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Church and State: Explorations

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The principal common tables of the magistrates may be associated with the buildings devoted to public worship, on some convenient and common site—except for such temples as are required by law, or by a rule of the Delphic oracle, to be kept distinct and separate. This site should be on an eminence, conspicuous enough for men to look up and see goodness enthroned, and strong enough to command the adjacent quarters of the city. . . .

. . . Pregnant mothers should pay attention to their bodies: they should take regular exercise and follow a nourishing diet. The legislator can easily lead them to a habit of regular exercise if he requires them to make some daily pilgrimage for the purpose of worshipping at the shrines of the goddesses who preside over childbirth. . . .

—Aristotle, Politics,VII, xii, xvi

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INTRODUCTION

It is prudent to be mindful of the monstrosities that an improper collaboration between Church and State can generate. These may be seen in Part I of this article, in which the horrendous witch hunts of the Fifteenth, Sixteenth and Seventeenth Centuries are discussed.

It is also important to remember, however, that there is much more than such religious savagery to the story of relations between Church and State. A considerable separation of Church and State has much to recommend it, but so does their proper collaboration. I trust that both separation and collaboration are given their due in this article. In any event, the importance of religion for the public life as well as for the private lives of human beings is examined.

The opening and closing parts of this article are rather general in scope. In the opening parts we range back over centuries. In the closing parts we move around the world as well as back to the Enlightenment.

The Constitution of the United States is kept in mind throughout this article. It is in the central third of this article (Parts IV, V, and VI) that we shall be most concerned with reading the First Amendment to that Constitution. The First Amendment provides,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.


One can see the demands of "the State" (or the political and moral order, grounded in reason) as distinct from the demands of "the Church" (or the spiritual order, grounded in revelation) in the discussion of military conscription in infra Part V. I refer in infra note 182 to the tension between the autonomy of the individual and the requirements of the community. See THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, Q.10, art. 12: "Whether the Children of Jews and of Other Unbelievers Ought to be Baptized against their Parents' Wills?"
Parts IV, V and VI, around which this article turns, incorporate three lectures given by me at Memphis State University in March 1982. At the heart of that Memphis State trilogy is an inquiry into the status of conscientious objection under the Constitution. Indeed, this seems to be the kind of problem, along with contentions as to how the young should be educated and by whom, which can be depended upon to arouse the most controversy among us with respect to Church and State matters today. It is hardly likely that serious or sustained efforts will be made by any American government at this time to promote any religious doctrine or to require any mode of worship. Rather, we again and again hear of resistance to conventional demands by the law that one do something (or not do something) that one's religion happens to forbid (or to require). Military conscription has long been in the West, partly because of certain Christian influences, a particularly dramatic form of such governmental demands—and its examination can put our principles to an instructive test.

Running through all parts of this article is consideration of the question of what nature calls for in the ordering of human communities and in the development of the human soul. The concern with nature becomes more pronounced in the latter half of the article, especially as I examine movements which make either too little or too much of reason as against revelation.

My readers will see how I have attempted, in discussions developed on nine separate occasions over a quarter of a century, to apply what I believe to be enduring political and constitutional principles to Church and State problems and to related issues. Each of the nine discussions incorporated into this article was fashioned with the interests and needs of its particular audience in mind. (This partly accounts for whatever repetitions may be found in the pages that follow.) One is not likely to be useful if one speaks altogether abstractly, or without regard to circumstances, about practical matters.

Similar considerations may be seen in the fashioning of this article—in the talks which have been used here, in how they have been put together, and in the notes prepared for this occasion. Much of what I say here and elsewhere consists of counsels of moderation addressed especially to intellectuals—among whom can be included, of course, lawyers, judges and teachers of law. Particularly to be reckoned with in recent centuries is that “antitheological pas-
which shapes, perhaps even distorts, the opinions of the typical intellectual. I have anticipated, in my publications heretofore, "a series of inquiries into the divine based upon a recognition of that question which is fundamental to much of philosophy as well as to theology—the question quid sit deus."  


3. Anastaplo, Seven Questions for Professor Jaffa, 10 U. Puget Sound L. Rev. 507, 527 n.30 (1987). Consider Thomas Aquinas, Summa Contra Gentiles ch. 37: "That man's ultimate happiness consists in contemplating God;" id. at ch. 40: "That man's [ultimate] happiness does not consist in the knowledge of God by faith." He had argued in chapter 34 that "man's ultimate happiness does not consist in acts of the moral virtues." Id. at ch. 34. See infra note 84 and accompanying text.

It is useful in considering "Church and State" problems today, to keep in mind the following caution:

"Church and State" . . . is a profoundly misleading rubric. The title triply misleads. It suggests that there is a single church. But in America there are myriad ways in which religious belief is organized. It suggests that there is a single state. But in America there is the federal government, fifty state governments, myriad municipalities, and a division of power among executive, legislative, administrative, and judicial entities, each of whom embodies state power. Worst of all, "Church and State" suggests that there are two distinct bodies set apart from each other in contrast if not in conflict. But everywhere neither churches nor states exist except as they are incorporated in actual individuals. These individuals are believers and unbelievers, citizens and officials. In one aspect of their activities, if they are religious, they usually form churches. In another aspect they form governments. Religious and governmental bodies not only coexist but overlap. The same persons, much of the time, are both believers and wielders of power.


This essay is devoted to what the author considers the fundamental problem of present-day social science. The urgency of the need for an adequate social science today stems from the nature of present-day political problems. No one doubts that these problems are global in scope. The contest that is joined today will certainly be decided, in part at least, by the nature of the convictions that reasonable men, and men of good will, in all lands, can be brought to share. Obviously the view that any opinion as to what is good is equally good, the characteristic tenet of present-day positivism and relativism, cannot supply a frame of reference within which differences can be reasonably composed. But our social science, if it is to be any use, must be addressed to Moslems and Jews as well as to Christians, to Buddhists and Hindus as well as to believers in the Bible; it must, finally, be addressed "not only to those who enjoy the blessings and consolation of revealed religion, but also to those who face the mysteries of human destiny alone."
I. THE TRIALS OF WITCHES AND THE TRIBULATIONS OF WITCH-HUNTERS

When human life lay foul before men’s eyes, crushed to the dust beneath religion’s weight, . . . a man of Greece first dared to raise the eye of mortal against her, first stood ground against her . . . His quick and cunning intellect won him paths to freedom beyond the world’s far-flaming walls. In mind and thought he marched the boundless Whole and then, victorious, taught us what can be and what cannot be . . .

—Lucretius

I propose to consider on this occasion the witch trials which swept Europe centuries ago. I hope thereby to suggest how men and women dedicated to justice under the rule of law should think about standards and evidence in controversial matters, especially when religious doctrines are involved.

What does witchcraft mean? I will say much more about this later—but a personal story may provide a useful introduction to the phenomenon.

I was, for a while during my graduate student days, a taxi cab driver in Chicago. One fine day I picked up a man with his suitcase who had just gotten off the Illinois Central Railroad at its Woodlawn station. He wanted to go somewhere beyond the Loop (the downtown area of the city). I suggested that he should go back into the station, pay the quarter needed for his fare downtown (some seven or eight miles away), and then take a cab from there rather than take a cab all the way from here. This visitor to the city would not listen to my advice: he had evidently been warned about Chicago cab drivers—and he insisted upon having his way. Well, with a heavy heart—for I could tell that this big, blustering man was to mean nothing but trouble—, we began our run down the Outer Drive with the meter ticking frantically away.

It was not long, of course, before he began grousing about the

Id. at 192-93. See infra note 41 and accompanying text.

4. This talk was given at the University of Texas Law School at Austin, Texas as the Fourteenth Annual Will E. Orgain Lecture, April 7, 1981.

The occasions for the other eight talks which follow this one in this article are recorded below. See infra notes 30, 43, 50, 89, 115, 141, 154, and 167.

fare that I was running up on him. He then began threatening me with the police, who would deal with my gouging as soon as we got off this expressway. It did not promise to be a happy day, however lovely the weather outside.

As we were approaching the Loop, still moving along at some forty miles an hour, we hit a patch of highway where there happened to be a film of dirt on the pavement because of some construction work—dirt which, it turned out, had been moistened by an earlier sprinkle which had transformed the pavement into a very slippery surface about which one had absolutely no warning. My cab hit that surface and we veered into a slide, far worse than anything I have ever experienced on the slickest ice. I found it most interesting, since there was really nothing I could do but observe what was happening all around me as I kept a firm hold on the steering wheel and hoped that one of my tires would eventually take hold somewhere. (I had not been in such a spin since my days as an Air Cadet, and those spins had been deliberate, with no traffic in the air nearby.) Our cab continued forward—as it described a 360-degree spin, with automobiles all around us. Somehow or other, I managed to avoid touching anything—and soon I had slid past the slippery patch and could drive on into the Loop without further incident.

I had been so irritated by my abusive passenger that I did not say anything to him either while we were in our spin or immediately thereafter. As soon as we got off the expressway, a couple of miles further down the road, he hurriedly paid his fare and jumped out of the cab—he wanted nothing more to do with me or with the policeman I pointed out to him across the street. It was only afterwards that I realized that my unnatural silence throughout the spin, and my apparent calmness afterwards, must have meant to him that I had deliberately put the cab into its quite spectacular spin in order to intimidate him.

Such a man, with such an experience, would once have been a prime witness for an accusation of witchcraft. I have sometimes wondered how he reported this episode when he returned home from Chicago, an episode (as must have been true with many episodes that formed the basis of sincere witchcraft accusations once upon a time)—a most unusual episode in which chance (as well as nature) played a considerable part in producing the remarkable effort created. I am reminded of what Thomas Aquinas says when he considers the assertion by some that “witchcraft is nothing in the world but an imagining by men who ascribe to spells those
natural effects the causes of which are hidden."\(^6\)

So much, then, for my miraculously-transformed passenger of some twenty-six years ago as we move on to our subject proper.

**ii.**

No doubt, everyone has heard about the witch trials which reached their climax about four centuries ago. No doubt, also, everyone considers them to have been awful. The student has a surprise awaiting him when he investigates this subject in this age of so much historical revisionism. It seems that the witch hunts were every bit as awful as they have long been said to have been. I make observations upon, and ask questions about, the situation as I perceive it to have been. Even if I should be mistaken about precisely what did happen and why, I trust that what I have to say, if only about a hypothetical situation, will be of use to students of the law.

One useful question, which can help us consider our subject, is this one: Would a criminal statute dealing with witchcraft be constitutional today under the First, Fifth and Fourteenth Amendments, with their guarantees with respect to religious freedom and with respect to due process of law?

Evidently hundreds of thousands (some say as many as eight million people) were executed as witches in Europe. The totals are uncertain, but they *are* considerable. The estimates for the numbers executed in England alone during the rule of Parliament, which extended only over a decade or so in the middle of the Seventeenth Century, run from three thousand to thirty thousand. The executions were by burning, except in England (and later in New England) where they were by hanging.\(^7\)

Most of those condemned for witchcraft seem to have been wo-

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6. See T. Aquinas, *Summa Theologica* I, Q. 114, art. 3: "[T]he devil is not the cause of every sin, for not all sins are committed at the devil's instigation, but some are due to free choice and the corruption of the flesh."

St. Thomas himself, it seems, was obliged to take witchcraft seriously. T. Aquinas, *Summa Theologica* I, Q. 117, art. 3, Rep. Obj. 2; II-II, Q. 25, Art. 6, Q. 64, art 2. A few centuries earlier the Roman Catholic Church had tended to regard belief in witches as superstitious, if not even as heretical. See 15 *Catholic Encyclopedia* 675 (1913); 12 *New Catholic Encyclopedia* 978 (1967); 23 *International Encyclopedia of the Social Sciences* 658-59 (1933).

An experienced lawyer said to Hercule Poirot, after he had once again exhibited his remarkable powers as a detective, "Really, Poirot! In the Middle Ages you would certainly have been burnt at the stake. How you can possibly know the things you do!" A. Christie, *Hickory Dickory Death* at 157 (1956). See also Anastaplo, *Human Nature and the First Amendment*, 40 U. Pitt. L. Rev. 661, 729 (1979).

7. See 23 *International Encyclopedia of the Social Sciences* 677 (1933). There were fifteen executions in New England between 1647 and 1692. There were
men, especially old women. Old women, like old men, can be unattractive, disagreeable, quarrelsome and otherwise vulnerable. They may no longer be useful; they can even become burdens to their families and communities. There must have been considerable pathology and intermittent senility around, especially in rural areas. Such derangements could be easily mistaken for the diabolical. And there must have been enough chronic misery to induce some people to want to be witches, to believe they were witches, or to talk as if they had the powers attributed to witches. One suspects that many people were condemned for their intemperate language and for their announced intentions. One can see, for an instructive modern parallel, the 1951 opinions of the majority of the United States Supreme Court in *Dennis v. United States*.

Why were women more apt than men to be charged with witchcraft? Were women more apt to be charged with witchcraft (a special kind of heresy, a heresy of deeds), whereas men (who were much more involved in the outside world) were more apt (if they were “different”) to be charged with doctrinal heresy? Were women more concerned with domestic affairs and with sexuality—with the domestic matters that witchcraft was more apt to be directed to? Some villages, it has been reported, were virtually stripped of their women when witch hunts hit them.

When did all this happen? Not during what are known as the Dark Ages! Rather, the witch hunts began to be serious in the Thirteenth and Fourteenth Centuries, intensified in the Fifteenth Century, reached their climax in the Sixteenth Century, continued into the Seventeenth Century, and tapered off in the Eighteenth Century. (The New England trials, which were quite few in number compared to what happened in Europe, were late in the Seventeenth Century.) Thus, the massive witch trials we have all heard of came during the Renaissance, with Protestants coming to nineteen executions in Salem, Massachusetts in 1692. P. Boyer and S. Nissenbaum, *Salem Possessed: The Social Origins of Witchcraft* 31, 79 (1974).

8. 341 U.S. 494 (1951) (upholding the convictions of the leaders of the American Communist Party for conspiring to advocate the overthrow of the government of the United States). The dubious “clear and present danger” test relied upon in *Dennis* was formulated in *Schenck v. United States*, 249 U.S. 47 (1919). For my discussions of *Schenck* and *Dennis*, see *Anastaplo, The Constitutionalist*, supra note 1, at 824, 826. See also infra notes 27 and 45 and accompanying text.

Even more intemperate language, with even more serious personal consequences for the Haymarket Massacre defendants, may be seen in *Spies et al. v. People*, 122 Ill. 1 (1887).
join Roman Catholics in pursuit of witches.\(^9\)

It seems that witch hunts were more the doings of what we would call intellectuals, especially within the Church, than they were the doings of peasants. (There is here another instructive parallel to the McCarthy Period in the United States.) This should remind us that the more enlightened one is, the more apt one is to be harmful when one goes wrong: the more enlightened—the better trained—are better equipped to do harm. The availability of the printing press may have helped intensify the witch hunts.\(^10\)

How did the witch hunts start? I gather that no one really knows, especially since the Roman Catholic Church tended, before the Thirteenth Century, to regard beliefs in witchcraft as superstitious. An eminent English historian who has written a quite useful essay on the witch trials, sees the intensification of witch hunts as related to the struggles between Roman Catholics and Protestants for control of Europe.\(^11\) I notice, in passing, that there was little, if anything, in the way of witch hunting among the Greek Orthodox: perhaps this is because the Greeks had the Turks, as obvious villains (if not even "devils"), against whom to vent their passions. It may have been somewhat the same among the Russian Orthodox who had an abundance of Jews to exploit as alleged practitioners of nefarious arts.

Why did the witch hunts stop when they did? This question, too, is hard to answer. The development of modern science may have been critical, especially when science began to provide alternative accounts of, and remedies for, the unpleasant things that happen to people in everyday life. Descartes's influence, which took a few generations to take hold (he died in 1650), is said to have been important in helping to bring witch hunts to a halt.\(^12\)

iii.

For our purposes, the most instructive materials for the study of

\(^9\) I understand that similar, though less intensive, pursuits were found among the Muslims, who are also "people of the Book."

\(^10\) On the Enlightenment, see infra Part VIII. One is reminded of what the highly advanced Germans did in the 1930s and 1940s when they went wrong. In Salem, the witch hunters were not the dominant group in the community. See Boyer and Nisenna


\(^12\) See id. at 677. Another possible explanation for the absence of old-fashioned witch hunts in modern times is that our predecessors "got them all!" That is, the "species" was exterminated by the massive witch hunts several centuries ago.
witch trials are the documents of the time, particularly directives for prosecutors and judges and the records of cases.

The most influential manual for witch hunters is said to have been *Malleus Maleficarum* (*The Hammer of Witches*), published in 1487 by two Dominican inquisitors (just a few years before Columbus discovered America). It was tied in to a papal decree of 1484.13 This manual includes “theoretical” accounts of what witches are like and how they fit into the grand order of things. The 1913 *Catholic Encyclopedia* could observe of this book that it made witchcraft a worse crime than heresy and that it exhibited a “notable animus against the female sex.”14 Roman Catholics could find some support for their opinions about witches in the writings of Thomas Aquinas (who died in 1274), a truly enlightened man (who was, for example, far in advance of his time in his attitude toward Jews); Protestants could find support for their opinions in the writings of Jean Bodin, an eminent man of letters. Perhaps the ultimate authority for all that was done in pursuit of witches was the command from *Exodus*, “Thou shalt not suffer a witch to live.”15

Two things about the statements of that time with respect to witchcraft should be noticed here:

1) The arguments and proceedings against witchcraft were highly publicized: they were not regarded as something to be ashamed of; rather, they were something to be proud of. Consider, by way of comparison, the concealment practiced both by the Nazis and by the Stalinists with respect to their excesses. Does an attempt at concealment suggest that one is aware that there is something questionable about what one is doing?

2) Substantial arguments against witch hunts—against taking charges of witchcraft seriously—were made quite early in the day. Responsible and reasonable men had available to them alternative arguments, arguments which reached full development in the skeptical works of John Weyer and Reginald Scot in the Sixteenth Century.16 What skepticism in these matters means can be seen in the

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13. Pope Innocent VIII, in his bull *Summis desiderantes* (Dec. 9, 1484), ratified the powers conferred upon Henry Kramer and James Sprenger as Inquisitors in Northern Germany and elsewhere.
16. *See infra* note 20. Consider how carefully Judge Blackstone dealt with this subject in his *Commentaries on the Laws of England* two centuries later:

[Another] species of offences against God and religion, of which our ancient books are full, is a crime of which one knows not well what account to give. I
works of Shakespeare (who died in 1616). True, he made use of witches in *Macbeth*, but as projections (so to speak) of Macbeth's ambitious and tormented soul. But Shakespeare could also, in one of his history plays, have Glendower boast, "I can call spirits from the vasty deep," to which Hotspur replies, "Why, so can I, or so can any man;/ But will they come when you do call for them?"17

Thus, it can be said that serious students of this subject at that time "should have known better." A belief in witchcraft, and in the necessity of vigorous action against it, was not the only belief of the day; but it was the belief which dominated the tribunals of Europe, and which, through those tribunals, shaped public opinion. It must have been difficult for ordinary people not to believe in witchcraft and in the dangers it posed when they could see witches burned at the stake all around them. This should remind us, at the least, of the power of the law as teacher.

iv.

I should now like to inventory a half dozen questions or problems raised by the witch trials, or by one's effort to understand and assess them. These are points of some relevance to any student of the law today, as he considers the dangerous cases and controversies which come to his attention.

One is obliged, fairly early in one's inquiry about witch trials, to answer, if only tentatively, a fundamental question: *What can be and what cannot be?* There is considerable information alleged and recorded about witches; the problem is to determine what to make of it. In order to do that, one must sort out one's ideas about what the world is truly like.

Some may be familiar with this question in the form of the so-called fact-value problem. One must wonder whether all evidence

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in these matters is bound to be somewhat ambiguous. Perhaps the
effort to assess the data properly brings one to the unbridgeable
gap between Philosophy and Theology, between Reason and Reve-
lation. It may be that chance and one's upbringing, as well as the
temperament one naturally has, will largely determine what one
accepts and rejects with respect to these matters.

In any event, what one's ideas are can largely determine what
one sees. Good judgment is needed if one is to see properly. Con-
sider the difference it makes, in assessing the information coming
out of Russia and China these days, if one has recognized those
regimes as deeply tyrannical. And consider the difference it makes,
in assessing all too much of contemporary "art," if one can recog-
nize beauty and obscenity for what they are.

Various kinds of "supernatural" activities were charged against
witches in the service of the Devil: flying through the air on
broomsticks; causing storms and otherwise affecting the weather;
blighting their neighbors' cattle and children (often from a dis-
tance); assuming other forms and shapes, both animal and human;
going about doing mischief and engaging in hideous orgies (which
included feasting on the corpses of unbaptized infants).

