Law* excerpt which I have quoted:

> If we take a bird's-eye view of the secular struggle between philosophy and theology, we can hardly avoid the impression that neither of the two antagonists has ever succeeded in really refuting the other. All arguments in favor of revelation seem to be valid only if belief in revelation is presupposed; and all arguments against revelation seem to be valid only if unbelief is presupposed. This state of things would appear to be but natural. Revelation is always so uncertain to unassisted reason that it can never compel the assent of unassisted reason, and man is built that he can find his satisfaction, his bliss, in free investigation, in articulating the riddle of being. But, on the other hand, he yearns so much for a solution of that riddle and human knowledge is always so limited that the need for divine illumination cannot be denied and the possibility of revelation cannot be

402. *Id.* at 74.

403. *Id.* at 74-75; *see infra* text accompanying note 408.

refuted.[404]

This, it can be said, is familiar ground, developing as it does the Strauss reflections of several decades earlier in *Philosophy and Law*.

There then follows the most challenging part of this discussion:

> Now it is this state of things that seems to decide irrevocably against philosophy and in favor of revelation. Philosophy has to grant that revelation is possible. But to grant that revelation is possible means to grant that philosophy is perhaps not the one thing needful, that philosophy is perhaps something infinitely unimportant. To grant that revelation is possible means to grant that the philosophic life is not necessarily, not evidently, *the* right life. Philosophy, the life devoted to the quest for evident knowledge available to man as man, would itself rest on an unevident, arbitrary, or blind decision. This would merely confirm the thesis of faith, that there is no possibility of consistency, of a consistent and thorough sincere life, without belief in revelation. The mere fact that philosophy and revelation cannot refute each other would constitute the refutation of philosophy by revelation.[405]

The use here of terms such as *seems* and *perhaps* suggests that "the refutation of philosophy by revelation" is far less certain than the casual reader may suppose. Certainly, Mr. Strauss never conducted himself as if philosophy were "infinitely unimportant"—or as if the path laid down by some revelation or other was the one that he should personally follow.

When a "bird's-eye view" is resorted to, it does seem that a perspective is provided which permits a reliable grasp of both the doings of revelation and those of reason. Such a perspective also seems to be relied upon for an assessment of what contributes to the vitality of the West—and for the evident endorsement (here as elsewhere) of that vitality as desirable.

We have already noticed that something other than revelation may be needed to sort out revelations, including those which are either primitive or perverse. But there are various long-established, rather sophisticated, religions, especially of the East, that Leo Strauss never seemed to be much interested in (even though he could refer to them from time to time).[406]

When he talks of revelation and its merits, the emphasis is upon Biblical revelation. And when Biblical revelation is referred to, it is primarily the Hebrew Bible that is looked to, not the Greek Bible.[407] Christianity is regarded as, at best, a Jewish sect, however much the work of Christian

404. *Id.* at 75.
405. *Id.*
406. *See, e.g., id.* at 71.
407. *See, e.g.*, STRAUSS, *supra* note 170, at 311 (*Why We Remain Jews*).

scholars such as Thomas Aquinas may be respected.[408]

It is hard to overestimate Leo Strauss' allegiance to Judaism, even though he was not what is called an observant Jew. He was very much aware of his Jewish sympathies.[409] Thus, it can be said, Mr. Strauss had standards for distinguishing among the revelations (ancient and modern) that he confronted. And, it can also be said, he could ignore, when he did not simply reject, revelations with far more adherents and far more direct influence worldwide than the one that he personally happened to take most seriously.

Is there any reason to believe that the revelation which he happened to take most seriously should not be subjected to the same scrutiny by the philosophically-minded as the other revelations which he evidently regarded as inferior? That is, is the approach to these matters by philosophy as vulnerable as Mr. Strauss found it prudent to suggest?

III.

The basis for the specialness of the Mosaic Law does have to be recognized—and this may be seen in the emphasis placed by Mr. Strauss from time to time on *Deuteronomy* 4:5-6. It is there, we are told, that Moses could say, in the course of his leavetaking:

> Behold, I have taught you statutes and ordinances, even as the Lord my God commanded me, that ye should do so in the midst of the land whither ye go in to possess it.
>
> Observe therefore and do them; for this is your wisdom and your understanding in the sight of the peoples, that, when they hear all these statutes, shall say, "Surely this great nation is a wise and understanding people."[410]

Thus, it seems, the prophet Moses, whatever the gulf between Reason and Revelation, had himself enough access to worldly wisdom to be able to anticipate the "secular" judgment about the Israelite institutions that would be expressed by other peoples. I notice, in passing, that there are also passages in the Greek Bible which regard the Christian revelation as the epitome of wisdom, something which is reinforced in that Bible by its use of the language in which philosophy emerged.[411]

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408. *See* STRAUSS, *supra* note 171, at 326; *see also supra* text accompanying note 403.