One's determination of whether such things (except perhaps for
the last item) are ever possible for human beings to do (with or
without the aid of the Devil) can very much affect how one regards
the evidence that is recorded and the confessions that were made.
I put aside the effect upon someone who, believing a potent witch is
acting against him, is stricken thereby. This phenomenon may be
related to what we now know as psychosomatic diseases. To be
stricken in such circumstances does not depend, of course, upon
the supposed witch's doing or thinking anything. Thus, until one
is clear about whether such things (as flying through the air on
broomsticks) are possible—indeed, unless one is firm in the convic-
tion that such things simply did not happen (or, at least are highly
unlikely to have happened) as charged, however "witnessed" or
"confessed"—, then one cannot begin to see or understand what
did happen. No doubt, inexplicable things do happen, but they
must be rarely, if at all, the doings of witches.

The article on witchcraft in the 1913 Catholic Encyclopedia con-
cludes with observations that move considerably in the direction I
have argued:

The question of the reality of witchcraft is one upon which it is
not easy to pass a confident judgment. In the face of Holy Scrip-
ture and the teaching of the Fathers and theologians the abstract
possibility of a pact with the Devil and of a diabolical interfer-
ence in human affairs can hardly be denied, but no one can read
the literature of the subject without realizing the awful cruelties
to which this belief led and without being convinced that in 99
cases out of 100 the allegations rest upon nothing better than
pure delusion. The most bewildering circumstance is the fact
that in a large number of witch prosecutions the confessions of
the victims, often involving all kinds of satanic horrors, have
been made spontaneously and apparently without threat or fear
of torture. Also the full admission of guilt seems constantly to
have been confirmed on the scaffold when the poor sufferer had
nothing to gain or lose by the confession. One can only record
the fact as a psychological problem, and point out that the same
tendency seems to manifest itself in other similar cases.\textsuperscript{18}

The first point in my inventory is that it does not really help, if
one is to see these matters properly, to remain "openminded." One
must proceed with a certain assurance as to what can be and what
cannot be: even one case out of a hundred is allowing far too much
for the manifestation of genuine diabolical powers in these matters.
(Is what I have been saying here to be suspected as a "political"
response to an essentially "religious" question?)

\textit{v.}

The second point in my inventory is this query: How useful are
defined judicial procedures in helping a community to determine
what is? That is, to what extent does a respect for due process
contribute to securing justice? Does it tend to put a brake on the
worst excesses?

Such braking could be seen in what is now the Republic of South
Africa for a decade or two after the Second World War. An in-
dependent judiciary has been of some use there in restraining acts
by a repressive government, although it has been overridden or cir-
cumvented in recent years by special legislation directed at alleged
subversion. Similarly, in this country, some of the worst abuses of
Congressional investigations and of loyalty hearings in the 1940s
and 1950s were moderated somewhat by the obligation that offi-
cials had to respect their own procedures.

In the witch trials, too, it seems that well-established proce-
dures—often quite elaborate procedures—were adhered to. But
they may not have done much good. This suggests that due pro-
cess, or procedural regularity and that sort of thing, cannot suffice

\textsuperscript{18} 15 \textit{Catholic Encyclopedia} 677 (1913).
alone, that fundamental opinions about justice and about the nature of things have ultimately also to be brought to bear upon the issue. Indeed, "due process," or the appearance of it, can even make matters worse, whenever it "legitimizes" the awful things that are done.

However all this may be, would there have been a due process problem under the Fifth Amendment? Perhaps not, unless one can establish that what cannot be (certain activities alleged of witches) cannot properly be the basis of any prosecution. Is a kind of "substantive due process"—which is perhaps a fashionable (and undisci-iplined?) way of talking about "natural right" or "natural justice"—invoked when this approach is taken?

Perhaps due-process arguments could also lead one to conclude: (1) that the deeds described (aside from the role of the Devil in them) were usually not serious enough to warrant capital proceed-ings (this, too, sounds like substantive due process), and (2) that these deeds, however serious, were too difficult to prove in a court of law, whether civil or ecclesiastical.

I should note, before proceeding to the next point in my inven-tory, that there would be a problem in the conduct of witch trials under the Fifth Amendment with respect to the right against self-incrimination (and the related problem of torture) and with respect to the right to confront one's accusers.

vi.

The line of inquiry about substantive due process leads us into the next: What did the witch trials assume about the causes of the things that happen every day in the lives of men and women?

Witchcraft did account for many things: disagreeable things do happen to us all the time; and we do sense (and resent) the malevolence of others. Witchcraft was consistent, furthermore, with the view of the world validated by the prevailing religious thought of the time. To invoke witchcraft, in one's efforts to account for what we would call disease or bad luck and accident or just plain mortal-ity, was to help make sense of things. The world of men might otherwise have seemed anarchic and purposeless.

Would there be a First Amendment problem here? We would certainly say that the right to "the free exercise [of religion]," guar-anteed by the First Amendment, precludes prosecution for belief in or advocacy of witchcraft, insofar as that can be considered a relig-iouss belief or practice. But does the First Amendment preclude prosecution for harming others or for attempting to do so? Should
it matter whether one uses thoughts and rituals or sticks and stones to harm another, if one is responsible for truly harmful thoughts and rituals? Of course, there might be a problem of proof as to whether one has indeed been able, by the use of thoughts and rituals, to harm another; but is there a constitutional bar to making an effort so to prove?

Or should we say that permitting the proof of diabolical spells is itself no more than an indirect way of condemning religious doctrines, especially since we believe ourselves to know that spells cannot work in the way witches or witch-hunters believe? How far does the protection of the free exercise of religion extend in these circumstances?

Furthermore, is any attempt to prove the effects of spells all too likely to turn into a condemnation of beliefs in such spells, thereby penalizing people for their religious (or, if you will, irreligious) opinions?

vii.

Let us move now from how we (under our Constitution) should respond to witch trials to how a decent, intelligent and educated man could and should have responded in the Fifteenth, Sixteenth and Seventeenth Centuries to witch hunts.

Certainly, he had to take great care not to be merely quixotic or simply suicidal. I have found this inquiry, which can be stated as follows, to be most troublesome: What could or should one have done in these circumstances if one had been sensible enough to see that a witch hunt in one's province would mean that hundreds, perhaps thousands, of innocent people would be prosecuted, condemned at law and executed?

There must have been desperate men (especially among the clergy) who recognized there was little they could do once the witch hunt began. It seems, among other things, that few were acquitted once they had been accused. This may have been true, for all I know, of other kinds of accusations as well. It may be that many of the abuses of the witch trials were abuses intrinsic to the prevailing criminal-trial practices of the time—for example, a routine recourse to torture—but we tend to associate these practices with witch trials because we happen to be interested only, or primarily, in the witch trials of that period, not in trials for other offenses. Still, with respect to other offenses there must usually have been something more or less concrete (such as the property stolen or the corpses found) to limit the number of accusations; the
misfortunes that could be attributed to witches, on the other hand, must have been considerable, if not infinite. And, as we shall see, to make matters worse, witches almost always had human accomplices, in addition to the help of the Devil.

What form, then, could decent opposition to the witch trials take? The fundamental defense, by the accused or by her advocate, was also the most dangerous: for to deny that witches could ever do the things charged was itself likely to be regarded as heresy. It seems that the accused usually stood little chance of success, except by establishing that the witnesses against her were moved by a "mortal enmity," something that was (for various reasons, as we shall see) quite difficult to establish. A conventional alibi—such as that which an accused thief or accused murderer might offer ("I have witnesses who can testify that I was in another village that day")—was of little if any use: for it was believed that the body of a witch could appear to be in one place while her projection was doing mischief elsewhere.

All this meant that if someone (for any one of a number of reasons) did happen to accuse a woman of witchcraft, there seems to have been little she could do to protect herself; and, often if not even usually, fierce torture was resorted to which compelled the accused to admit to whatever her prosecutor and judges seemed to want to hear or to whatever she had heard that others had confessed to. No doubt, in many instances, the confessions were "volunteered" before torture was undergone, especially by those who figured that they "had had it," and that there was no sense anticipating the agony of their impending execution by even more excruciating tortures. Even so stalwart a character as Joan of Arc (who died in 1431) could announce in advance that she would confess to anything under torture—and then would repudiate it afterwards.

What then could be done on behalf of the accused? No doubt, behind-the-scene efforts were made on behalf of some, with influence and wealth being brought to bear on receptive witnesses and judges, if they could be gotten to in time. But probably the best course of action was to head off a witch hunt before it could start in one's locality. Sensible people would have had to unite at the earliest symptom of the disease, to catch it early. Of course, with some diseases, it may be sensible to let them burn themselves out—but that was a risky course to pursue when a witch hunt threatened at that time. (One does need prudence to distinguish one kind of affliction, or one set of circumstances, from another.)

Perhaps, also, in such circumstances, decent men should have
been prepared to use extralegal means. Perhaps, indeed, some communities fared well precisely because discreet leaders knew what measures to take, whom to get rid of and how—and in such a way that there would be (to this day) no record of its having been done. The measures that are appropriate in such circumstances would surely occur to truly sensible men, especially to men not unduly constrained by conventional spiritual considerations. A piecemeal invocation, so to speak, of the “right of revolution” may be called for in such desperate times.¹⁹

The next point in my inventory is one that brings together aspects of several of the points I have already touched upon. Perhaps the principal reason the witch trials were so hard to deal with was that nature was, in effect, denied by the witch-hunters. Ordinary tests for cause-and-effect connections were suspended, as fear and hate and pain came to dominate proceedings. This made it difficult for judges seriously to search out the truth: standards were subverted, as accusations became virtually conclusive evidence of guilt. It sometimes seems to have been assumed that one’s children or cattle or crops could not fare poorly but for the intervention of demonic powers.

My reference to nature raises here the question of whether one is obliged, ultimately, to oppose witch trials not merely by denying that witches simply cannot do what is alleged of them but also by questioning whether the supernatural ever manifests itself in any form in the affairs of men. Certainly, such questioning seems to have been one result of the witch-hunting craze: questions have come to be raised in modern times about the reliability even of the Biblical revelation in the light of which these lethal doctrines and practises with respect to witchcraft flourished. This questioning seems to have been one major effect of the modern scientific development.

Yet, one might wonder (even as one is relieved to see a general belief in witchcraft moderated), is it prudent to undermine among a people a general respect for the supernatural? One might even be led to wonder whether the religious life of the community should not be under ultimate political control? That is, is religion, when it is sovereign, more apt than a sovereign politics to go wild? Is there

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a danger for the community when religion is substantially independent, when it can, in effect, direct or use temporal power? Religion can, in such circumstances, all too often become either highly destructive and, in time (if only by reaction), highly vulnerable. Politics is more apt to be rooted in the common good of this world, whereas religion is more apt to be otherworldly and, hence, oblivious of immediate consequences. Are such considerations improper for a political order to take account of wherever something like the First Amendment governs? Or is it only when the principles of the First Amendment govern that religion can be kept in its proper realm, for the good both of the general welfare and of eternal happiness?

Various features of any kind of trial should, no matter what the particular offenses are, put an alert community “on notice.” Some of these suspect features, which we have already touched upon, were all too evident in the witch trials.

The more prosecutions there were, the worse matters became. It was as if a doctor should make an epidemic steadily worse because of his efforts. This making-matters-worse was partly because of the ready recourse to torture. Among the secrets the accused would have, eventually, to disclose were the names of others engaged with her in nefarious practices—and those people, upon being tortured, would in turn name still more who were addicted to terrible sexual and cannibalistic indulgences. One suspects that the gravity of the actions confessed to were somewhat proportionate to the intensity of the tortures threatened or resorted to—and those tortures could, by all accounts, be terrible.

Thus, a witch hunt could easily mushroom to engulf an entire community: a self-sustaining chain reaction could easily be set in motion by an inquisitor determined to root out the vile infection. This, then, is one suspect feature of these prosecutions, a feature which should have put sensible people on notice that something was probably wrong with the investigations and trials themselves.

It should also have been evident to sensible people that crazy things came to be said and to be believed on all sides. (No doubt, some of the confessions were “sincere”—if any pathological statement can be so regarded.) That is to say, common sense should permit and compel us to recognize madness as madness.20

It should also have been evident that "rationalizations" (I am using the term loosely) were employed to forestall any repudiation of what was alleged or shown. Thus, it was believed that the Devil promised long life and prosperity to witches. Yet it was obvious that most witches were quite poor. Why? Because, it could be explained, if they were given wealth by the Devil, they would be exposed as in his service. Besides, the Devil liked to show with how little he could get them. Also in need of explanation was why the prosecutors and judges were not themselves destroyed by the witches: it had to be argued that once witches came within the power of the authorities, they lost their own power (and Biblical verses could be drawn upon to that effect). Certainly, it was evident that no witch exercised supernatural powers once in the hands of the authorities! We can appreciate—and we must wonder why they did not appreciate—that this obvious fact admitted of more than one explanation. Consider, also, the need to keep most witnesses against witches anonymous: for if the witch knew who witnessed against her, she or her colleagues might take measures against them. Of course, such anonymity made it difficult to prove the "mortal enmity" of the witnesses against one. One could be asked, "Do you know of anyone who has a mortal enmity against you?" If one guessed wrong, one was really in trouble. But even if one guessed right—that is, if one mentioned someone known to the judge as a witness against one—there was still the problem of determining whether the enmity was mortal and otherwise unjustified. After all, it was pointed out, it was only natural that witches who harmed one should be disliked.

And so rationalizations were developed, making it difficult to break out of the system. We are familiar with the notion of "rationalization" from Freudian theory. And we are familiar with it in practice, when we listen to Freudians or Marxists justifying their systems or discrediting those who would raise objections to them. Law students who need to be reminded of how modern jurists can also go wrong in this respect need only study Justice Harlan's absurd 1961 opinion in Scales v. United States.
It should also have been evident to sensible people that advocates in witch trials were intimidated into fairly restrained defenses, lest they become victims themselves. Certain kinds of attacks upon the very possibility of witchcraft were, as I have said, themselves regarded as heretical.

In short, it should have been evident that it was virtually impossible to test what was being alleged in a trial for witchcraft. It should have been asked, as conscientious lawyers and judges should continue to ask whenever passions run high, "If all that is alleged is not true, how would we know?" Would a miracle have been required in most cases? The curious thing is that in trials for witchcraft (or for heresy, generally) the gravity of the danger led judges to be less observant of legal proprieties and less responsive to common-sense considerations than they would ordinarily have been, whereas (we can now see) the obvious dubiousness of such ventures should have made judges much more scrupulous than usual. Thus, in Malleus Maleficarum, it is urged that witch trials should be conducted "without the legal quibbles and contentions which are introduced in other cases."24

Do not these considerations, relating to the features of witch trials that should have put an alert community "on notice," point up the need for the proper education of judges and, hence, of lawyers?

x.

I conclude my inventory of problems with a seemingly naive yet all-important question: Who was harmed most of all by the witch hunts?

The absurdity of the things believed and the awfulness of the things done (by way of prosecution, torture and execution) should prompt one to wonder who the true victims were.

Not the old women, it could be argued: most of them must have been near the end of what must have become, in most cases, miserable lives; their torment ended fairly quickly. Furthermore, the condemned, if they remained firm in their faith and in their recognition of what had happened to them, suffered only in their bodies, not in their souls, no matter what they had been obliged to confess to (except, perhaps, for naming other innocent people).

But consider the plight of the community at large, and especially of the better people who prosecuted and who countenanced the

prosecutions (including the members of learned law and theological faculties who should have known better but who nevertheless "went along"). I am reminded of the trial judge, the United States Attorney's office, the Attorney General of the United States, the Solicitor General's office and the appellate judges in the Rosenberg case between 1950 and 1953. Consider what it means to have believed the things believed and to have done or acquiesced in the things done in the course of the typical witch trial. One illustration should suffice here. It is asked, in Malleus Maleficarum, "whether the method employed by some to capture a witch is lawful, namely, that she should be lifted from the ground by the officers, and carried out in a basket or on a plank of wood so that she cannot touch the ground." This method is defended. Among the reasons given is the following:

[W]e know from experience and the confessions of witches that when they are taken in this manner they more often lose the power of keeping silence under examination: indeed many who have been about to be burned have asked that they might be allowed at least to touch the ground with one foot; and when this has been denied them and they have been asked why they made such a request, they have answered that if they had touched the ground they would have liberated themselves, striking many other people dead with lightning.

One moves toward a comic, rather than an apocalyptic, view of the universe when one encounters such nonsense as this. It is remarkable enough that such things should be said by the alleged witches: perhaps this was but another instance among some of them of a delusion of power, or perhaps this was a way of frightening and hence striking out at their persecutors one last time. There must have been an unholy thrill in making such a claim as this. Even more remarkable, however, is that prosecutors and judges should have accepted this kind of thing at face value. This suggests a prevalent hysteria, if not even madness. It shows how bad off some of these people were, on both sides of the controversy.

One can see here the ugliness promoted, ratified and intensified by the witch hunts: hate and fear (if not also a kind of blood lust) had become legitimated and multiplied, rooted in a terrible view of what makes the world run, and of the evils in it. People were en-

26. Malleus Maleficarum, supra note 21, at 215. See also id. at 229.
couraged to believe in malignity, rather than in ignorance, chance, mortality, negligence or greed, as the cause of their troubles. Badly troubled people came to be taken seriously on their own (sometimes mad) terms. No doubt, the troubled can be troublesome; but to allow oneself to be infected by their fantasies and passions is hardly the mark of a sensible man. In this sense, then, the respectable and talented men who zealously rooted out witches were the most serious victims of the witch hunts, victimizing in turn the communities entrusted to their charge.

Of course, it will be said, many of these prosecutors and judges were not really troubled: many of them must have eaten well and slept soundly. But perhaps it is even worse not to be troubled by such misconduct. Not even to be aware of how mistaken one is in thought and deed only shows how bad off one truly is, how far one is from purgation and cure. The men we are talking about—men who occupied the positions in their communities much like the positions occupied today by graduates of the better law schools—were the kind of people who lived the lives of people who believed, or at least accepted and acted upon, the silly and awful things they did about witches. Is not such ignorance, such contentment in the face of injustice and cruelty of one’s own making, the worst possible condition for the gifted human being? It is this that one should be particularly careful to avoid: this is the pitfall of the talented and well-placed and successful, not the prospect of being victimized by unjust accusations. But lest we look down upon those people, we should remind ourselves of what the United States Supreme Court could be permitted to say in 1951, and for a decade thereafter, about “the clear and present danger” perceived to this country from the American Communist Party. Even so, it should at once be added, the witch-hunters were far worse, so much so that men have naturally reacted against them and all (good as well as bad) that they stood for. This reaction may be seen in, among other places, Mark Twain’s A Connecticut Yankee in King Arthur’s Court. But, it should at once be added, the grim conclusion of Mark Twain’s novel testifies to the fact that he was artist enough to sense the dangers of his (and hence our?) way also.

It is tempting to try to bring all this immediately to bear upon

27. See G. ANASTAPLO, THE CONSTITUTIONALIST, supra note 1, at 812 (discussions of the “clear and present danger” test). See also supra note 8.
our own affairs. This, if it is to be done at all now, must be done briefly. Besides, I have already indicated parallels here and there.

Certainly, one can apply to one's own time whatever one learns from the witch hunts about what irrationality can mean and how serious inquiry can be foreclosed by one's unexamined (perhaps unexaminable) assumptions, passions and procedures. Various of the considerations to which we have referred are of vital importance to the legal profession. Not the least important is the last consideration touched upon: it is hardly a happy prospect that many young lawyers face, that they can be quite "successful" (or, at least, can be generously compensated and widely respected) without making a genuine contribution to the cause of justice, that cause which makes their profession meaningful.

Are there, comparable to what prevailed in witch-hunting times, large-scale and self-defeating irrationalities at this time? A few candidates can be mentioned, with one or two of them perhaps even worse than the witch hunts themselves ever were.

There are (among the large-scale and self-defeating irrationalities of our time) the following:

1) the various massive and sustained massacres of the Twentieth Century;

2) the determined preparedness for recourse (in self-defense) to all-out nuclear war, which would dwarf in its deadly effects all the massacres we have seen thus far;

3) the psychic conditioning and demagogic appeals which make it difficult, if not impossible, to relieve our people of the tens of millions of unnecessary guns that repeatedly disturb our domestic tranquility;

4) the virtually uninhibited biological research that we permit, research justified by our war on disease and death—but research which threatens the very survival of human life on this planet.

Will not these, and similar, activities and attitudes seem strange, even incomprehensible, to generations centuries hence? An observation (perhaps the last thing written) by one of my teachers at the University of Chicago Law School, Malcolm P. Sharp, suggests how we should look at ourselves with respect to a couple of the matters I have just listed:

The Cuban missile crisis and the Vietnam war are episodes which test our understanding. It appears that by some significant ethical tests our policy in Cuba, leading to a deliberate decision to take a "30 to 50 percent," that is 50 percent, chance of thermonuclear war, was more destructive than our policy in Viet-
nam. [Our Viet nam policy] . . . was designed primarily with whatever degree of misjudgment to lessen the long-run chances of thermonuclear war.

Our Cuban policy [on the other hand] has among other things tended to create an approved precedent, and thus it may become a permanent danger. It is a danger which is worth continual reflection and frequent reexamination. We are choosing, at best, to lessen the chances of growth in Russian power by taking the existing chances of destroying mammalian life, or human life in the northern hemisphere, or the society of the United States, or our contemporary civilization. 28

xii.

We should not close this preliminary inquiry into the trials of witches without asking how we account for terrible things all around us. It can be argued that the witch-hunters did have hold of something. How is the existence of evil to be understood? Did they not see considerable misery, violence and evident malignity in the world which had to be accounted for somehow? Both God and the Devil can be said to care very much about mankind: it is not a meaningless world. A belief in witchcraft, then, could be reassuring as well as threatening—reassuring in that the world makes sense, especially if God is considered on the side of the witch-hunters. One has the sense that one can do something, that one need only act with resolution against the devious and the diabolical.

Meaningfulness, as a practical matter, may presuppose not only caring but also prejudice. We can root out prejudice and superstition, but perhaps only at the cost of meaningfulness—which may depend, in part, at least for most people, upon illusions. And as we do the rooting out we are equipped to do, partly with the help of modern science, do we deny the reality of evil? And to this extent, may we not be more naive, and perhaps even more dangerous (and more likely to induce and support large scale, even mindless, violence) than were the witch-hunters of the Fifteenth, Sixteenth and Seventeenth Centuries?

Consider the implications of the publicity given from time to time to those among us who parade themselves as witches. Is there

not something dubious about such blatant conduct, even when it is
put in terms of a reaffirmation of nature-worship? Is there not here
a certain presumptuousness, an affront to public sensibilities? Is
there not something unhealthy about such exhibitionism? Things
have somehow gone wrong when a community is not robust
enough, or confident enough, to discourage such occasional public
spectacles. But, of course, such eccentricities are not our principal
concern, but rather the acceptance of the notion that there is some-
thing worthy of respect and admiration in Faustian pacts with the
Devil. Consider how Faust—not Marlowe’s miserable Faust but
Goethe’s heroic Faust—has become a model for moderns. Does
such countenancing of collaboration with sophisticated Satanic
powers suggest that it has become fashionable to believe that there
are no enduring standards by which to judge the deeds, to say
nothing of the words, of others? Does it even deny that there re-
ally are any evil things in the world?

But, thoughtful descendants of the witch-hunters might insist,
there are evil things all around us. Indeed, the most beautiful, or
innocent-looking, people can conceal unsuspected passions of great
destructive force. Cardinal Newman could argue, a century ago,
that the world and man’s condition in it are such that “the human
race [must be] implicated in some terrible aboriginal calamity.”

How do we account for the terrible things of our time? Do we
tend to ignore them? To speak, as men once did, of the Devil was,
at least, to face up to the fact of evil—and perhaps to try to do
something about it.

Still, we have seen that there are better and worse ways of trying.
It could be argued, from the point of view of the most thoughtful
Believer, that the Devil was truly involved in the witch hunts, in
that he induced Christian authorities to proceed as they did, know-
ing that this would eventually help lead to a general repudiation of
revealed religion, if only because people’s sense of natural justice
and a concern for the common good would eventually assert them-
selves. The Devil can be understood to have used the witch-
hunters to subvert respect in the West for religion and the good
that can come from it.

founded on, and have their life in, some truth or other . . . Id. at 197. For the wicked-
ness which mankind is capable at least of imagining, see Russell and Wyndham, Witch-
craft and the Demonization of Heresy, 2 Mediaevalia 1 (1976).
To argue thus is to recognize the Devil to be far subtler than the typical inquisitor suspected. Something of the Devil's legendary subtlety may even be discerned in the rationalizations devised by those who were determined to destroy virtually anyone who happened to be suspected either of particular acts of witchcraft or of a general disbelief in witchcraft.

We, too, must be wary of the Satanic, lest we succumb to whatever fear-ridden rage for persecution that happens to rise among us in the decades ahead and lest we cynically repudiate altogether the religious and patriotic sentiments which such persecution can invoke. Perhaps the modern notion that things, even the most terrible things, just happen without rhyme or reason is indeed the Devil's doing—and is vigilantly to be guarded against.

Thus, both the deadly self-righteousness of the witch-hunting centuries and the determined moral relativism (if not thoughtless nihilism) of our own century must be opposed by men of good will and of common sense if the truly diabolical is not to have its way among men.

Permit me to close this talk on a happier note. We celebrate this year [1981] Mozart's 225th birthday—which means he was born (in 1756) just about the time Europe endured its last witch trials. I was reminded of this (provocatively reminded of this, some would say) when I heard on the radio, as I was finishing this talk, a piece that Mozart wrote when he was only eight years old. This helps one understand why a distinguished Viennese conductor can say, "Some of the composers, Beethoven maybe, sometimes reach heaven; but Mozart came from there."

Should not the "Mozart phenomenon" challenge us to try to understand the marvels-filled world we somehow find ourselves in, even as it reminds us that there are divine as well as diabolical things among us which may be difficult, if not impossible, fully to comprehend?

II. THE BEGINNINGS OF AN ARGUMENT

[T]he United States Government must not undertake to run the churches. When an individual in a church or out of it becomes
dangerous to the public interest he must be checked, but the chur-
ches as such must take care of themselves. It will not do for
the United States to appoint trustees, supervisors, or other agents
for the churches. I add if the military have military need of the
church building, let them keep it; otherwise let them get out of it,
and leave it and its owners alone except for causes that justify the
arrest of any one.

—Abraham Lincoln\textsuperscript{31}

\textit{i.}

1.

There is a sense in which all Americans—believers, agnostics,
and atheists alike—are Jews and Christians. Much of what we are,
of what we believe and aspire for, has been shaped by creeds and
institutions rooted in the Old and New Testaments. For many citi-
zens, the question is not whether we shall act as Christians and
Jews, but, instead, the appropriate form and degree of cooperation
between religion and the political order.

2.

We address ourselves here to one aspect of this problem, that
aspect which is reflected in, but not limited to, the current concern
about the proposal that direct financial aid be extended by the Fed-
eral Government to sectarian schools.

The cooperation of Church and State with respect to education
has a long history. In fact, in many periods, even in this country,
education was primarily if not exclusively the concern of religious
institutions. This has not been an accidental connection: it has
always been one of the objectives, if not the primary aim, of popu-
lar education that it should insure and elevate the moral capacities
of a people.

The state—that is, we the people in our collective political ca-
pacity—should have a critical interest in the ethical training and
civic virtue of the citizen body. Not only does the state depend
upon a vital sense of morality and of patriotism for its survival and
prosperity, but the state also has as one of its principal purposes
the furthering of morality: it is intended to make men better than
they would be outside civil society.

\textsuperscript{31} The Collected Works of Abraham Lincoln 223 (R. Basler ed. 1953). See
also id. at 85-86, 178-80, 247, 339; Anastaplo, Abraham Lincoln’s Emancipation Procla-
mation, in Constitutional Government in America 421 (R. Collins ed. 1980) (on
the military’s taking what they “have military need of”).
Alexander Meiklejohn opened a thoughtful discussion of our subject more than a decade ago with these questions:

The basic question underlying all controversies concerning educational cooperation between church and state is this: Have these two institutions any community of purpose? It is, of course, obvious that they have a sharp diversity of purposes. In Jefferson's words, there is a "wall of separation" between them. But how high and wide and thick is that wall? Are there any gates in it? Or is the barrier so impregnable that every form of cooperation for a common purpose is negated and forbidden by the Federal Constitution?\(^{32}\)

Mr. Meiklejohn goes on to say,

Our legislatures are directed by the Constitution, not to be hostile to our varied attempts at spiritual understanding, not to be indifferent to them, but to be impartial in recognition of them, in dealings with them. Are they also directed to have nothing to do with them? That is the inquiry with which this argument is concerned.\(^{33}\)

The catalogue of issues to which I now turn is intended as an exploration of "this argument." I attempt, in accordance with the mandate given me, to be "objective" in outlining for your discussion the contending positions that confront us.

\textit{ii.}

1.

What is it that makes men good? I am not speaking of some men, or of a few men, but of the ordinary citizen in our community. It cannot be his understanding of temperance or of justice or of courage: an understanding of the advantages of the good life requires not only a degree of training but perhaps also a level of intelligence that may be beyond him. He cannot, strictly speaking, know what is good; he must be encouraged to believe those things to be good which others have learned to be good and which others persuade him to be so. This, it has long been thought, is what religion and only religion can do for most men generation after generation.

The classic American restatement of this proposition is set forth in President Washington's 1796 Farewell Address:

\[^{32}\text{Meiklejohn, \textit{Educational Cooperation Between Church and State}, 14 \textit{Law and Contemp. Probs.} 61 (1949).}\]
\[^{33}\text{See id. at 63.}\]
Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.  

Was Washington correct in his appraisal of the role of religion in the moral training of a people?

If our answer to this question is in the negative, then several difficult problems are simplified: the state may not need to concern itself with religion any more than with various leisure-time activities of its citizens; it need do no more than make certain that the public peace is preserved, that human life is not put in jeopardy, and that the relevant laws and regulations (relating to fraud, contracts, zoning, etc.) are enforced. Perhaps, even, the state might reconsider the tax privileges and other immunities traditionally extended to religious activities and organizations.

This, then, is one issue: how important is religion in the affairs of the community? At one extreme we have the contention with the implications I have just sketched, that the state does not need religion, that it can fulfill its purpose as well—some might even say, much better—without religion. At the other extreme, there is the position that religion is not only vital to, but even (some might say) the most important influence in the state and for human life: not only would moral training be less effective for most citizens without the aid of religion, but (even more important) the souls of citizens would be otherwise unprovided for through eternity.

Some of the proponents of the two extreme positions have one political principle in common: the modern state should leave religion strictly alone, either because the state does not need religion and should not expose itself to the quarrels and meddling of sects,
or because religion is too important to be subject to the management or influence of a temporal power which religion does not control.

2.

We leave unresolved our first issue and simply proceed, if only to advance our analysis, on the assumption that Washington was correct. Further questions confront the citizen. Can religion thrive in a community in which it is divorced from education? What support does religion need, aside from the typical fleeting Sabbath-day exposure and whatever influence parents are equipped to exert upon their children? Or, more precisely for our immediate concern, what does religion need in the way of educational institutions in an age of scepticism?

Some sects have a clear, or at least definite answer, to this question. There is, for example, the description by Justice Robert H. Jackson of the position of the Roman Catholic Church:

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. . . . Catholic education is the rock on which the whole structure rests . . . .

Is this an accurate interpretation of the Roman Catholic position? Does it not tend to overlook the circumstances in which the Church was moved to establish the not-so-venerable institution of its parochial school system in this country? Are there circumstances in which the Church and other sects with schools of their own might reasonably be expected to rely again upon public school systems or to devise means of sharing with public schools the responsibility for students.

3.

The circumstances which no doubt influence the Roman Catholic are suggested by another passage in the opinion of Justice Jackson:

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and

35. Everson v. Board of Education, 330 U.S. 1, 24 (1947) (Jackson, J., dissenting). See infra note 124 and accompanying text. For still another opinion as to "the rock on which the whole structure rests," see Matthew 16:18.
scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premises that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.\footnote{Everson, supra note 35, at 23. Critical to developments since this talk was given in 1961 is that various Protestant fundamentalist sects are now making the sort of complaints against the public school system that Roman Catholics once made.}

To what extent is there an implicit allegiance to “mainline” Protestantism still built into the public school systems of this country? And is any such allegiance good or bad? The answers one makes to these questions affect, although perhaps not conclusively, the attitude to be taken toward the insistence of certain sects upon maintaining separate school systems: it may be for these sects not a question of increasing their influence but rather that of simple survival. One must concede that there are grounds for a legitimate fear that a public school system is not truly neutral among sects but is, instead, inevitably disposed toward a set of unexamined assumptions, of a more or less Protestant cast, about the relation of man to both God and society. (Is the assumption of the importance of state neutrality in these matters itself more or less Protestant in character?)

But, the public school administrator might ask, what alternative do he and his colleagues have? Must not a public system conform to the general inclinations of the electorate? Is this nominal neutrality a necessary condition for public school education in a community which has long had, and will long continue to have, considerable diversity in its religious allegiances?

4.

The next issue is related to those we have just considered and bears on the support, or at least acquiescence, to be given sects that embark upon separate school systems.

Should we permit such systems to exist? Are they divisive? Or do they produce a healthy diversity in an age of conformity? Do separate school systems result in a citizen body that is fragmented and unable to communicate, one part with another? Or do they insure that among our many school systems, there will be some of
excellence, particularly as an effort is made to build upon the strengths, contributions and standards of various sects?

The current answer is, of course, that such school systems must be permitted to exist—but even though this question seems closed for the moment, the asking of it (and the answer given to it) can illuminate the position we take on other issues. For our answer may range from the most reluctant acquiescence to an enthusiastic encouragement—and our reasons affect our general attitude about what these school systems should expect of the state.

5.

What should these separate school systems expect of the state? And, in particular, what are they entitled to in the form of financial aid?

Obviously, there is some financial support already given by the state, even though indirectly: tax exemptions are permitted; such expenditures as those for school lunches and innoculations seem to be generally uncontested. But should there be anything more? And, to turn to current concerns, should there be direct payments by the state (in this case, the Federal Government) to sectarian schools or to students of such schools in order to help those schools maintain or improve their facilities and instruction? Two broad problems present themselves: Is such aid good for the state? Is it good for religion?

Is it good for religion? (Some maintain that it is illegitimate for an American legislature even to consider this problem.) No doubt particular religious groups would benefit, if only because they would be relieved to some extent of heavy financial burdens. Their educational activities might even expand. No doubt, also, other sects would have additional incentive to establish schools of their own. I assume, that is, that all sects would be free to establish school systems of their own with the expectation of government subsidies, subject to compliance with specified educational standards. It is probable that the proportion of American children in the schools of one sect or another would increase. And it is likely, once the precedent of government subsidies had been established, that the Federal Government would be asked to bear more and more of the cost of operating such schools.

Is religion in America strengthened by cooperation of this nature between church and state? Or is religion made more vulnerable if the state can exercise increased control over its activities? Would political control be likely to follow?
Perhaps these questions can be rephrased in terms sanctified by the First Amendment to the Constitution: Can government support be extended to sectarian schools without prohibiting to any citizen the free exercise of religion? We turn now to the companion problem.

6.

Is such aid good for the state? Is it good for the state that religious sects be stronger—and are these sects stronger if their educational activities are subsidized? Or is there a source of unhealthy dissension in the struggle among sects for their fair share of the money to be allocated to each of them? Can money be given in such a way as not to permit improper discrimination among sects? Can it be given in such a way, that is, as not to permit officials of the state to make unjustified distinctions among sects?

On the other hand, should public funds be distributed without any regard for the religious teachings of the sects receiving support, without any official concern about how particular religious teachings affect the civic virtue of citizens or the happiness and health of individuals? Would public opinion adequately police the sectarian schools in this respect? That is, would the problem be essentially the same as it is when any sect completely finances its educational activities?

Whether the extension of public support to sectarian schools is good for the state raises the question of just how good the public school system is for our country. Are we prepared to risk an eventual reduction, if not virtual extinction, of the public school system as more and more private groups (religious or secular), either because of the opportunity or simply in self-defense, establish or expand school systems of their own? To address oneself adequately to this question, one must consider the place of the public school in a modern liberal democracy, especially in a country with the many elements that we have which make for discord and even disunion.

7.

American education has been, traditionally, the concern primarily of local governments. This tradition has been severely tried by the application of a national policy against racial segregation of school children. Another challenge may be seen in the emerging national policy for the raising of academic standards throughout the country, a policy which is reflected in the proposed program of Federal financial aid to our schools.
Implicit in some of the issues I have listed is the fear of governmental control over religious activities and, to the extent that Federal aid is extended to both our public and our sectarian schools, the fear we have lest local self-government be subverted. Indeed, this question of the significance of local self-government may someday be recognized as the most critical issue raised by the Federal-aid proposal.

It is for this reason that some have suggested indirect financial support of the schools by means of an income-tax exemption rather than outright Federal grants. A tax exemption (or credit for local taxes devoted to education) would mean that more money would be left with the taxpayer, money which would be available for local authorities to draw upon or for the citizen to contribute to the sectarian school of his choice. Although such a plan does not result in the subsidy of the public school systems of the poorer States by the richer States, which is one feature of the direct Federal-aid proposal, it does address itself to the problem of Federal control over education and religion. The intended effect of such proposals is to leave on the local level the problems we have touched upon.

One is reminded, as one considers the implications of Federal involvement with our schools, of the remarkably smooth administration of the "G. I. Bill" educational-benefits program for veterans of the Second World War: there does not appear to have been any significant interference by the Federal government with the academic freedom or the authority of universities and colleges. (It should be noticed, by the way, that although the schools participating included church-related schools, to say nothing of the fact that veterans were able to use the benefits to secure religious education, no serious question seems to have been raised about the propriety of this allocation of public funds. An appropriate rationale was agreed upon, forestalling the development of the kind of controversy that some anticipate from any attempt to allocate public funds to parochial schools.) One is reminded also of the National Defense Education Act, with its "loyalty oath" provision for college-scholarship recipients: this indicates one form that undesirable federal government interference can take when funds are disbursed.37

Of course, local governments can also be repressive. But their effects do tend to be local. An adequate discussion of our subject would have to include a review of the virtues as well as the vices of

American local self-government.38

8.

Still another issue can be framed in immediate political terms, even as one keeps in mind the broader considerations that have been sketched. What is to be done in the decade ahead about the sectarian schools we already have?

These schools, especially in the poorer parts of our large cities, carry an ever-increasing share of the burden of education that would otherwise have to be borne by the State. Whatever one might decide about or desire as the fate of such schools—that is, whether they should be encouraged to expand or put in the course of ultimate extinction, to mention the extremes—, one must consider the operations of these schools at this time.

The sectarian points out that he and his co-religionists are providing a service for the community, a service for which the community should pay something. On the other hand, it is said, those who provide and pay for the service do have alternatives—that is, they can send their children to public schools. But, we hear the rejoinder, the public schools would not be able to handle immediately such an increase.

Does the request of the sectarian—or, rather, the request of some sectarians (for not all partisans of sectarian schools are unanimous about this)—amount to a suggestion that the state (Federal or local) begin to subsidize and, in principle, eventually finance and control completely the educational, or non-religious, aspect of sectarian school systems? Opponents would protest that it is precisely because the sectarians refuse to make a distinction between the non-religious and the religious aspects of education that such schools were established in the first place: to subsidize a sectarian school system, in any degree, would be to subsidize religion to that extent. To this the defense might be made that such support would apply to all religions, that none would be favored, and that the state would simply be benefitted by such strengthening of both religion and education. In short, do we, as citizens, derive from these religious schools (to say nothing of religion itself) a benefit that we want—and for which we should, in justice, pay?

We must assume, in any event, the continuance of sectarian schools during the generation ahead, with or without Federal aid. That is, it does not seem politically feasible for the state either to

38. See G. Anastaplo, The Constitutionalist, supra note 1, ch. VII. See also infra notes 47 and accompanying text; infra note 127.
"purchase" or replace such schools immediately or to insist upon academic standards that would result in a drastic decrease in their size. We must also assume that the cost of providing an adequate education, especially as expenditures for teachers' salaries and for science and other equipment mount, will continue to increase. Can we afford to permit the sectarian schools (or, for that matter, the schools of very poor States) to operate at an increasingly inadequate level? The graduates those schools produce will make up a significant portion of the citizen body of the next generation. If education is essential to good citizenship, what can we do to avoid the effects of an inadequate education? That is, must we subsidize these schools not because of any concern about their survival but because of concern for our own?

9.

I have left for the end of this survey of issues my observations about the constitutional status of the current controversy. This is due, in part, to my belief that the constitutional issues are secondary here, at least with respect to the question of an allocation of Federal funds to sectarian schools.

The State constitutions generally prohibit financial payments to any sectarian schools. The Illinois Constitution is typical in this respect:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.39

It is partly because of the broad prohibition laid down in State constitutions and partly because of the much larger resources available to the Federal Government, that Congress is looked to for aid in this matter. The pronouncement on the relations of church and state in the Federal Constitution seems to some to be ambiguous: it is certain that an "establishment of religion" cannot be the object of Federal legislation—but there remains the problem

39. This provision, which was Section 3 of Article VIII of the 1870 Illinois Constitution, is retained unchanged as Section 3 of Article X of the 1970 Illinois Constitution. Ill. Const. art X, § 3.
whether a non-partisan allocation of Federal funds to sectarian schools constitutes such an "establishment."