409. *See, e.g.*, George Anastaplo, *Leo Strauss and Judaism*, 1998 THE GREAT IDEAS TODAY 457 (1998).

410. *Deuteronomy* 4:5-6 (in a Jewish Publication Society translation); *see* George Anastaplo, *Law & Literature and the Austen-Dostoyevsky Axis: Explorations*, 46 S.D. L. REV. 712, 751 (2001).

411. *See, e.g.*, 1 *Corinthians* 3:19 ("For the wisdom of this world is foolishness with

We see, also again and again, that Reason and Revelation may not be as far apart as had been said. Moses was aware of standards that other peoples could use in judging Israel—just as other peoples, down to our day, have praised various regimes (including the revelations upon which they depended), regimes such as the Spartan, the Roman, and the American.[412]

An awareness of the Good seems to be drawn upon in sustained judgments about regimes, an awareness which permits an admiration of some regimes and a detestation of others.[413] Our judgments of these regimes, both good and bad, look past revelations that their peoples may have happened very much to depend upon. What one ultimately looks to in these matters may be reflected in the differences between revelation-based natural law and philosophy-based natural right.[414] One can see here how the prudent statesman may make use of whatever decent revelation his people may happen to inherit.[415]

Thus, *nature* is critical here, that nature so vital to philosophy and so likely to be ignored by revelation. Indeed, we can suggest, any longstanding regime, even if it is not explicitly aware of nature, is likely to be rooted enough in nature to have some reliable grasp of the Good.[416] And the same may be said of the effective prophet, if only as a rhetorician of a high order.

We see, again and again, that human actions do aim at the Good in a variety of circumstances. This is so, it seems, whether the banner under which a people is mobilized is one invoking revelation or one invoking, indirectly if not directly, philosophy. Leo Strauss, it seems to me, was enough of a Socratic to discern that both the Prophet and the Philosopher are, in the final analysis, ultimately guided by visions of the Good. Much of what I have suggested on this occasion is reflected in this observation from one of Mr. Strauss' oldest students:

> The American tradition of popular government in the person of [Abraham] Lincoln [can be] seen to depend upon the statesman as prophet. And prophecy, as I learned from [Leo] Strauss, who had it from

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God.").

412. We might well wonder what Plato and Aristotle wold have made of the Mosaic regime, had they known it. Maimonides may provide suggestions about how to begin to think about this matter. *See supra* note 391.

413. Detestable regimes, both ancient and modern, include such as those of the child-sacrificing Carthaginians, the Aztecs, the Nazis, the Stalinists and the insanely murderous Pol Pot.

414. *See* ANASTAPLO, BUT NOT PHILOSOPHY, supra note 3, at 323-33.

415. *See* ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 453. On George Washington's *Farewell Address*, see Anastaplo, *Constitutionalism, the Rule of Rules*, *supra* note 7, at 136.

416. *See* ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 3, at 303.

> Maimonides—and ultimately from Plato's Athenian Stranger [in the *Laws*]—was the political name for political science.[417]

Is, then, the philosopher more apt to make proper use of prophecy, in the ordering of the political community, particularly as circumstances change, than the prophet is to make proper use of philosophical speculations, in an effort to understand what he is doing and how long he (and his successors) should continue to do it?

We wonder, with this question, how that *prudence* may be developed and maintained upon which an effective and hence beautiful dedication to the Good depends generation after generation, even if not to the end of time, to say nothing of what lies beyond Time.[418]

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417. *Id.* at 131 n.38 (quoting Harry V. Jaffa).

418. On prudence, see ANASTAPLO, ABRAHAM LINCOLN, *supra* note 3, at 368; ANASTAPLO, THE AMENDMENTS TO CONSTITUTION, *supra* note 2, at 462; ANASTAPLO, THE AMERICAN MORALIST, *supra* note 3, at 618; ANASTAPLO, BUT NOT PHILOSOPHY, *supra* note 4, at 390; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 337; ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 329; ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 401; *see also supra* notes 42, 209; *supra* text accompanying note 1.