The considerations we have raised here may seem relevant more for the legislator than for the judge. The question of Federal aid to sectarian schools, if it should ever come to be litigated while the Supreme Court's present view of what "no-establishment" means prevails, will probably come down to the resolution of a question of "fact": are funds allocated to sectarian schools given primarily, if not exclusively, to maintain the nonreligious part of the curriculum? Or, to put it another way, can a reasonable distinction be made (no matter what some sectarians themselves believe to the contrary) between the religious and the non-religious aspects of the operations of these sectarian schools? I have raised the further question whether such a distinction should be insisted upon as a prerequisite for the allocation of Federal funds in these circumstances.

Much more important and difficult than the resolution of any constitutional questions that are likely to be litigated, however, is the development of a general understanding of the relation between church and state appropriate for a people of our traditions, prejudices and aspirations.

iii.

1.

The problem we have begun to explore—whether Federal financial support should be extended to sectarian schools—suggests far-reaching questions about both religion and education that can only be touched upon here.

Are all religions really foreign to the modern spirit and doomed to a steady decline of influence? Would governmental cooperation with sectarian schools conceal and perhaps temporarily postpone an inevitable repudiation of religion which we should recognize and for which we should prepare ourselves?

Or will only the complacent and less aggressive sects be repudiated? Are the Roman Catholics, for instance, likely to benefit from the remarkable sacrifices they make to maintain their sectarian schools? That is, are they, because of their enterprise, the sect most likely to prosper and, hence, to dominate the civic and moral life of the country in the century ahead? What should be the attitude of the public at large, as well as of the government, toward this possibility?

A turning point is about to be reached in relations among reli-
gious organizations in America. (This is anticipated in the fact that a Roman Catholic can be elected to the Presidency.) As a result, we have in the decade ahead an opportunity that our descendants are not likely to have: we can establish a permanent settlement of the fundamental political issues bearing upon Church and State relations. The rationale of such a settlement would have to be so evidently just and reasonable that it can earn the sustained approval of all intelligent citizens of good will. This is the occasion for the citizen to rise above the apparent interests of his sect. Otherwise, we will secure merely a temporary truce ratifying the triumph of one faction over another and leave for succeeding generations a legacy of opportunism, strife and bitterness.

2.

There are among us many sects, each with its peculiar claim to preeminence. Must not the political order, as political order, regard our problem from a secular perspective? Must not the political order ask—must not we ask—what is best for our country at this time, however much we as private persons might prefer to ask, "Which faith is the true one?"

An essentially political appreciation of religion is revealed in a commentary by Winston Churchill upon the miracles encountered by the Israelites as they moved under the inspired leadership of Moses from Egypt to the Promised Land:

Everyone knows that the pollution of rivers, the flies, frogs, lice, sandstorms, and pestilence among men and cattle, are the well-known afflictions of the East. The most sceptical person can readily believe that they occurred with exceptional frequency at this juncture. The strong north wind which is said to have blown back the waters of the Red Sea may well have been assisted by a seismic and volcanic disturbance. Geologists tell us that the same fault in the earth's structure which cleft the depression of the Dead Sea in Palestine runs unbroken to the Rift Valley in what we now call the Kenya province of East Africa. The Sinai Peninsula was once volcanic, and the Bible descriptions of Mount Sinai both by day and by night are directly explicable by an eruption, which would have provided at once the pillar of cloud by daylight and of fire in the darkness. Flocks of quails frequently arrive exhausted in Egypt in their migrations, and some might well have alighted in the nick of time near the encampments of the Israelites. Renan has described the exudation by certain

40. John F. Kennedy, a known Roman Catholic, had been elected to the Presidency the year before this talk was given in 1961.
shrubs in the Sinai Peninsula of a white gummy substance which appears from time to time, and is undoubtedly capable of supplying a form of nourishment.

All these purely rationalistic and scientific explanations only prove the truth of the Bible story. It is silly to waste time arguing whether Jehovah broke His own natural laws to save His Chosen People or whether He merely made them work in a favourable manner. At any rate there is no doubt about one miracle. This wandering tribe, in many respects indistinguishable from numberless nomadic communities, grasped and proclaimed an idea which all the genius of Greece and all the power of Rome were incapable. There was to be only one God, a universal God, a God of nations, a just God, a God who would punish in another world a wicked man dying rich and prosperous; a God from whose service the good of the humble and of the weak and the poor was inseparable.\textsuperscript{41}

Are we not offered here a model, both in sentiment and in tone, that the prudential statesman might well emulate in his public deliberations about the role of religion in the commonwealth?

3.

Our concern about religion should be heightened by a realization of what has happened to education in the public schools. I have suggested that a critical problem with education today is that it has less influence upon the reinforcement of moral standards than ever before in the history of this country. This is partly due to the dominance in modern thought of what is known as "relativism." The relativistic approach is accentuated whenever the teacher is obliged to be "fair" to all sects in discussing with the class a subject that is at all "controversial" (that is, important). Thus, the teacher runs the risk of either triviality or blind partisanship.

When education becomes provincial and limited in this way, it does make a difference who controls it. The better the education, the less concern need there be about who controls it. I need only remind you of something that was once extolled as "liberal education," a rigorous course of study which stressed such subjects as grammar, rhetoric, logic and mathematics. These subjects do not have implied in them (or at least do not have implied in them as much as do such studies as "history," "social science," and

"human relations") the preconceptions and contentions of one sect as against another. One result of liberal education is that both the teacher and the mature student are equipped and motivated to investigate intelligently such questions as those bearing upon the origin, purpose and end of life.42

I conclude then with the suggestion that the problem of Church and State with respect to the schools, to say nothing of its other manifestations, takes the acute form that it does for us partly because of what has happened to our understanding of what education is. Genuine education, adapted to the capacities of students, would not only have made the general problem of Church and State less troublesome, but would also have been of inestimable worth in preparing us to think and talk properly about this subject.

III. THE LIMITATIONS OF EXPERTS43

Therefore he who does not recognize evils when they are being born in a principate, is not truly wise; and this is given to few. . . .

. . . It is therefore to be concluded that good counsels, from whomever they may come, needs must arise from the prudence of the prince, and not the prudence of the prince from good counsels.

—Niccolo Machiavelli44

i.

In constitutional law, as in political life generally, much is to be said for the adage, "It's not what you don't know that can hurt you; it's what you know that ain't so!"

This is especially true, it can be added, with respect to the things we so take for granted that we never examine them. This can make discouraging the study and teaching of politics, including the study and teaching of constitutional law.

ii.

Consider the current concern with the so-called energy crisis. People line up for hours in California: I have talked to someone who was obliged this past week to get in line at 5 a.m. at a gas

42. See, e.g., ANASTAPLO, What is a Classic?, in THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE 284 (1983). See also Adler, The Order of Learning, 12 MORAGO QUARTERLY 3 (1941).

43. This talk was given at the Seminar in Public Law for University of Chicago graduate students in political science, Chicago, Illinois, May 16, 1979.

44. N. MACHIAVELLI, THE PRINCE 84, 142 (L. de Alvarez trans. 1980).
station in the Los Angeles area in order to have a chance to get gas when the station opened at 7 a.m. The Governor of that State is exercised about what has happened. So is the President of the United States. And so, of course, are many, many citizens, not the least those who rush to “fill’er up” before the hoarders get all the gas.

One California skeptic, who suspects an “oil company conspiracy,” observed, “Once gasoline hits $1.00 and $1.25 a gallon around the country, we’ll be able to get all we want.” One hopes so! That is, is there not a price at which the available gas (whatever “available” means in this context) can be easily gotten? Or, put another way, why is oil different from any other useful commodity which we regularly consume? Precisely what does “energy crisis” mean?

It is a crisis, I suppose, when people are obliged to pay more for something than they are used to paying, or more than they would like to pay, especially if it means that they must forego pleasures or conveniences or even so-called “necessities.” But what is wrong here is not the market or its operations but rather how people think about it, about their expectations and entitlements.

Is there a conspiracy at work, at least in the sense that oil companies are holding back oil in anticipation of higher prices? Again, one hopes so! That is, one hopes that there are, here and there, producers and suppliers who are doing what they should be doing—using and not using, reserving and producing, when and how they think it most profitable for them to do so. (I assume—and it would be gross folly for them to proceed otherwise, considering the present climate of opinion—I assume that these producers and suppliers are proceeding independently of each other, however much they know of and take account of what is happening elsewhere and of what is likely to happen.)

Or, to put all this still another way, it is in our interest (our long-run interest) to have fuel prices go up to “where they should be.” And where they should be is the price which again makes it possible for a motorist to purchase gas without delay. Of course, that would be a price which would discourage some driving. It could also become a price which requires, in the interest of social justice, that gasoline stamps join food stamps as welfare measures on behalf of the poor.

To say all this is not to suggest that politicians can ignore the present “energy crisis.” They, unlike us, cannot afford to identify foolishness as foolishness—and especially when their actions (such as various forms of price controls) have contributed to the current
difficulties. But it is one thing for the political man to accommodate himself to the foolishness of the moment; it is quite another, thereby making the foolishness more damaging than it need be, for him to be swept along by the uninformed passions of others. The risks of damage to public policies, both at home and abroad, should be evident.

iii.

So much for the energy crisis—and what it can remind us of about the limits of political understanding.

Consider another illustration. I recall a conspiracy of another day—not that of the oil companies but rather that of the American Communist Party. That, too, has had dire consequences—consequences due not to the activities of a few thousand so-called conspirators, but rather to the activities of the millions mobilized against the conspiracy.

It is now evident—and some of us thought it evident then—that the efforts of the Communist Party of the United States were, so far as they affected the military security or the political stability of this country, quite trivial. (The period I refer to is the one I observed close up, that of the late 1940s and the 1950s.) No foreign agent in his right mind would have used members of the American Communist Party—an organization under extensive surveillance—for purposes of espionage or sabotage or anything of that sort. As for their revolutionary effort, that should have been the least of anyone's legitimate concerns.

But trivial as the effort of American Communists may have been, they had dire consequences—in that the responses to them, or to what they were supposed to be, hurt this country badly. For the responses, by well-meaning patriots of limited understanding, led not only to numerous injustices, to numerous personnel dislocations in government and elsewhere, and even (in 1953) to a pair of dreadful executions. They also led to a befuddlement of the public opinion and a misdirection of the national will. One result of this, I suspect, was the fierce toll exacted of us by our unnecessary involvement in the Vietnamese War. But then, this is the sort of thing one can expect when one does not think.

We are somewhat over that now. Even so, we need to be reminded from time to time, that the Russians have massive problems of their own which are more or less independent of our

45. See supra notes 8 and 25 and accompanying text.
existence, just as we have problems (not as intractable, we can hope) that do not depend upon their existence. I hardly think, therefore, that any advantage one side gains over the other as a result of the acceptance or rejection of the current SALT proposals will change these facts of life.

But here, too, the political man must accommodate himself to the foolishness of the moment, whether the foolishness takes the form of a “Red scare” in the 1950s or to the fear of a Soviet first-strike capability in the 1980s.

*iv.*

We are primarily concerned here, however, not with “Red scares” or “energy crises” or “nuclear vulnerability”—but rather with constitutional law.

Still, what I have said about these other matters does bear upon how one can begin to think about constitutional law. This is not only because each of these concerns—concerns with Communist intrigues, fuel shortages and surprise attacks—can induce us to play fast and loose with constitutional restraints (especially restraints which are designed to protect rights in property, broadly conceived). Rather, what I have said bears upon how we think generally about constitutional law because we need to be reminded, again and again and again, that much of what passes for the wisdom of the moment in political life can neither bear examination nor be ignored.

That is, it is important to be sensible—and this includes a recognition of the limits of sensibleness in much of political discourse, which includes discourse about constitutional law. Much of what the learned commentators say about the Constitution, to say nothing of what the courts say (upon which the commentators comment), seems to me to border on foolishness. The most that can be said for much of what one reads is that it is conscientious elaboration keyed to unexamined (and, usually, unrecognized) hypotheses of a dubious character.

And yet the recognized experts in constitutional law are sober citizens, respected and made much of. I am somehow reminded of an observation I associate with Cicero, “It is held to be a matter of amazement that one soothsayer can happen upon another soothsayer in the street without laughing.”

Unfortunately, the consequences of constitutional adjudication can be serious—or, at least, can ratify serious developments. I have already referred to what the courts did with the Red scare a
generation ago. Constitutional doctrines were then manipulated to cater to public fears. In more recent years, they have been manipulated to cater to public desires—as can be seen in what we have come to tell ourselves about our constitutional rights to abortions, to obscenities of all kinds, even to immunity from justly-deserved sentences of death and from conscription for community service.

In this way, we have broken down the useful distinction between, loosely speaking, policy judgments and constitutional judgments.

V.

Perhaps in no field of constitutional law is so much foolishness accepted by some as gospel as what the courts, guided and reinforced by the commentators, have said about the Religion Clauses of the First Amendment.

The aberrations with respect to the Speech and Press Clauses of the First Amendment have been intermittent. One can see, in what the United States Supreme Court now says about those clauses, some relation to what the First Amendment provides. What those clauses are primarily concerned with is the right of citizens to learn what they need to know in order to be able to govern themselves. This right is usually respected by the courts, however far they sometimes stretch the protected discourse (and despite the unwarranted restrictions that have been placed on genuine political discourse from time to time).

The aberrations with respect to the Religion Clauses, however, have been longstanding and continuous. I sometimes think that the United States Supreme Court has said very little that is sensible on this subject since the case of Reynolds v. United States 46 in 1878. What, then, does it mean that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof? It means something like this:

Congress cannot itself establish any religion or do anything about (either in support of or in opposition to) an establishment of religion in any State. What establishment means, primarily, is official action designed to promote one or a few religious sects at the

46. Reynolds v. United States, 98 U.S. 145 (1878) (affirming application, to a Mormon who claimed that polygamy was his religious duty, of a federal law making bigamy a crime in the territories of the United States). Reynolds has been affirmed or relied upon on various occasions. See, e.g., Davis v. Beason, 133 U.S. 333 (1890); Romney v. U.S., 136 U.S. 1 (1890); NOONAN, supra note 3, at 194-207. What is not sensible about these Nineteenth Century discussions is the determined hostility exhibited against the Mormon church. See also infra note 133 and accompanying text.
expense of the others. Nor can Congress interfere with the free exercise of religion, which means, primarily, the holding and expressing of presumably sincere opinions about divine matters and gathering together, or refusing to gather together, to share and to express those opinions.

Conduct which is said to be based upon religious doctrines, however, is to be treated like any other conduct (except for that religion-based conduct which consists of attending religious services, but not necessarily everything that might happen at such services, or which consists of professing the beliefs that one has). A legislature's exception of any conduct from regulation, because it is deemed to be religious, is hardly likely to contribute to an establishment of religion unless there is also a more direct and obvious attempt to do so.

What a "religion" is, for the purposes of these two clauses of the First Amendment, was once fairly evident—and, I suspect, still is to the community at large. Certainly, Americans generally agree that people should not be compelled to witness, or even to seem to witness, to what they do or do not believe in with respect to religious matters.\(^{47}\) Even so, the legitimate political and social interest in religion has something to do with a general concern for morality. This concern, which is worthy of support by public funds, has even found expression in such Congressional enactments (of constitutional stature) as the Northwest Ordinance of 1787, where it is said, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."\(^{48}\)

\[\text{vi.}\]

What the "free exercise of religion" does not mean can be seen by considering (if only briefly) the activities, supposedly constitutionally-sanctioned, of a sect with which we are all familiar. I say we are all familiar with this sect because we confront it whenever we travel—and I do not mean the Salvation Army! (Other sects

\(^{47}\) See infra note 126. See also supra note 38 and accompanying text. It has been noticed by the author of a useful survey of the cases, "There is a certain frustration in attempting to understand the peculiarly American interaction between religion and law in the United States." Sullivan, Religion and Law in the United States: 1870 to the Present, in Church and State in America 339, 353 (Wilson ed. 1987). For my attempts heretofore to explain the Religion Clauses of the First Amendment, see infra notes 123, 125, 130, 135, 137, 139 and accompanying text.

could have served as illustrations at other times. What the Peoples Temple was permitted to do in the San Francisco area, in the name of religious freedom, could also serve as an illustration. But its Guyana atrocities make it too bizarre an illustration to serve our purposes.

I have several times stepped aside from the stream of traffic at airports to watch members of our sample sect accost travellers. What they do, in employing well-developed techniques, is a mixture of intimidation and fraud. Their shakedowns are conducted in broad view, day in and day out, but sensible people (such as airport authorities) are said to be prohibited by the Constitution from stopping them. (The United States Supreme Court has considered itself obliged to rule in effect that prosecutors and judges should not notice what all other sensible men in the community can see, that the gullible and the weak and the lonely are being cheated by religious frauds.49) It is instructive to watch who is now being “taken” by the aggressive missionaries at airports: they make it difficult for decent, naive people to go about their business without paying what amounts to ransom.

Of course, it does not stop with this: now one can see the same “con men” and “con women” in downtown Chicago, pretending to be confined to wheelchairs, as they accost passersby (to sell them candy, I believe, or to solicit contributions). There is something shameless, sometimes amusingly shameless, about these persistent efforts. It remains to be seen whether even this particular kind of extortion (to say nothing of more serious forms of fraud or sources of harm) can be immunized from governmental interference because it is said to be dictated by “religious” doctrine.

Nor does it stop here. For among those hurt, perhaps hurt most of all, are the calloused (and often exploited) participants in such activities, not their fleeting victims. An example of this is suggested by the recent announcement of a “mass wedding” more or less dictated by the leader of this association. Does not the community have a legitimate interest in, if only because it will have to deal with the social consequences of, such a cavalier approach to marriage? But then, it will be asked, does the community have the right to keep people from harming themselves? The old-fashioned
answer would have been, “Yes, both a right and a duty”—an answer that can be accompanied by the reminder that it is virtually impossible for the self-destructive human being to hurt only himself.

Such distortion of the right to the free exercise of religion is based, I suggest, not upon religious sentiments but upon an inordinate desire for privacy—a desire to be permitted to do with oneself whatever one happens to want. The legitimate concerns and authority of the community are brushed aside; the autonomy of the “self” is asserted. Perhaps at the root of this aberration is the assumption that there are no standards of right and wrong, of good and bad, of the beautiful and the ugly which can be known and by which human beings are bound (either individually or as communities). So much, then, for what the “free exercise of religion” does not mean.

What the prohibition of an “establishment of religion” does not mean can be seen by considering (again, if only briefly) what has happened to repeated efforts since the Second World War to use public funds to support the educational activities of church-sponsored schools. These schools are said to provide services that the community wants, and at a cost which is significantly less than that which the community would have to pay if it provided the services itself. Why should not a community be permitted, when and so long as it should want to, to support such schools, especially if the alternative is that these schools are likely to have to close their doors because of escalating financial difficulties?

On the other hand, why should not the community be permitted, if it should believe that separate school systems are divisive or are otherwise harmful to the community or to part of it, to prohibit all such schools? Whether a community chooses to support such schools or to suppress them, it is obliged to do so in conformity with its duty to provide for all citizens equal protection of the law and due process of law. Is it not sensible—and anything but an “establishment of religion” problem—to decide, in one’s circumstances, what one wants to support or to forbid, in what way, and how much?

But the fashionable constitutional doctrines of our day stand in the way of such sensibleness. One result of those doctrines is that the efforts to circumvent them have meant that we have been “obliged” to allocate massive Federal funds for education in ways
we might not otherwise have chosen to do. Thus, we have had to place the emphasis upon "welfare" rather than upon education.

viii.

What I should like to emphasize here is not my analysis of the Religion Clauses, but rather the opinion that what the courts have said on this subject has little if anything to do with the First Amendment. And yet, again and again, the Founding Fathers are invoked in support of sweeping declarations by the courts.

If anything is certain in the American constitutional system, it is that the Founding Fathers had no intention of applying against the States (with their varied religious establishments, and with their generally acknowledged power to "establish" churches) the prohibition placed in the First Amendment upon Congress. What the Fourteenth Amendment did to all this remains a much-vexed question; that is another story. But even with respect to Congress, the Establishment Clause surely did not mean what the courts now say it has always meant.

How does one determine what the Constitution means? Certainly, one cannot rely simply upon the pronouncements of the courts. Those statements, especially in controversial situations, are no more than opinions deserving consideration—so far as our understanding is concerned (however much we are obliged to conform to them, and take account of them, in practise). Rather, one must look to the language of the Constitution, guided in one's looking by an understanding of the regime which is reflected in that language and elsewhere. History, properly used (preferably in small doses), can be helpful. But perhaps even more helpful is an awareness of the enduring teachings of political philosophy—certainly if one is to be alert to what various regimes presuppose, require, and promote.

The recognized constitutional experts, on the other hand, are obliged to take the courts seriously. One is reminded of the contests in the Cave in Book VII of Plato's Republic—contests as to who is most adroit in interpreting the distorted shadows on the wall. No doubt, such adroitness on the part of constitutional experts serves a purpose: clients do have to be advised as to tendencies; the public needs a rationale, or at least a likely story, for the constitutional developments issuing from the courts. Passions, and the errors as well as the right opinions resulting from passions, have to be taken into account. It is only politic to do so.

The true politician, however, knows what he is doing here and
why. This permits him to lead his community out of impasses, away from self-destruction, and toward justice. Only someone who is not swept along by the current movements in constitutional law can truly see what is going on, what is sound and what is questionable in the fashionable opinions of his day. Only such a student of constitutional law is apt to avoid both the impassioned partisanship and the cynical apathy to which those not satisfied with mere scholarship and the rewards of ordinary ambition are subject.

ix.

The American statesman recognizes that the people of his country, if they are to be truly self-governing, must be of a certain character. That recognition, which can be said to be reflected both in the Religion Clauses and in the Speech and the Press Clauses of the First Amendment, is suggested in Federalist No. 49. There Publius observes, "[I]t is the reason of the public alone that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."

IV. THE POLITICAL USES OF RELIGION

"Then what," [Adeimantus] said, "might still remain for our legislation?"

And I said, "For us, nothing. However for the Apollo at Delphi there remain the greatest, fairest, and first of the laws which are given."

"What are they about?" he said.

"Foundings of temples, sacrifices, and whatever else belongs to the care of gods, demons, and heroes; and further, burial of the dead and all the services needed to keep those in that other place gracious. For such things as these we neither know ourselves, nor in founding a city shall we be persuaded by any other man, if we are intelligent, nor shall we make use of any interpreter other than the ancestral one. Now this god is doubtless the ancestral interpreter of such things for all humans . . ."

—Socrates

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50. This talk was given at Memphis State University, Memphis, Tennessee, March 29, 1982. It was the first of a series of three lectures delivered by me at Memphis State under the auspices of the Political Science Department of that University. This first talk was given the afternoon of March 29, 1982; the second, infra Part V, was given the evening of March 29, 1982; the third, infra Part VI, was given the afternoon of March 30, 1982. I refer back and forth among these three lectures.

The opening sentence of Plato's *Laws* shows an Athenian asking a Spartan and a Cretan, "Is it a god or some human being, strangers, who is given the credit for laying down your laws?"\(^{52}\) In the Greek, the first word of the dialogue is *god*. The opening sentence should be, however awkward it may sound in English, "A god is it, or some human being, strangers, who is given the credit for laying down your laws?"

The response is that it is indeed a god in each instance who is given the credit, one god for the Spartans (Apollo), another for the Cretans (Zeus). There may be difficulties with these answers for anyone who recalls the reservations indicated in various Platonic dialogues about the stories associated with the named gods (as distinguished from one god, who is unchanging and everywhere and always the same). But we need not concern ourselves with these difficulties, at least for the moment; it suffices to notice that men have long—perhaps have always—associated the founding of well-established regimes with a divine influence.\(^{53}\) Certainly, it is often (if not always) thought salutary (as prescribed later in the *Laws*) that everyone, and especially the young, should always say in harmony that all the laws are finely made by the gods. This sentiment is consistent with what may be found throughout Plato's works, as may be seen for example in his letters, where it is suggested that god is the cause of all existing things, that god is the cause of all that is beautiful, and that divine providence is needed to achieve good regimes.\(^{54}\)

A similar dependence upon the divine may be seen in another great "practical" work of antiquity, also of a seminal character, and that is the *Book of Genesis*. There, too, of course, we can see God insisted upon as the founder of everything that exists. Thus, it can be said, fundamental to representative texts from both of the major sources of Western thought has been the opinion that the divine is the cause of all existing things and that men should conduct themselves accordingly.\(^{55}\)

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\(^{52}\) See PLATO, *LAWS* 624A. The best translation into English of Plato's *Laws*, upon which I draw in this talk, is by Thomas L. Pangle in the Basic Books edition. See infra note 182 and accompanying text.

\(^{53}\) See, e.g., id. at 634E.

\(^{54}\) See THE COLLECTED DIALOGUES OF PLATO 1566, 1567, 1776-77 (E. Hamilton & H. Cairns eds. 1961) [hereinafter DIALOGUES]. Compare id. at 1584.

\(^{55}\) Consider as well how God presents Himself in the *Book of Job*, where he deigns to "justify" himself to Job.
To say that the divine is the cause of all existing things and that divine providence is needed to secure good regimes is not to expect any thing or any regime on earth to endure forever. Nor does it mean that God should be considered responsible for everything that happens in the created world. Where human beings are involved, some degree of free will can be expected and, hence, some error will follow from the exercise of choice. To eliminate the possibility of any error would be to eliminate also the possibility of the highest good among men, that seen in willing the good for its own sake.

But any imperfection in a political order contributes to its ultimate dissolution. The smaller the imperfection, the longer it may take—but no matter how small, it will eventually have a fatal effect. This is only to recognize that all regimes can be expected to be mortal, for none of them is likely to have that perfection which ensures immortality.56

Small matters, then, as well as large ones, should be considered for their effects. We know this from everyday life. Consider, for example, where the last patches of snow are apt to be found in an early Spring landscape—at those places where shadows are cast, even if the shadows are insubstantial (say, from leafless bushes). Who can predict what effect such lingering snow will have, over a long period of time, upon the texture or fertility of those patches of ground?

Comparably small matters, with lingering effects, may be seen in rituals and prayers, especially those one becomes accustomed to in childhood—more or less formal utterances and activities which can nevertheless tend to shape one this way rather than that. Consider how a pebble in one’s shoe—even a very small pebble—can affect, perhaps permanently affect, how one walks. The most dramatic instance of this sort of thing I know of is what an injured toe, which was favored, did to the glorious pitching career of Dizzy Dean, one of the heroes of my youth in St. Louis Cardinals territory.57

56. PLATO, LAWS 676B-C.

57. See Anastaplo, The United States Constitution of 1787: A Commentary, 18 Loy. U. Chi. L.J. 15, 19 (1986) [hereinafter Commentary]. This Commentary is scheduled to be published in book form by the Johns Hopkins University Press in 1988. It will have the same divisions into lectures and sections as those cited in this article. It includes a selected bibliography in which there are recorded corrections for various of the items both listed there and cited in these notes.
I make these observations in support of the proposition that relatively small influences can have profound, unpredictable and yet lasting effects upon one—and especially may this be so, even in an increasingly secular age, with religious influences, even influences which are more or less nominal. A not insignificant sign of the times, I might add, is the sort of thing one sees in so influential a journal as *The New Yorker*, the high priest of sophistication among the American “elite”: I noticed in a recent issue the use of profanity in three different cartoons; and I recalled how much furor there was, in my childhood, about the use by Clark Gable of one profane outburst in *Gone With the Wind*. There has obviously been a change in religious sensibilities, both for better and for worse perhaps, of which the change in public speech is merely a sign.\(^{58}\)

One must wonder, if one is interested in the foundations and the perpetuation of the American regime, what such changes (casually taken for granted) portend.

### iii.

But, it will be said by some, the American regime (unlike those reflected in Plato’s *Laws* and in the *Book of Genesis*) does not depend upon religion; rather, the separation of Church and State is at the foundations of our regime, a separation written into the First Amendment.

Precisely what is and is not written into the First Amendment I will have more to say about tomorrow afternoon.\(^{59}\) But that religion has always been vital for the American regime is evident upon examining the careers of our greatest statesmen. One can see in Abraham Lincoln’s work as President repeated utilization by him of the religious sentiment of the American people. This is fairly explicit in his Second Inaugural Address; it is implicit, and with even greater effect, in the Gettysburg Address, where Biblical language and thought are skillfully woven into the texture of his argument.

The question of the proper relation between religion and the law was faced early in the history of the Republic under the Constitution, not only in the First Amendment (which does not really say


\(^{59}\) See infra Part VI. See also supra note 50.
what many assume it to say) but also in George Washington's Farewell Address upon leaving the Presidency (in 1797). He insisted on that occasion upon the indispensable role of religion in the moral training of a people. He then added,

It is substantially true that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government. Who that is a sincere friend to [free government] can look with indifference upon attempts to shake the foundation of the fabric?60

I will return to the question of the relation of law to morality. It suffices here to notice that Washington was dubious about the supposition "that morality can be maintained without religion," at least in any people at large, whatever may be said about "the influence of refined education on minds of peculiar structure."61 In making a distinction between "national morality" (or the morality of people generally) and "minds of peculiar structure" which are privileged to undergo "refined education," Washington called into question a critical assumption of the Enlightenment which had occupied intellectual circles in Europe for more than a century by his time.62 The ordinary citizen, he recognized, is hardly likely to be philosophical, to be influenced by anything other than common opinion: much is always made in common opinion of religious sentiment (especially with respect to the divine superintendence of things and with respect to expectations of rewards and punishments after death, if not in this life, for virtue and vice respectively). The prevailing religious sentiment of a civilized community (what is cause here, and what is effect, we need not consider for the moment)—the prevailing religious sentiment is likely to direct people in their everyday activities to do and to want to do that which "the influence of refined education" would direct them to as well. So why not treasure and make use of such an invaluable support for morality, a morality that not only induces people to be good but also provides for them (in other ways as well) the basis of considerable human happiness?

Shortly before Washington gave his Farewell Address, the State of Tennessee provided in its first Constitution (of 1796), "[N]o person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this

60. NOONAN, supra note 34, 132. See supra note 34 and accompanying text for the passage preceding the sentences from the Farewell Address quoted here in the text.
61. Id.
62. See infra Part VIII.
This provision has been in every Tennessee constitution since 1796. This, too, reminds us of what republicans in the period during which the Constitution was written and ratified, and during which the First Amendment was adopted (in 1791), believed about the relation between religion and politics. In this respect, at least, they were closer to the ancients than to the moderns. Certain religious sentiments were regarded by the ancients as critical for a healthy civic life: for how else, they would have asked, can so many be bound so firmly to morality? Received opinion, it should be remembered, is what most citizens depend upon, not demonstrated truths, to guide their lives and to make sense of things.

**iv.**

The limits of the approach to these matters of the Enlightenment of the Seventeenth and Eighteenth Centuries, with its highminded ambitions about the educability of virtually everyone in the most sublime moral and political truths, may be seen in the career of Benjamin Franklin, who was (as perhaps the greatest scientist ever nurtured on this continent) at least a stepchild of the Enlightenment.

Franklin, in his intriguing *Autobiography*, has this to say about what may be called the political (including the moral) uses of religion:

> Before I enter upon my public appearance in business, it may be well to let you know the then state of my mind with regard to my principles and morals, that you may see how far those influenced the future events of my life. My parents had early given me religious impressions, and brought me through my childhood piously in the dissenting way. But I was scarce fifteen when, after doubting by turns of several points, as I found them disputed in the different books I read, I began to doubt of revelation itself. Some books against deism [that is, a religion that does not depend upon revelation] fell into my hands; they were said to be the substance of the sermons which had been preached at Boyle's lectures. It happened that they wrought an effect on me quite contrary to what was intended by them, for the arguments of the deists which were quoted to be refuted appeared to me much

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63. *Tenn. Const.* art. IX., § 2. No doubt, the United States Supreme Court would invalidate this provision as unconstitutional if it should have occasion to consider it.
64. See *Commentary*, supra note 57, Lecture No. 15.
65. See, e.g., *Plato*, *Laws* 713B-714B.
stronger than the refutations. In short, I soon became a thorough deist.  

A caution here is in order, which I interrupt Franklin's narrative to notice—and that is that there is much about the rationalist position, when placed in opposition to the claims of revelation, which can be expected to challenge and to appeal to the young and adventurous mind. But it is the better part of valor in the believer not to attack the rationalist (such as the deist) but rather to suggest the social and moral privileges and duties that believers and rationalists alike share. I return to Franklin's narrative:

In short, I soon became a thorough deist [that is to say, one who depends upon reason alone and not on revealed religion, in accounting for the order of the universe]. My arguments perverted some others, particularly Collins and Ralph; but each of them having afterwards wronged me greatly without the least compunction, and recollecting Keith's conduct toward me (who was another freethinker) and my own towards Vernon and Miss Read (which at times gave me great trouble), I began to suspect that this doctrine, though it might be true, was not very useful. Further on in his Autobiography, Franklin indicates an approach to religious doctrines which recognizes their usefulness:

I had been religiously educated as a Presbyterian; and though some of the dogmas of that persuasion, such as the eternal decrees of God, election, reprobation, etc., appeared to me unintelligible, others doubtful, and I early absented myself from the public assemblies of the sect, Sunday being my studying day, I never was without some religious principles. I never doubted, for instance, the existence of the Deity, that he made the world and governed it by his providence, that the most acceptable service of God was the doing good to man, that our souls are immortal, and that all crime will be punished and virtue rewarded either here or hereafter.

We see here sentiments that, a generation later, were incorporated in such documents as the first constitution of Tennessee from which I have read. These sentiments—and especially the insistence that one's well-being will be very much affected by the way one lives, whether virtuously or viciously—these sentiments, I suggest, were generally believed by Americans of all persuasions and, it can be said, also by those of no religious persuasion who were of a philosophical inclination. In this sense, at least, "religious" opin-

67. Id. at 56-57.
68. Id. at 79.
ions were woven into the fabric of the American understanding of things. Franklin continues:

These [principles] I esteemed the essentials of every religion, and being to be found in all the religions we had in our country, I respected them all, though with different degrees of respect as I found them more or less mixed with other articles which without any tendency to inspire, promote, or confirm morality, served principally to divide us and make us unfriendly to one another. This respect to all, with an opinion that the worst had some good effects, induced me to avoid all discourse that might tend to lessen the good opinion another might have of his own religion; and as our province increased in people and new places of worship were continually wanted and generally erected by voluntary contribution, my mite for such purpose, whatever might be the sect, was never refused.69

Franklin's bent in these matters is further indicated by the complaint registered on the next page of his autobiography, where he observes that a Presbyterian minister's sermons "were chiefly either polemic arguments or explications of the peculiar doctrines of our sect, and were all to me very dry, uninteresting, and unedifying since not a single moral principle was inculcated or enforced, their aim seeming to be rather to make us Presbyterians than good citizens."70

We can see here the usefulness that Franklin conceived religion to be capable of in the right hands: morality and citizenship mattered more to him than abstract doctrines. The culmination of such usefulness, perhaps, may be seen in a celebrated speech that the then quite elderly Franklin made (on June 28, 1787) in the course of the Federal Convention at Philadelphia, which constitutional convention was held behind closed doors. His speech reads,

Mr. President

The small progress we have made after 4 or 5 weeks close attendance & continual reasonings with each other—our different sentiments on almost every question, several of the last producing as many noes as ays, is methinks a melancholy proof of the imperfection of the Human Understanding. We indeed seem to feel our own want of political wisdom, since we have been running about in search of it. We have gone back to ancient history for models of Government, and examined the different forms of those Republics which having been formed with the seeds of their own dissolution now no longer exist. And we have viewed Mod-

69. Id. See also 1 COLLECTED WORKS OF LINCOLN, supra note 31, at 382; infra note 121 and accompanying text.
70. B. FRANKLIN, supra note 66, at 80.
ern States all round Europe, but find none of their Constitutions suitable to our circumstances.

In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection.—Our prayers, Sir, were heard, & they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God Governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that “except the Lord build the House they labour in vain that build it.” I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and bye word down to future ages. And what is worse, mankind may hereafter from this unfortunate instance, despair of establishing Governments by Human wisdom and leave it to chance, war and conquest.

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service—

Franklin’s motion was duly seconded by Roger Sherman (of Connecticut). There then followed an interesting exchange, as recorded in James Madison’s Notes—an exchange which reflects the mixed feelings Americans do have about the political uses of religion:

Mr. Hamilton & several others expressed their apprehensions that however proper such a resolution might have been at the

71. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450-52 (M. Farrand ed. 1937) (emphasis in original). The juxtaposition here of “Human wisdom” and “chance, war and conquest” is echoed in the opening lines of the Federalist Papers.
beginning of the convention, it might at this late day, 1. bring on it some disagreeable animadversions. & 2. lead the public to believe that the embarrassments and dissensions within the convention, had suggested this measure. To these objections—that calling now for prayers each morning would be embarrassing and would also alarm people outside the Convention, who were counting upon political salvation from this body—to these objections, the reply was made that the past omission of a duty could not justify a further omission—that the rejection of such a proposition would expose the Convention to more unpleasant animadversions than the adoption of it: and that the alarm out of doors that might be excited for the state of things within, would at least be as likely to do good as ill.

Hugh Williamson (of North Carolina) tried to smooth over the deep difference of opinion here (about which I will soon say more) by suggesting that “the true cause of the omission” of opening prayers “could not be mistaken,” “The Convention had no funds.”

Still, the concern lest alarm be aroused by what might seem to many a desperate measure—like seeing an ambulance pull up at your neighbor’s house in the middle of the night—was spoken to by Edmund Randolph (of Virginia) who (in Madison’s words) “proposed in order to give a favorable aspect to [the] measure that a sermon be preached at the request of the convention on 4th of July, the anniversary of Independence” (which was, then, a week away), “and [that] thenceforward prayers be used in [the] Convention every morning.” Thus, Randolph astutely proposed, we can bring in a clergyman for an Independence Day service, which would seem only natural to the people at large, and once we have done that, we can simply continue bringing a clergyman in every morning for opening prayers—and a sense of desperation would not have been exposed. This was a shrewd proposal worthy of Franklin himself, and he seconded it. But Madison’s account of all this follows with only one more sentence, “After several unsuccessful attempts for silently postponing the matter by adjourning, the adjournment was at length carried, without any vote on the motion.”

That cryptic concluding sentence is, it seems to me, highly sug-
gestive. We can see here the evident reluctance of various of the more sophisticated delegates to the Convention to have anything to do with religion in public life. Alexander Hamilton seems to have been among them. But these delegates did not want simply to say "no" to Franklin’s original proposal, partly because Franklin himself was held in such great esteem among them—one can see again and again in the Convention how much he was deferred to (even when he was not being followed in his proposals [for example, as to not paying various officers of government])—and partly because these freethinking delegates did not want to offend the religious sensibilities of their more devout colleagues. To offend them would mean not only difficulties in subsequent deliberations and voting but also possible trouble in political life later. (Hamilton, in fact, did have difficulties in the decade that followed, because of the stories that circulated as to some of the outrageous things he was supposed to have said in the Convention. Thus, he was later reported to have responded to Franklin’s prayer proposal with a comment to the effect that he did not want to see the United States rely upon foreign aid!)

Various of the delegates preferred not to have to vote on Franklin’s proposal: they evidently figured that (depending on how they voted) either their integrity would be compromised or their interests would be damaged by such a vote. And so they maneuvered an adjournment, an adjournment perhaps conceded eventually by some of the more devout when they realized how troublesome this issue could become. Still, it can also be said, Franklin’s proposal was not without effect, for at the very least he did direct the delegates’ attention (by his invocation of “that kind providence [to which] we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity”)—he did direct the delegates’ attention to concerns and goals beyond those narrower interests (those “little partial local interests,” as he called them) which had kept them from developing a proper plan for the common good. Religion does tend to lift men outside, and often above, themselves—and perhaps Franklin counted on that, perhaps even figuring that the less devout would be challenged to be as self-denying as devotion can lead others to be.

In any event, it is worth noticing that Hamilton, who is named by Madison in his Notes as a leader in the effort to head off Franklin’s prayer proposal, is known to have had a good deal to do with the preparation of Washington’s Farewell Address, that statement which contains (as we have seen) a reminder of the usefulness of
religion for a healthy political and moral life, especially among free men. Perhaps, indeed, Hamilton had put to good use, in the decade since the Federal Convention, the lessons taught by Franklin, lessons that moderns have to be reminded of from time to time, especially since it is in a sense noble not to consider oneself constrained, as the more prudent men of old once considered themselves to be, by popular religious passion. By the time of Washington's Farewell Address, thoughtful Americans had come to see in the excesses of the French Revolution the dreadful things that the public repudiation of organized religion (even a religion which had become in many ways corrupt) can lead to.

Be all this as it may, it is well to keep in mind Franklin's concern (expressed a generation earlier in his Autobiography) that religion be used to help inculcate moral principle and to make good citizens.

\[v.\]

Such uses of religion as I have noticed—whether Franklin's, Washington's or Lincoln's—oblige us to reconsider not only what the relation is between religion and law (or politics) but also what religion itself is.

Everyone knows that religion, as conventionally understood, is a major source of law. It is also known that religion is usually supportive of laws, both by what it teaches about this life and by what it predicts about the hereafter. But what is not generally appreciated, at least in these times, is that religion is itself a major form of law—and not only because it consists, in part, of commandments. One of religion's consequences, as a major form of law, is that it helps shape—sometimes it can be decisive in shaping—the character of people. Of course, some ways of doing this may be better than others; but, one way or another, religion does indicate what the community expects, what it takes an interest in, what it considers worthy of praise and of reward. Thus, religion is available to restrain and guide our considerable political and personal freedom.

But what does it mean to say that religion is itself a major form of law? Law is, among other things, the considered opinion of the community, supported by sanctions and by other means, about what is and is not to be done. A generally-accepted religion similarly instructs and restrains people; and it, too, represents the con-

75. See Dialogues, supra note 54, at 1567, 1589, 1590, 1591-92. Modernity means, among other things, that the deepest truths, once husbanded by responsible men, are now considered fit to be made public. See supra note 16; also infra Part VIII.
sidered opinion of the community. An effective religion has many of the features of law: it is, in several respects, like the "unwritten" common law.

Of course, there are dangers in such uses of religion; but, then, there are dangers also in the use of the law as ordinarily understood, as well as in the refusal to use religion at all. Thus, there is something unrealistic, however convenient it may be, in what we know as "the separation of Church and State." So long as religion is effective, there is no complete separation, however little explicit provision should be made by the legislature for the religious life of the community.

This is not to deny, however, that religion may usually require some support in law if it is to be effective. (Tax privileges come to mind, as one example.) Nor is it to deny that it may be difficult for religion to have the force of law if there should be many religious sects of significantly different tendencies. (We should recall Franklin's effort to emphasize the similarities, especially with respect to moral teachings, among the various religious sects of his day.) Another way of putting this is to say that it may be difficult to have an effective religion in public life if the public itself is fragmented, especially if that fragmentation is reflected in, and is reinforced by, religious differences. It is well to remember that when we do speak of the separation of Church and State, that which is usually designated by the term state is itself a narrow and somewhat artificial entity. "State" may not imply a "religious" element; but "community" (or "country" or "polis"), which is the more natural association, almost certainly does, an element vital to the self-identity of that community and to the reassuring sense it conveys of the overall significance of things.

I suggest, then, that religion—a healthy religion—is law in an especially effective form, reaching as it does the interior motions of the soul and not just external actions. Religion is shaped somewhat by the general opinion of the community, even as it refines or reshapes that opinion. One can sometimes see in the religion of a people the art of the statesman in its highest form. Even the Declaration of Independence, whatever its rationalist author may have thought, is obliged to appeal to "the Supreme Judge of the World for the Rectitude of our Intentions."

vi.

To emphasize the importance of religion for promotion of morality, at the same time that one identifies religion itself as a major
form of law, is likely to provoke the protest that it is not the role of
the law to try to "legislate morality." This kind of protest is usu-
ally based upon one of two assumptions, either that it is not possi-
bile to legislate morality (that is, to use law to promote and to
preserve morality) or that it is not desirable for the law to do so,
even if it could—not desirable because our freedom would thus be
circumscribed or because the wrong kind of morality is apt to be
foisted off on us or even that morality is but a matter of opinion or
taste and hence not something that any community should try offi-
cially to determine and to promulgate.\textsuperscript{76} This last argument, about
the radical subjectivity of morality, is conveniently put in terms of
the flexibility of values—and, indeed, there \textit{is} something to this ar-
gument when "values" is used as the critical term, for that is a
term (drawn evidently from the realm of economics) which implies
assessments which are temporary and subject to fluctuation (just as
products in the market place are subject to the vagaries of supply
and demand).

The bigger issue is not the questions of "religion and the law"
but rather the issue of "morality and the law." Even so, morality,
or any attempt to legislate it, is suspect today in large part because
morality is seen as another way of talking about religion, another
way of imposing religious doctrines upon one another—and such
impositions call up images of cruel inquisitions, witch hunts and
religious wars. It may well be, then, that the recourse to "legal
realism," and to the insistence that moral judgment is not objec-
tive, may be in large part a rebellion against religion itself, or at
least against the excesses of religious zealots.

It might be more sensible, if one does consider religion to be
superstition and otherwise subjective, to seek out and nourish that
which may be natural and objective in the moral sense of a people.
Certainly, it makes sense to recall that there is in the West a great
natural-right tradition which is not rooted in revealed religion,
however much the natural-right advocate may use religious men
and women to the extent that they share a common cause in the
promotion of personal and civic virtue.

However shortsighted it might be to forget the dreadful things
that have been done in the name of religion, it could be suicidal
folly to ignore the even more dreadful things done, as in our own
time, by those who are restrained by no religion in the traditional
sense. Certainly, it is difficult to exaggerate the importance, and

\textsuperscript{76} \textit{See}, e.g., O.W. HOLMES, JR., \textit{THE COMMON LAW} 144-46 (1881).
the usefulness, of a sense of awe, or of reverence, among a people.\textsuperscript{77}

If conscientious citizens, including statesmen, should (on principle) try to keep religion out of politics, they may only cripple themselves—and leave to less thoughtful men the shaping and use of that religion which will, in one form or another, have a considerable influence upon the life (including the politics) of the community. Any attempt to legislate morality can do harm if the legislator is seriously mistaken in his opinions about morality or about how best to promote it. But a legislator's principled refusal to take seriously the problem of the morality of his people will not mean that morality will not be legislated; it will only mean that it will be legislated by others, if only "unofficially," and by others who are apt to be less thoughtful and less civic-minded than he would be if his principles did not paralyze him.

\textit{vii.}

The genuine statesman, or the teacher of statesmen, I have suggested, should be very much concerned with the religious opinions of his people. He should be particularly alert to those opinions which affect the personal and civic virtue of his people. If need be he should call attention to, and in other ways try to change, those religious opinions which have (perhaps inadvertently) a deleterious effect upon community life.

One deleterious effect is that which may follow upon any religious opinion which so depreciates temporal happiness as to discourage serious politics in this life.\textsuperscript{78} Or this can take the form of dual, and conflicting, loyalties—with one's country being only one, and a lesser, fatherland. The statesman must do what he can to counteract such tendencies. He should discourage, for example, the opinion that happiness is not possible at all if one cannot expect to have it forever (because of personal mortality or because of the changes that all human institutions are subject to).\textsuperscript{79} There may well be a natural desire for immortality: but it should be suggested by the astute legislator that there may be more than one legitimate way to secure, or to contribute to, such immortality, including that of the patriot who is taught that his country's form of government

\textsuperscript{77}. See Plato, \textit{Laws} 647A sq. See also G. Anastaplo, \textit{The Artist as Thinker}, \textit{supra} note 42, at 153-58. Thus, Plato invokes the gods to persuade a tyrant to stand by his promises. See \textit{Dialogues}, \textit{supra} note 54, at 1595-96. See also \textit{id.} at 1603-04.

\textsuperscript{78}. See G. Anastaplo, \textit{The Artist as Thinker}, \textit{supra} note 42, at 75-85 (on John Bunyan's \textit{Pilgrim's Progress}).

\textsuperscript{79}. See \textit{Selected Writings of Thomas Aquinas} 135, 139 (Library of Liberal Arts Series 1965). See also Plato, \textit{Laws} 676A sq.
"shall not perish from the earth." The least the statesman can do is to help his people enjoy, in a reasonable manner, the life they may happen to have here.

A related problem is that which emerges because of the suggestion by some religious teachers that there is no possibility of a fully virtuous life on earth without the guidance of revealed religion. This raises serious doubts about the status of virtuous men among the ancients. Even more important for our immediate purposes is what such a teaching about the necessity of revelation for genuine moral virtue says about the status of natural right. But I reserve for other occasions discussion of what natural right means. It suffices to remind ourselves that there have been, from time to time, thoughtful men who recognize that there are guides provided by nature, working through the use of reason and a certain innate moral sensibility perhaps, which indicate what one should and should not do in certain critical situations.

It is not unreasonable to expect that that in which nature can instruct us as to what is good and bad, right and wrong, might well be reflected in the teachings of various revealed religions. If nature does so instruct us, it would require bizarre twists on the part of the religious-minded permanently to subvert completely the guidance provided by nature.

Chance does usually determine precisely what form our own religion will take, or at least what religions we are apt to be exposed to. (One can add to this, if one is so inclined, the reservation that grace, not chance, determines whether one has the true religion.) This may even mean, then, that most peoples may be better or worse, according to chance. It is such possible effects of chance that the thoughtful statesman attempts to moderate as he draws upon what is useful in the religion of his people and limits the consequences of what may not be useful for temporal purposes, however critical it may be for the hereafter.

The statesman, in making use of the religion of his day, may have to consider in a special manner the effect upon people of the

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80. See also Plato, Symposium 206E, 207C-D, 209, 211.
81. E.g., is charity a virtue only if done under the auspices of Jesus or of the Church? See T. Aquinas, Summa Theologica I-II, Q.91, art. 4; Q. 93, art. 6; Q. 94, art. 3; Q. 100, art. 10; II-II, Q. 23, art. 4, art. 6 and art. 7; Q. 24, art. 3 and art. 12; Q. 27, art. 7. See also Leo XIII, Rerum Novarum 45. (May 15, 1891)
82. Compare Deuteronomy 4:5-6, in which it seems to be suggested that natural wisdom can confirm revelation. See infra Part IX.
fact of their mortality.\textsuperscript{83} Perhaps he should even indicate in various ways, as does Plato, that immortality alone would not bring one happiness, that virtue is the key to any happiness truly worth having, with or without immortal life.\textsuperscript{84}

Some view of the world—some comprehensive view of things, now and forever, here and everywhere—however dimly perceived or crudely stated that view may be, must guide us if we are to have any choices at all. Religion in its broadest sense, provides a comprehensive opinion about what is meaningful and about what is the good life. Even Marxists make a kind of divinity out of history, with an infinite perfection (albeit on earth) being assumed. That is, there may be in mankind a natural appetite for such a comprehensive opinion, an appetite which philosophy can satisfy in only a few.

I have referred to the possible usefulness of religion as guidance for us in the exercise of our considerable freedom. Did not that unprecedented freedom develop in the Anglo-American world at a time when statesmen could still count upon religious influences to restrain and guide men?\textsuperscript{85} This expectation is consistent with the observation in Plato's \textit{Laws} that "total freedom from all rule is to no small extent inferior to a measured degree of rule by others."\textsuperscript{86} A "measured degree of rule" among us is provided to some degree by sensible religious sentiments and by that moral sense which is reinforced by such sentiments. But if those religious sentiments wither away, what becomes of morality, especially if an implicit "legislation" of morality by the community through its religious institutions has misled theorists into believing that there is no need to legislate morality at all, that we have done and can continue to do very well without such interference in one another's private affairs?

\textit{ix.}

My reference just now to "one another's private affairs" reminds us of still another aspect of our problem which we can barely touch upon in closing—and that is the tendency of religion, or of some religious sects, to make more and more of privacy, to make more of

\textsuperscript{83} See, e.g., AQUINAS, supra note 79, at 21f.
\textsuperscript{84} See \textit{Dialogues}, supra note 54, at 1583. \textit{See also} ARISTOTLE, NICOMACHEAN ETHICS, bk. I, ch. 7. \textit{Compare supra} note 3.
\textsuperscript{85} See, e.g., HOLMES, supra note 76, at 145. Consider, also, the emphasis upon private property and family in \textit{Rerum Novarum}, supra note 81, but with cautions expressed about usury, in section 6, and about the duties of employers, in section 31.
\textsuperscript{86} PLATO, \textit{Laws} 698A-B.
a concern for one's own at the expense (or, rather, in disregard) of the common good. If religion itself is thought of more and more as a purely personal concern, then this tendency toward privatization of our lives is reinforced. Certainly, to legitimate (as we do) diversity in religious sects tends to make religion less and less a community matter, more and more a private matter.

What, if anything, can the statesman do to counteract such diversity? What common elements should he draw upon and encourage? Does nature herself suggest which religion is useful, which is not? But, it will be said, even to ask such questions is to suggest that "the state" may properly interfere with "religion." We have been concerned, up to this point, in large part with the reservations of those who do not want to see religion interfere with political life or with the morality of the community, insofar as that morality may be determined by law. Now we hear the concern of those who do not want to see politicians (including judges) interfere with religious life, with that which (as so many believe) makes life worth living, or at least bearable.

But, I have suggested, the political man should be able to make use of—indeed, he probably cannot help but make use of—the religious opinions of the community. Should it not matter to the community what religious opinions are available to it, which have a salutary effect, and which are harmful (leading to excesses of all kinds and even misery)? If it does matter to the community what religious opinions are authoritative and hence influential in everyday life, then should not the statesman take a lively interest in them? But, it should be noticed, before I develop these matters further this evening, that the statesman I am now referring to need not be an agent of "the state." Rather, he can well be—perhaps he can better be—a leader in his church, instead, a religious man who recognizes and discharges responsibly his duties as guardian of that sacred trust which the great religions have always had to preserve, protect and defend the moral constitutions of communities of men and women on this earth.


88. See Dialogues, supra note 54, at 1601, 1602.
V. CONSCIENTIOUS OBJECTORS AND MILITARY CONSCRIPTION

I will not fight.

—Arjuna

Peculiarly troublesome questions confront us when we consider the problem of conscientious objection to military conscription. I hope to sharpen these questions somewhat, not to answer them in a comprehensive way, as I develop further the matters touched upon in my lecture earlier today.

We have seen in recent decades, in various parts of the Western World, extreme responses to those who make claims of conscientious objection. Thus, in Denmark a young man may “single out a specific element of military policy or war he may object to, and be excused from service.” In Russia, on the other hand, it could be said in 1945 that “the Soviet government no longer recognizes conscience as a basis for refusing military service,” even though “war objection once flourished [in that country] under the influence of Tolstoi.” “The penalty for such refusal is five years’ imprisonment in peacetime, capital punishment in wartime.” This, I believe we would all agree, is going too far, except perhaps in the most extreme circumstances.

In 1969, the Christian Science Monitor opened an editorial on “Conscience and the draft” with this observation:

One of the thorniest but most exalting challenges a freedom-strong democracy can face is reconciling private conscience with public need. If public need is not served, freedom and democracy can be lost. But if private conscience is not honored, this can be equally fatal to all that freedom and democracy hold dear. The great, continuing, never-settled problem is to harmonize this

89. This talk was given at Memphis State University, Memphis, Tennessee, March 29, 1982. See supra note 50.
right of the individual to do what his deepest, best, God-given conscience dictates with the right of society to protect and enforce what a democratic consensus of opinion deems the highest good.  

The challenge referred to here as "one of the thorniest" is indeed made particularly difficult because the conscientious objector appears to some, if not to many, as a citizen who is shirking his duty, as one who is indulging his self-interest if not even a cowardly inclination, while at the same time he appears to others (including some who are not themselves conscientious objectors) as a fine human being, motivated by the highest ethical concerns and eminently principled. One does not have to go far to find stories of conscientious objectors who, serving as medics in combat outfits, distinguished themselves in the face of great physical danger. There may be no serious practical problem for us if conscientious objectors assigned to "alternative service" were as likely as ordinary draftees to be put in combat or other dangerous situations. And, for all I know, this may be what did happen during the Vietnam War. But what if the conscientious objector claims a right to refuse alternative service as well, a right not to have anything to do with the entire conscription system? Besides, it can be useful, in thinking about what the relation between religion and the law is or should be, if we set aside, if only for the moment, the alternative-service option.

Two key issues have long been before those who consider the problem of the conscientious objector:

1) Should exemption (assuming that there should be any military-service exemption at all) be limited to the religious pacifist, especially (among us) to the Christian pacifist and particularly the Christian associated with a traditional "peace church" who objects to participation in all war?

2) Should anyone, Christian or otherwise, who conscientiously objects to participation in a particular war (rather than to all war) be granted an exemption?

A related question that has become critical in recent years is whether the government should be able to conscript anyone at all. Or are money, honor and technical training (but especially money) to be used to induce men to volunteer for military service? This concern is connected with the now fashionable notion that one should be able to do as one pleases with one's body, at least so long as one does not directly harm another. Another way of describing

this development is to speak of the emergence of the right of pri-
vacy as a vital concern in American law.

This challenge—as to whether government should be able to
conscript anyone—may very well make others wonder whether
government need exempt anyone from conscription. And thus the
entire problem is up for reexamination.

ii.

Most citizens would agree that military defense is sometimes
needed, however much they may differ about the sensibleness or
necessity of this or that military action. If military defense is
needed on occasion, this means that the community as a whole
does benefit from it. If this is so, why cannot all be compelled to
contribute to that defense whatever others in like circumstances
are obliged to contribute, whether their property, their minds or
their bodies?

The sometimes equivocal character of any comprehensive paci-
fism may be seen in Benjamin Franklin's Autobiography. He de-
scribes dealings he had with members of the Society of Friends, or
Quakers, in his capacity as an official in the government of Penn-
sylvania, a community in which the Quakers were then able to ex-
ert considerable political influences. Much of what he has to say
here is a development of his conclusion, "Indeed, I had some cause
to believe that the defense of the country was not disagreeable to
any of them, provided they were not required to assist in it." He
recalls his experience with the Quakers in this way:

I found that a much greater number of them than I could have
imagined, though against offensive war, were clearly for the de-
fensive. Many pamphlets pro and con were published on the sub-
ject, and some by good Quakers in favor of defense, which I
believe convinced most of their younger people. A transaction in
our fire company gave me some insight into their prevailing senti-
ments. It had been proposed that we should encourage the
scheme for building a battery by laying out the present stock,
then about sixty pounds, in tickets of the lottery. By our rules no
money could be disposed of till the next meeting after the propo-
sal. The company consisted of thirty members, of which twenty-
two were Quakers, and eight only of other persuasions. We eight
punctually attended the meeting; but though we thought that
some of the Quakers would join us, we were by no means sure of
a majority. Only one Quaker, Mr. James Morris, appeared to
oppose the measure. He expressed much sorrow that it had ever

94. B. FRANKLIN, supra note 66, at 111.
been proposed, as he said "Friends" were all against it, and it
would create such discord as might break up the company. We
told him that we saw no reason for that; we were the minority,
and if "Friends" were against the measure and outvoted us, we
must and should, agreeable to the usage of all societies, submit.
When the hour for business arrived, it was moved to put the vote.
He allowed we might then do it by the rules, but as he could
assure us that a number of members intended to be present for
the purpose of opposing it, it would be but candid to allow a little
time for their appearing.95

This, then, was the situation: those known to be in favor of provid-
ing the arms were in the minority; those supposed to be opposed to
the arms, the Quakers, were in the majority, but they were not yet
present and their spokesman (James Morris) asked for a delay
before proceeding to the announced business of the meeting in or-
der to give the majority time to appear. The question was whether
those present could take advantage of the absence of those on the
other side on the issue of arming for defense. Franklin continues
his account:

While we were disputing this, a waiter came to tell me two gen-
tlemen below desired to speak to me. I went down and found
they were two of our Quaker members. They told me there were
eight of them assembled at a tavern just by; that they were deter-
mined to come and vote with us if there should be occasion,
which they hoped would not be the case; and desired we would
not call for their assistance if we could do without it, as their
voting for such a measure might embroil them with their elders
and friends. Being thus secure of a majority, I went up and, after
a little seeming hesitation, agreed to a delay of another hour.
This Mr. Morris allowed to be extremely fair.96

Notice how things stand now: Franklin is sure of a majority,
knowing that the Quakers who are prepared to show up, if needed,
would vote with him; but he is respectful of the desire of the
Quakers downstairs not to make themselves known as his support-
ers if that can be avoided; and so he is patient, indeed even "gener-
ous," in allowing Morris an hour's delay, knowing all the time that
Morris is deluded about the sentiments of his fellow Quakers.
Thus, Franklin is not reluctant to allow himself to seem "extre-
mely fair," but not without "a little seeming hesitation." One
can see here intimations of the shrewdness for which this learned

95. Id. at 111-12.
96. Id. at 112. The word "fair" here seems synonymous with the word "candid" used earlier (see supra note 95 and accompanying text). Does not this bear upon the meaning of "candid World" ("fair-minded world"?) in the Declaration of Independence?
man was famous. Franklin concludes his account of this episode in this fashion:

Not one of [Mr. Morris's] opposing friends appeared, at which he expressed great surprise; and at the expiration of the hour, we carried the resolution eight to one; and as of the twenty-two Quakers, eight were ready to vote with us and thirteen by their absence manifested that they were not inclined to oppose the measure, I afterwards estimated the proportion of Quakers sincerely against defense as one to twenty-one only. For these were all regular members of that society, and in good reputation among them, and had due notice of what was proposed at that meeting. 97

But Franklin does not leave it at this. For he then proceeds to account for the sentiments of those Quakers who were indeed ready to concede that self-defense was legitimate. One of these men, "the honorable and learned Mr. Logan," in explaining his willingness to contribute to a defensive fund, told Franklin the following anecdote "of his old master, William Penn, respecting defense":

[James Logan] came over from England when a young man with [William Penn], and as his secretary. It was wartime, and their ship was chased by an armed vessel supposed to be an enemy. Their captain prepared for defense, but told William Penn and his company of Quakers that he did not expect their assistance and they might retire into the cabin, which they did, except James Logan, who chose to stay upon deck and was quartered to a gun. The supposed enemy proved a friend, so there was no fighting. But when the secretary went down to communicate the intelligence, William Penn rebuked him severely for staying upon deck and undertaking to assist in defending the vessel contrary to the principles of Friends, especially as it had not been required by the captain. This reproof, being before all the company, piqued the secretary, who answered: "I being thy servant, why did thee not order me to come down? But thee was willing enough that I should stay and help to fight the ship when thee thought there was danger." 98

What can we say the significance of Franklin's experience with the Quakers to be? Not that pacifists such as those Quakers were hypocrites, but rather that nature does assert herself on occasion, no matter what one's principles happen to be. (After all, one can imagine that most of those people were Quakers for the same reason that most of us are what we are, because of our parents and our

98. Id. at 113.
circumstances.) Perhaps, also, a sense of natural justice may also affect the pacifist at times: that is, he may recognize that he should contribute to that from which he expects to benefit.

To suggest that nature does assert herself on occasion is to say that it may be natural to defend oneself—and by oneself I do not mean one’s integrity alone (which may be, of course, the most important thing, ultimately) but also one’s life and one’s physical freedom, and the life and freedom of one’s family and friends (which life and freedom may be the condition for the development of the best, at least on this earth, in oneself). A legislator can be quoted, in Plato’s Laws, as laying down this prescription:

Every real man should be of the spirited type, but yet also as gentle as possible. For there is no way to avoid those injustices done by others that are both dangerous and difficult, or even impossible, to cure, except to fight and defend oneself victoriously, in no way easing up on punishment. This, every soul is unable to do, if it lacks a high-born spiritedness.99

Gentleness is also recognized here as desirable—and it is particularly important to recognize this on the occasion reported in the dialogue, since the men listening to this legislator’s prescription come from Sparta and Crete, communities which are elsewhere in the dialogue severely criticized for being too warlike.100 It is perhaps consistent with gentleness to recognize, as this legislator does, that no one is ever voluntarily unjust and that the unjust man is pitiable. Still, this toughminded legislator does insist that, nevertheless, “against the purely evil, perverted man who cannot be corrected, one must let one’s anger have free rein.” One must be spirited or gentle as the occasion requires, keeping in mind the caution that wrongdoing generally comes from caring more for one’s own than for the truth.101

These observations oblige us to notice what may be a condition for much, but not all, of the contemporary attitude toward conscription and toward military service, especially among the young, and that is the assumption that human life and our institutions are quite secure without any substantial sacrifice on our part. Is much taken for granted, including the opinion that civilization is the nat-

99. PLATO, LAWS 731B.
100. See, e.g., id. at 625C sq.
101. See id. at 731C-E. See also ANASTAPLO, HUMAN BEING AND CITIZEN, supra note 87, at 133-34. Is ignorance at the core of one’s wrongdoing? We must wonder what the witch-hunting inquisitors really believed about the observation, “[F]or according to Aristotle every wicked man is either ignorant or in error.” MALLEUS MALEFICARUM, supra note 21, at 200. See supra note 5 and accompanying text.
ural (that is to say, the inevitable) state of things for mankind, at least at this stage of our development? This is not to deny, of course, that there are pacifists who sincerely believe that enslavement or death would be preferable to killing another man, that in no circumstances should one defend oneself by the use of force. But such people are rare—and their sincerity is not a guarantee of their good sense, especially for one who is charged with a duty to care for the community, whatever one may want to do (in a spirit of gentleness as well as of efficiency) in response to such sincerity.

What, then, should we do, as a community living under the Constitution, when confronted with the claims of the conscientious objector? I put aside, as raising questions of a perhaps radically different character, the problems posed by the possibility both of wholesale nuclear war and of certain kinds of bacteriological-chemical war. Such wars, which (we are told) can virtually wipe out the human race, may require an analysis and discussion very much its own. Thus, the Roman Catholic Archbishop of Seattle could announce, in January of this year [1982], that he was refusing to pay fifty per cent of his income taxes in protest of the nuclear-arms race. His pastoral letter on that occasion included these observations:

As you all know, I have spoken out against the participation of our country in the nuclear arms race because I believe that such participation leads to incalculable harm. Not only does it take us along the path toward nuclear destruction, but it also diverts immense resources from helping the needy. . . .

I believe the present issue is as serious as any the world has faced. The very existence of humanity is at stake. . . .

I am saying by my action that in conscience I cannot support or acquiesce in a nuclear arms buildup which I consider a grave moral evil.

I am saying that I see no possible justification for the willingness to employ nuclear weapons capable of destroying humanity as we know it.102

These are sobering sentiments and, as I have said, worthy of being considered separately. Extreme measures may well be called for in order to forestall recourse to nuclear weapons. But whether or not conscientious objection to participation in conventional military activities heads off, or makes more likely, recourse to nuclear war is difficult to be sure about. However that may be, my consideration of the problem of conscientious objection on this occasion

puts aside the grave problems posed by the possibility of large-scale nuclear war.  

iii.

Any consideration of the problem of conscientious objection among us would do well to take account of the discussion of this problem in the First Session of the First Congress in 1789. Indeed, critical arguments were made then which have been decisive ever since, not necessarily because subsequent legislators have known what was said then but rather because what was said then drew upon common-sensical notions which subsequent generations of Americans have worked out for themselves as well, having been guided by the practise of their predecessors.

When the provision which is now the Second Amendment (assuring “the right of the people” to establish and arm “a well regulated Militia”) was being developed in the First Congress, it was originally proposed that there should be added to it the exception, “but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.”

Egbert Benson expressed on that occasion the following reservations:

No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.

I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.

Thus, special protection for conscientious objectors was not

103. See, e.g., Anastaplo, Book Review, Chicago Sun-Times, June 26, 1977, Show/Book Week, at 8. See also infra note 182.

104. 1 DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 451 (1834). This was on June 8, 1789. The version of August 17, 1789 read, “but no person religiously scrupulous shall be compelled to bear arms.” Id. at 778. See G. ANASTAPLO, THE CONSTITUTIONALIST, supra note 1, at 40-41 (1971). Are not the “pro-guns” people today similar in critical respects to those who would constitutionalize the right to conscientious objection? Neither group pays sufficient attention to the reference in the Second Amendment to “a well regulated Militia” as “necessary for the security of a free State.”

105. 1 DEBATES AND PROCEEDINGS, supra note 104, at 780 (August 17, 1789). Does the proposed Balanced Budget Amendment in our time also “intermix matters of doubt with fundamentals”? See Commentary, supra note 57, Lecture No. 14.
given the constitutional sanction that is provided, for example, for those who exercise freedom of speech or of the press. The freedom of speech guarantee is ultimately in the service of the common good, in that ours is the kind of regime that requires and hence must guarantee extended and even controversial discussion by citizens of public policies. But, Benson implied, the conscientious objector is not to be considered, primarily, as someone acting in the service of the common good, however important what he is doing may be for the salvation of his own soul. "It may be a religious persuasion," he says, "but it is no natural right . . ." It could perhaps be thought of as a natural right if what the conscientious objector asked for, for himself and (on principle) for all others in his community, were in the service of the community—and it would be unjust for the legislature not to acknowledge such service. But, Benson indicates, it is not the justice of the legislature that is to be depended upon but its "humanity"—that humanity which one should always be inclined to exhibit when confronted by some disability or by the prospect of inflicting unnecessary or needless pain.

And so Congress was left with discretion in the handling of conscientious objectors. Its reasons were not simply those given by Benson. Thomas Scott, another member of the House, expressed practical reservations about an unlimited right on "religious" grounds to conscientious objection, reservations which are even more critical today than they were then:

There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religions shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.106

Thus, Congress refused to permit itself to be bound with respect to conscientious objection as it did with respect to freedom of speech and the press—even though it is likely that the members agreed with Daniel Carroll that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."107

Although there is, then, no right under the Constitution to have

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106. 1 DEBATES AND PROCEEDINGS, supra note 104, at 796 (August 20, 1789). See infra note 118 and accompanying text.
107. Id. at 757 (August 15, 1789).
one's conscientious objection respected by the law, there are certainly good reasons for exempting certain conscientious objectors from compulsory service in the military, just as the physically or mentally unfit may be exempted. If certain men refuse to fight, or say they will refuse to fight no matter what is done to them, it may be neither humane nor efficient to try to make them fight or to punish them when they do not. But even here an absolute rule is not prudent: for, if one keeps Scott's concern in mind, it may be that the punishment of certain claimants may discourage others who are eager to "have recourse to [any] pretexts to get excused from bearing arms."

I need not consider on this occasion whether Christianity requires absolute pacifism and, if it does, what that says to the thoughtful citizen about Christianity. One can be reminded here of the nature of those lovers who are inclined to develop allegiances that look beyond the city.

The brotherhood of man is implied in what the lover does, rather than the parochial limits of the patriot. And yet the city and its support may be required if the lover and his beloved are to have the opportunity to develop into lovable, and loving, human beings.108

iv.

If we assume, then, that there is no constitutional right to exemption on the basis of conscientious objection, to whom may Congress as an act of grace grant an exemption?

Traditionally, as I have indicated, Congress provided an exemption for those men who declared themselves against participation in any war, did so on religious grounds, and (until a few decades ago) did so as members of churches generally known to be pacifist in their doctrines.

The church-membership qualification has been dropped by Congress in our time; but the claimant was still obliged (when we have had conscription) to show that he was, by reason of his religious training and belief, conscientiously opposed to participation in war

108. See PLATO, SYMPOSIUM 197C-D. Consider, however, what is said elsewhere in the Symposium, and in Plutarch's Lives, about lovers' emulating the best in battle when performing before their loved ones. Also a problem here is the frequently-heard insistence upon conscience. "Conscience" seems a distinctively Christian concept; its invocation seems different from an invocation of natural right. Thus, unlike natural right, conscience is likely to be largely private in its orientation, related more to concerns about the salvation of one's soul than to concerns about service to the common good. But this requires a long discussion better reserved for another occasion.
in any form. And by "religious training and belief," Congress explained itself to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."109

Is there any sense in, or justification for, an exemption rooted in religious beliefs and affiliations? Thoughtful men have argued that the privilege of conscientious objection ought not to be limited to the religious. But what was Congress thinking of when it did limit the privilege to the religious? There was, in part, the problem of evidence: who is sincerely a pacifist and how can we tell? Such issues need to be addressed in order to be fair to those who do serve and in order to be able to secure the services the community needs. Courts determine all the time who is and who is not sincere—and evidence about church membership is not absolutely necessary in order to do that. But may not evidence about a certain kind of church membership be quite helpful in these matters? May it not reassure the community at large, including the families of the young men who do serve, that plausible grounds are being relied upon to excuse the conscientious objector, grounds rooted in the traditional "peace churches" rationale that has long been accepted by the rest of the community as "just the way things are"?

These considerations may be related to another which is never expressed but which, I sense, may nevertheless have been central to developing the traditional rationale: not only has membership in the traditional peace churches probably been regarded as a convenient way to test a claimant's sincerity but also (and this is the related consideration) such membership has been considered by many as itself a kind of deprivation, perhaps even comparable to the deprivation that conscription ordinarily means. Many would rather have their sons take their chances with the army for a year or two than have them live all their lives with the disabilities of the Quakers or the Amish or whatever. Such practitioners, it might be added in the fashion of our day, "have suffered enough." Certainly, a simple, austere life does not recommend itself to many—and is a sufficient test of sincerity, as well as affliction enough.

Then there is the simple fact that those whose pacifism is rooted

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109. See United States v. Seeger, 380 U.S. 163, 172 (1965). The courts have done strange things with this provision, expanding as they have the "relation to a Supreme Being" qualification to include, in effect, strongly held "political, sociological, or philosophical views." See infra note 112 and accompanying text. On the litigation with respect to conscientious objectors, see NOONAN, supra note 3, at 255-68.
in religious faith may usually be harder to reason with than those whose pacifism is dependent upon "essentially political, sociological, or philosophical views"—not only harder to reason with but also less subject to public opinion. One can even say that those who "opt out" on the basis of what are called "essentially political, sociological, or philosophical views" are, in effect, doing what Congress is doing in assessing the political situation but are coming to a different conclusion and are insisting that they have as much right to act on their opinion as Congress has to act on its opinion. There may be, in many instances, something presumptuous about such an insistence—as we would all recognize, readily enough, if a factory owner decided, on "essentially political, sociological or philosophical" grounds that he knew as well as any government what he should do about controlling the discharge of waste from his factory.

To suggest that the non-religious pacifist may be easier to reason with than the religious one may be to recognize, as well, that the non-religious, because he is apt to be more of this world, is more susceptible to the threats and effects of painful actions taken against him. Certainly, martyrs are more apt to be found among the religious than among the non-religious. Then there is the problem of numbers: if non-religious grounds are permitted for conscientious objection, one can expect (as Scott anticipated in 1789) that all too many young men might declare themselves as not "really" wanting to serve. And, it should be noticed, such an exemption would throw a greater burden upon the poor and the uneducated who have not been taught the formulae which provide one immunity from military service. If a religion-based exemption should also prove destructive of efficient conscription, the community might have to consider, in an emergency, withdrawing all conscientious-objection exemptions, even if it should mean being harsh toward those who "could not help themselves."

To say all this is to recognize that there may well be times when the community is desperately in need of armed forces which can be raised only by conscription.

v.

But, it will be said, Congress discriminates if it provides (as it has from the earliest days under the Constitution) conscientious objection status only for the religiously-moved claimant. True, but may not such discrimination be justifiable if done on a plausible basis? It is that which I have just been considering.
Still another consideration should be noticed here. The Congress that enacts, or permits the continuation of, a conscientious-objection exemption is the very institution that makes war possible, by declaring war and by appropriating money for military purposes. So, it is not the Congress' preferences about war (or about pacifism) which are written into the conscientious-objection exemption but rather an opinion quite opposite to the dominant Congressional opinion. It is not likely, therefore, that Congress, in providing for conscientious-objection qualifications, is thereby indulging its preferences (religious or otherwise). Rather, it is exercising its judgment as to whom it is appropriate to conscript in the circumstances in which we find ourselves.

There can be said about Congress here what can be said about predominantly white legislatures which provide for reverse racial discrimination (or affirmative action programs) in this country today: "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking." 110

But what is suggested here about Congress need not apply to the courts. The courts need not approve of a war; they certainly are not responsible for carrying on any war—and so there is no assurance that they are acting against what they conceive to be "their own interests," so to speak, when they take measures which impede conscription. Of course, courts may want to consider whether the rules governing conscription are clear and perhaps even whether the combat being prepared for is consistent with the prerogatives of Congress alone to declare war.

Conscientious objection has become the problem it has today in part because of the folly of our Vietnam involvement in the 1960s. That war has done remarkable damage to the patriotism of all too many of the susceptible young. When such subversion of patriotism is reinforced by changed public responses to questions of shame and honor, young people cannot help but change their opin-

110. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 735 (1974). Professor Ely adds, "A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks." Id. He also warns, "There is nothing suspicious about a majority's discriminating against itself, though we must never relent in our vigilance lest something masquerading as that should in fact be something else." Id. at 741.
ions about what their duty is and what it means not to respond to the call of one's country.

vi.

It is Vietnam which has made it fashionable to invoke not only the right of conscientious objection on "philosophical" grounds but also the right of conscientious objection to participation in particular wars.

A limited conscientious objection is much more apt, than is comprehensive pacifism, to be based on non-religious grounds. The critical problem here is one I have already mentioned, the apparent presumptuousness of any citizen's second-guessing the political judgment of the legislature and acting upon that. Why should one's ability to do this in the case of conscription be greater than whatever one's ability may be to do this in the case of pollution regulations, tax rates, or speed limits?

Of course, it may be unjust to comply with any particular demand of one's government. But what one should (or should not) do when that happens need not depend either upon any constitutional right or upon whether an exemption, privilege or immunity has been granted to one. Socrates is known to have served in several military campaigns ordained by Athens—in wars which were, in some ways quite dubious, and which were hardly good for Athens. But there is no indication that Socrates ever considered himself entitled to second-guess the Athenian assembly in this respect—although, I should add, neither is there any indication that he distinguished himself on those campaigns in anything but defensive tactics and in retreats.

Socrates, at his trial, points out that he did serve—and that he stood firmly (as one should, he conceded) at the posts at which he had been stationed. But he also points out that on two occasions he had defied the government of Athens, at considerable risk to himself, in that he refused to cooperate in the doing of unjust actions demanded of him. What one does on such occasions—which are, in a civilized community, few and far between, it can be hoped—does not depend then upon whether there is a recognized

exemption or privilege. In fact, it is in precisely such situations that an unjust government is most demanding in requiring cooperation and is least respectful of the sensibilities of its citizens.

We are reminded by this observation of another reason why the legislature may provide for the status of the religiously-directed conscientious objection—and that is that it thereby shows us all that it is aware of its limitations and that it wants thereby to recognize that there may indeed be an authority beyond its own to which an occasional citizen may have, or may seem to have, access. Such self-restraint by a legislature is, one can say, a guard against *hubris*. Whether the citizen himself become *hubristic* (that is, recklessly presumptuous) in undertaking to decide which wars he will serve in, or in what capacity, remains a question—whatever may be said about the right, indeed the duty, of the citizen to refuse to do any particular unjust act that he is personally confronted by in circumstances which permit him clearly to see both what is happening and what he is called upon to do.

It should also be noticed, however, that there may be something artificial about the question of whether there is a right to selective conscientious objection, insofar as one may be concerned about wholesale invocations of such a right. For if there is, or would be, a widespread recourse to lawful avoidance of military service if available, it suggests that the war proposed, or mandated, by Congress is not likely to have that support in public opinion necessary for its successful prosecution. To recognize this is to say in still another way that we may have here a political problem, not a question about individual rights.

vii.

I have suggested that it is understandable why Congress and the courts have always been much more inclined to respect a claim of comprehensive conscientious objection than a claim of a right to opt out of participation in a particular war.

And yet this is a curious state of affairs: the fact is that the selective conscientious objection (in the form of the judgment that this war simply is not just) may sometimes be more defensible than comprehensive pacifism can ever be (whether on religious or other grounds). Comprehensive pacifism is almost certain to be dubious on principle, whereas a particular war or a particular campaign in a war may indeed be something that one should not cooperate with. Consider what one's response should be to certain orders
directing either a large-scale discharge of nuclear weapons or a systematic extermination of innocent people.

Still, it seems to me, it is defensible for Congress to discriminate as it does between the comprehensive and the selective conscientious objector. This is partly because (as I have indicated) Congress has made a judgment, by which it and others have to live at their peril about the justice or necessity of this war. On the other hand, the comprehensive conscientious objector (on religious grounds) can plausibly be regarded by Congress as "incurable" or useless for military service or not worth the trouble or pain (to himself and to the community) of punishing.

Besides, as I have indicated, the pacifist does remind us all of our limitations: he does challenge us to consider, and reconsider, what we are doing. His presence does testify to the humanity of the community which can tolerate such principled abstention from the common effort—the humanity of the very community which can, sometimes with a certain necessary harshness, march reluctant conscripts off to war and even to a likely death.

It should be noticed here that more and more Americans in the Twentieth Century have invoked the status of the conscientious objector (aside from what happened in Vietnam, which can be considered as much a political protest as an objection based on pacifist principles). Thus, the ratio of invocations during the Second World War was three times as high as it was during the First World War (only a quarter century earlier). Why has the willingness to invoke the privilege grown? Because of increased awareness of what war means? But that is hardly likely, considering the fact that the Second World War was, for the United States, far more defensible than the First World War. Or was it because American society has become more humane—and thus encourages some to admit to what others had not dared to invoke before? Or is it because of neither of these reasons but because Americans have become softer and the community has become more permissive?

Perhaps as much as anything else, the key to the increased tolerance of a comprehensive conscientious objection may be that the community is far less sure than it once might have been that there is a truth to be known, and that there are moral and political principles which it is entitled to teach the young and which it feels confident in acting upon in rewarding and punishing those who will not comply with the directives of the community.
I anticipate my next lecture by dealing quickly here with certain constitutional questions sometimes raised by what the legislature might do about conscientious objectors. The First Amendment, as you all know, provides that Congress may not make any law respecting an establishment of religion or prohibiting the free exercise of religion.

I suggest that there is no violation of the establishment prohibition if an exception is made by Congress which is limited to certain people with certain kinds of religious training or associations. I also suggest that there is no violation of the free-exercise guarantee if Congress should decline to provide any exemption at all, no matter what a person's religious opinions or calling may be.

I believe it would be generally recognized by the courts that there would be no free-exercise issue if Congress provided for no exemption, that the exemption is indeed a matter of legislative grace, not a matter of right. It is not one's religion that is being acted against by Congress by providing for no exemption; rather, Congress would then be simply treating everyone the same, without a concern for whatever one's religion tells one to do or not do (just as it might condemn bigamy or other "anti-social conduct" wherever it appears, whatever one's religious opinions on the subject).

But the courts have been anything but astute in dealing with the Establishment Clause problems here, as distinguished from the Free Exercise Clause problems. Thus, there has been the doctrinaire insistence by a Justice of the Supreme Court (in one of the conscientious objectors cases) that the Establishment Clause does not permit government to "draw the line between theistic or nontheistic religious beliefs on the one hand and secular belief on the other," as grounds for establishing the privilege of conscientious objection. But, as I have indicated, there may be sound public-policy considerations which entitle Congress, when there is conscription, to make special provision for people incapacitated by their religious training and opinions. Similarly, there was no Establishment Clause problem when Congress, upon enacting the legislation which implemented the Prohibition Amendment, provided for religious and other exemptions to the complete prohibition "for beverage purposes" of the manufacture and sale of intoxicating li-

quors thereby enacted. The religious exemption, on that occasion, was seen in the form of the special arrangements made for the production and distribution of sacramental wine for recognized religious organizations.

Comparable to the exemption of certain kinds of conscientious objectors is the decision not to require women to be conscripted for military service, whatever one may do about permitting them to volunteer for service in various capacities. Such an exemption of women is surely neither a deprivation for women nor an unconstitutional discrimination against men.\footnote{See Rostker v. Goldberg, 453 U.S. 57 (1981).} No doubt, some women could serve very well, but it may be questionable that all women should be treated the same here as all men. Similarly, some pacifists could serve very well if forced to do so, but it may be questionable that much would be gained by trying to force all dedicated, and especially religiously-bred, pacifists to serve in the military. That is to say, various conditions may disqualify one from compulsory military service.

In any event, it is a mistake to assume that there must be judicial protection—a constitutional right to be invoked—whenever someone might be hurt for acting justly. It is too much to expect that the constitutional should always coincide with the just—and to proceed on the assumption that they must coincide is in effect to attempt to turn the judiciary into another branch of the legislature. Broad policy arguments, as well as special exemptions, do seem more within the domain of the legislature, where the relevant arguments with respect both to justice and to humanity can be made with the appropriate data and the necessary political support.

Still, it should be added, what must be left open here is the right and duty of all of us to be able to question what Congress is doing, including the wars it gets us into and what is done, in our name, during those wars. The sincere comprehensive conscientious objector does serve, as I have said, to remind us of the right and the duty to examine and to judge what is going on, whatever reservations we may have about the principles which preclude him from judging properly the facts case by case when a question of military action is before the house.

ix.

I have suggested that to constitutionalize a refusal to be conscripted as an individual right is to make too much of the judicial
process and not enough of politics. It may also shift the burdens of
the community from the less conscientious to the more conscien-
tious, from those willing to take advantage of whatever exemptions
are specified to those who are not willing to be anything but sincere
and patriotic in their claims to privileges.

In the final analysis, I suspect, the conscription exemptions for
conscientious objectors must be continually assessed just as must
be, for example, tax exemptions for religious organizations. Such
matters call for policy determinations, to be adjusted as circum-
stances change. Certainly, the rules might have to be changed—if,
for instance, many private residences in a town should be design-
nated by their owners as separate church buildings for tax-exemp-
tion purposes.\textsuperscript{114}

I suggest that prudence on the part of government officials and
the citizen body alike is at the core of proper resolution of such
problems. A sensible exercise of power, as well as a sensible re-
response to such exercise, is needed if we are not to be burdened by
the development of dubious constitutional attitudes. Contributing
to a sensible firmness is a proper compassion for people disabled in
various ways—a compassion to be balanced by a justified confi-
dence in one's moral judgment.

Here, too, the sincere conscientious objector, especially in times
when doubts are entertained about his manhood, may be of use to
the community at large, however questionable his principles may
ultimately be: for he does remind us what it means to be both
compassionate and confident, challenging us to be as steadfast, as
thoughtful and as principled as the conscientious objector usually
considers himself to be.

VI. THE PROPER COLLABORATION OF CHURCH AND STATE\textsuperscript{115}

From each according to his abilities; to each according to his
needs.

—Karl Marx\textsuperscript{116}

A good beginning for our further consideration here in Memphis

\textsuperscript{114} See Anastaplo, The Religion Clauses of the First Amendment, supra note 112, at
211-12, n.84 (1981).

\textsuperscript{115} This talk was given at Memphis State University, Memphis, Tennessee, March
30, 1982. See supra note 50.

\textsuperscript{116} K. Marx, Critique of the Gotha Program (1875). See also Anastaplo, On Speaking To and For Mankind: The “Laborem Exercens” Encyclical of Pope John Paul II, Catholicism in Crisis, September 1983, at 6-7.
of the Religion Clauses of the First Amendment and what the Framers of that amendment believed and intended is to consider three provisions in the first constitution of Tennessee, which was adopted only a few years after the Bill of Rights was added to the Constitution of the United States. The first of these three provisions, all of which have been retained in every Tennessee constitution since the first, is the following:

That all men have a natural and indefeasible right to worship ALMIGHTY GOD according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever controul or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or mode of worship.

Immediately following upon that provision is this one: "That no religious test shall ever be required as a qualification to any office or public trust under this state." Both of these provisions may be found in the Declaration of Rights appended to the 1796 Constitution. 117

Earlier in that constitution, among those articles concerned with the selection and qualification of various officers in the State, the following provision may be found (a provision I commented upon in my talk here yesterday afternoon): "No person who denies the being of God or a future state of rewards and punishments, shall hold any office in the civil department of this state." 118

It might well seem to many of us that because this provision disqualifies anyone "who denies the being of God or a future state of rewards and punishments" it must run counter to the assurance, earlier quoted, that "no religious test shall ever be required as a qualification . . ." Yet it is prudent to assume that the framers of the Tennessee constitution, and the people of that day (and not only in Tennessee, we shall see), considered these provisions to be consistent with one another.

Nothing, it should be noticed, is said in the disqualification provision about subjecting prospective officeholders to inquisitions respecting what they do believe about God and "a future state of rewards and punishments." Rather, it is said that anyone who denies certain things—presumably at his own volition and in a more

117. TENN. CONST. art XI, §§ 3 and 4.
118. Id., Art. VIII, § 2. This evidently does not apply to those in the military service of the State. If it did, would it not provide all too convenient means for effective conscientious objection to such service? See supra note 63 and accompanying text.
or less public way—should not hold any civil office. I dare say that anyone then, and perhaps anyone today in most parts of this country, who presumed to make such a public denial would jeopardize, if not eliminate completely, his chances of holding public office, at least elected office or an office depending on elected officers. Nothing is said in the Tennessee constitution about calling upon the courts to enforce this provision: rather, it is a provision which indicates what the people expect of each other, and especially of their civil officers—an expectation that is implemented not so much by judicial review as by the political process.

It should be noticed as well that such a restriction as is indicated here about what one can safely deny and still expect to hold public office does not seem to be considered a "religious test." A religious test evidently refers to any kind of provision (of a positive character, by the way—that is, an oath or statement to be made) which prefers one sect or one set of doctrines to another. It is quite clear from the "religious test" provision and from the first provision I have read, that the people of Tennessee wanted to foreclose preferential treatment. But the provision with respect to the opinions one presumes to express about "the being of God or a future state of rewards and punishments" is not a concern about one's religion, or religious affiliations or beliefs, but rather about one's political judgment and one's reliability both as a teacher and as a moral human being.

What the people of Tennessee were saying, I suggest, is what George Washington and his colleagues were also saying during that decade. They had written into Article VI of the Constitution of 1787 the guarantee which Tennessee drew upon in 1796 for its religious-test language:

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.

But this did not mean that the Framers of the Constitution did not recognize the Biblical orientation of the American people and of various of the institutions of the United States, as may be seen in the recognition of the fact that Sunday is a holiday for constitutional purposes (with respect to Presidential-veto time limitations) and even in the use of the language, for purposes of dating, "the Year of our Lord one thousand seven hundred and Eighty
seven.\footnote{119} Nor did the absolute prohibition of a religious test mean that the Framers did not depend, for the administration of the government under the Constitution, upon the religious sentiments and attachments of the people. Although the religious-test prohibition appears in the provision requiring oaths of virtually all government officials in the United States, national and local, this does not mean that religion should be disregarded by responsible officers (and others) in their efforts to have oaths and other duties respected by Americans. We should recall how Washington himself spoke in his Farewell Address of the uses of religion for the moral training of a people.\footnote{120}

Nor is such an approach to the civic life of the country limited to the founding period. Traditional political thought emphasized the dependence of the commonweal upon religious support for the moral and even political virtue of the citizen body. This awareness is reflected in an 1846 handbill by Abraham Lincoln in which he replied in this cautious fashion to the charges of infidelity made against him in the course of a Congressional election campaign in Illinois:

I do not think I could myself be brought to support a man for office, whom I knew to be an open enemy of, and scoffer at, religion. Leaving the higher matter of eternal consequences, between him and his Maker, I still do not think any man has the right thus to insult the feelings, and injure the morals, of the community in which he may live.\footnote{121}

When we recall the seemingly divergent things that the people of Tennessee, as well as Washington and his colleagues, evidently had no trouble reconciling, we are put on notice that we may not know what the men in the late Eighteenth Century did think about the place of religion in American political life. We may even be moved to wonder, upon reflecting on what they thought then, whether we truly understand the questions and problems that should be addressed with respect to these matters.

Certainly, we have departed from the earlier understanding. At least, intellectuals and those now responsible for official statements of political and constitutional doctrines have departed from the earlier understanding. But there are reminders from time to time

\footnotetext{119. See Commentary, supra note 57, Lecture No. 15.}
\footnotetext{120. See supra notes 34, 60-61 and accompanying text.}
\footnotetext{121. 1 COLLECTED WORKS OF LINCOLN, supra note 31, at 382 (1953). See also supra note 69.}
Church and State

(as may be seen in the political emergence of the so-called Moral Majority) that the people at large may be lagging behind their more sophisticated leaders in these matters. Or should we say that the people at large instinctively continue to identify themselves with the sentiments, posture and expectations of the leaders of an earlier (and perhaps more politic) day?

ii.

Before we can consider the Religion Clauses of the First Amendment properly, we should remind ourselves of how the First Amendment as a whole is put together. That amendment, you will remember, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...”

Notice the distinctions drawn here between what may be done by Congress about “an establishment of religion,” about “the free exercise” of religion, and about “the freedom of speech, or of the press.” No law can be made respecting an establishment of religion; no law can be made prohibiting the free exercise of religion; no law can be made abridging the freedom of speech. Why is not “respecting” used in all three cases? Because, it would seem, Congress is not intended to be able to have nothing at all to do with freedom of speech or with the free exercise of religion. Perhaps, indeed, Congress is to be permitted to expand or protect those rights. But Congress is emphatically told that it is to keep its hands completely off establishments of religion? Why should this be so? Because, it would seem, State power to establish, or to “de-establish,” religions is permitted to continue. To notice this is to raise a question about the soundness of what is so often said by constitutional scholars today (and especially by judges) about how highly the Founding Fathers regarded “the separation of Church and State.” (I will return to this point later in my talk today.)

But, it might be asked, why was a distinction drawn between “prohibiting” the free exercise of religion and “abridging” the freedom of speech or of the press? Because, it would seem, freedom of speech is something that is susceptible of being cut down (for instance, by government regulations favoring certain speakers and interfering with others)—and so, in order to protect freedom of speech, any abridging of it (or cutting it down) must be dealt with. But, it can be useful to suggest by way of speculation, the free exercise of religion is something either one does or does not have: it is either prohibited or it is not. This may suggest, to continue these
speculations, that the free exercise of religion is a fairly simple (and indissoluble) whole: either one is, or is not, permitted to believe what one chooses and to worship accordingly (aside from the question of regulating actions, in churches and elsewhere, which believers attempt to have immunized as related to their religious doctrines). Any selective prohibition with respect to the free exercise of religion—that is, by prohibiting certain sects while permitting others—can be understood to amount to a partial establishment of religion. (These speculations are aside from the influence of traditional associations of "prohibit" and "abridge" with one or another right.)

Be all this as it may, the States are left alone by the First Amendment. But the government of the United States is not kept by that amendment from interfering with, and correcting, State prohibitions of the free exercise of religion and State abridgments of the freedom of speech or of the press. All this, I also remind you, applies to the First Amendment alone, not to whatever may have been done by the Fourteenth Amendment to curb State powers.

Much of what I have said about the Speech and Press Clauses of the First Amendment, which is well to be reminded of before I discuss further the Religion Clauses, is summed up in the following passage from my book, *The Constitutionalist*:

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.

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.

Absolute as the constitutional prohibition may be with respect to Congress, it does not touch directly the great State power to affect freedom of speech and of the press. In fact, I shall argue, one condition for effective negation of Congressional power over this subject (which negation is important for the political freedom of the American people) is that the States should retain some power to regulate political expression. It seems to me, however, that the General Government has the duty to police or restrain the power of the States in this respect, a duty dictated by such commands in the Constitution of 1787 as that which provides that the "United States shall guarantee to every State in this Union a Republican Form of Government . . ." 122

iii.

My extended discussion of the Religion Clauses of the First Amendment, particularly as they bear upon problems of public aid to church-sponsored schools today, may be found in my 1978 Department of Health, Education and Welfare report on the Title I schools program established in 1965. The Memphis State University Law Review was kind enough to publish my report in its entirety in its Winter 1981 issue. It is in these education cases, by the way, that most serious Establishment Clause cases come up today.

I draw extensively upon that report in spelling out what I have already outlined in these Memphis lectures about what I believe the Religion Clauses to say and not to say, those clauses which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." What I hope to do, by the use of extensive quotations from my H.E.W. report, is to develop in various ways an interpretation of a fairly simple set of provisions found in the First Amendment.

I begin now to draw upon my Memphis State University Law Review article:

The original intentions of the Religion Clauses of the First Amendment seem to me far simpler than one would suspect from the [Supreme] Court's convoluted pronouncements of the past three decades. The Free Exercise Clause is today in better shape than the Establishment Clause, probably because . . . the original intention of the former clause appeals more to contemporary in-

clinations than does the original intention of the latter clause. There is said to be some tension between the Free Exercise Clause and the Establishment Clause. . . . I believe that this tension results, at least in part, from misreadings of both clauses.

Consider, for example, one scholar's report on the Court's readings of these clauses:

In the Court's early efforts to articulate the contours of freedom of religion, there were repeated reliances on a distinction between "belief" and "action." At first . . . the Court suggested that "free exercise" extended only to belief, and did not reach conduct at all. More recently, the Court has increasingly come to acknowledge that conduct based on religious belief may sometimes claim exemption from general regulatory statutes because of the free exercise guarantee. That growing recognition in turn has brought inherent tensions between the free exercise and establishment clauses to the forefront . . . When must regulatory statutes exempt religion-based conduct? When may a legislature exempt such conduct without violating the establishment clause?

The old answers to these two questions would have been (1) that religion-based conduct is to be treated like any other conduct (except for that religion-based conduct (a) which consists of attending religious services [but not necessarily everything that might happen at such services] or (b) which consists of professing the beliefs about the divine that one has), and (2) that a legislature's exemption of any conduct from regulation is hardly likely to contribute to an establishment of religion unless there is also a more direct and obvious attempt to do so. These old answers, unfashionable though they now are, still seem to me quite sensible.123

Of course, as is well known, the Establishment Clause of the First Amendment has been difficult for the courts to interpret consistently. But that is in large part due to the fact that the original meaning of that Clause has been lost sight of. I have further suggested, in my Memphis State article,

This clause of the First Amendment was designed (1) to keep the Federal Government from setting up a religious establishment of its own, and (2) to keep the Federal Government from interfering with deliberate establishments of religion sponsored by various State Governments.

That State religious establishments were intended to be pro-

123. Anastaplo, The Religion Clauses of the First Amendment, supra note 112, at 182-183. The scholar quoted from at length in the passage in the text here is Gerald Gunther. I omit, in my quotations here from this article, citations and most of the notes.
tected by the First Amendment has been demonstrated many times by constitutional scholars and has been conceded again and again by Justices of the Supreme Court. Even [the most determined separationists on the Court seem] to recognize that the First Amendment may have been designed as much to hinder Federal interference with State establishments as it was to forbid a Federal establishment. Thus, one scholar observed, "The purpose of the First Amendment was not to keep government and religion separated, but rather 'to forbid the Federal Government from interfering in the manner in which the state governments dealt with religion.'"...  

It should be evident, from any thorough study of the framing in 1789 of the First Amendment (in the First Congress), that the prevailing opinion did not consider the State establishments bad in themselves. That opinion is reflected in the First Amendment. James Madison may have thought otherwise, but even that is not clear. He could only say, in response to inquiries about the meaning of the proposal which was eventually to become part of the First Amendment, that he "apprehended the meaning of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."  

Madison did try to have various limitations in the Bill of Rights extended against the States as well, but this effort proved unsuccessful. Even so, his attempt did not include the establishment restriction, only the free exercise (or "rights of conscience") restriction. Nor was Thomas Jefferson, from whom the "wall of separation" language is drawn, representative of American opinion on this issue at the time of the framing and adoption of the First Amendment. One can find considerable evidence, therefore, to support the following conclusion:

It is argued that there is no basis in the legislative history of the First Amendment for assuming that the wording finally agreed on was the work of Madison any more than that of others, like Charles Carroll. . . . Further, it has been said that the views of the two Virginians [Madison and Jefferson] regarding church-state relations were not representative of the other constitutional authors.  

It should also be evident that it was not the intrinsic badness of religious establishments which led to the prohibition against the Federal Government's setting up an establishment of its own. Rather, it was primarily the diversity of religious inclinations and establishments in the various States that made a Federal effort seem highly undesirable.

Thus, Madison had to assure his colleagues in Congress that
the proposed amendment was directed against any attempt to establish a "national religion." Thus, also, Madison could observe, in the course of debates in the House of Representatives on the Bill of Rights, that he "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." ... Critical to the meaning of "establishment of religion" at the time of the writing (in 1789) and ratification (in 1791) of the First Amendment was, I have suggested, the sense of a marked preference by government for one or a few sects over all the others. An "establishment of religion" prohibition would not rule out aid or regulations which help all sects, whatever objections Madison or Jefferson might have had to taxing one man to support another man's religion.

There is about this interpretation of "establishment of religion," as originally understood, nothing complicated. Indeed, it is quite simple and amply supported by the available evidence. But, unfortunately for our understanding of constitutional law, it has not been the dominant interpretation by the Court in the Twentieth Century. Instead, there is the influential pronouncement by [the Court in the Everson bus subsidies case124], the first of the Establishment Clause cases after the Second World War:

The "establishment of religion" clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

To argue as I have for the simple definition of “establishment or religion” which was originally intended has been condemned by [a Supreme Court Justice] as a worthless “academic exercise.” The Court, he insisted, has “rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.” This rejection, he insisted, is no longer open to question.

Such is the attitude of partisans who, whatever they might concede to the ambiguity of the historical record, take refuge in what the Supreme Court happens to have decided to be “correct.” But, as should by now be evident, judicial mandating of “correct” answers does not permanently settle questions which depend on the nature of man, on the nature and hence the needs of communities, and on the conformity to one another of various parts of the Constitution.125

It would now be useful, in order to suggest further how the Religion Clauses should be read, to touch upon various kinds of cases that have come before the courts in recent decades. I return to my Memphis State article:

Government can properly penalize such conduct as bigamy or child neglect or snake-handling, whatever the sincere religious opinions may have been which led to (or even “compelled”) the misconduct, and even though the opinions themselves, as such (that is, without the conduct), are not vulnerable before the law. Why then cannot the public provide aid to children in church-sponsored schools, and even to the schools themselves, so long as legitimate public concerns are being dealt with (concerns about transportation safety, nutrition, morality, health, and education) and so long as the aid is not primarily designed by the public to advance or to hinder the “religious mission” of the association sponsoring the schools?...

[Vital] to the problem of public funding of church-sponsored schools is not a constitutional issue but a policy question. We should be asking ourselves, “Do we want what we are getting from these schools?”

The legitimate constitutional issue which does come up here, in the circumstances of the United States today, is not that of any possible establishment of religion but rather that of any possible interferences by government with the free exercise of religion. A free exercise problem is evident whenever oaths of allegiance, school prayers, and religious ceremonies are mandated by law. Thus, the Gobitis-Engel line of cases should raise more serious

125. Anastaplo, The Religion Clauses of the First Amendment, supra note 112, at 183-86. One paragraph in the long passage quoted here is taken from notes in my Memphis State article.
constitutional, or at least political, concerns than the *Everson-Allen* line of cases. One can see in the *Gobitis-Engel* cases the spectacle of government power being used to force reluctant children to appear either "religious" or "patriotic" (or both) by reciting oaths or prayers. On the other hand, the *Everson-Allen* cases can be seen primarily as efforts by the public to underwrite expenditures (on bus rides, textbooks, etc.) made by students in church-sponsored schools.

It is the coercion of citizens which proves troublesome in the *Gobitis-Engel* line of cases, thereby raising Free Exercise of Religion concerns. Certainly, Americans generally agree that people should not be compelled to witness, or even to seem to witness, to that in which they do not believe with respect to religious matters.

Thus, a genuine concern for religious liberty can be said to be shared in this country by all the major sects. No wonder then that religious liberty was "the American issue at the [Vatican] Council..." It was the American bishops who argued for the right of conscience in the exercise of religion in society. Compare the sincere query a generation before, by a critic of the Roman Catholic Church, as to "whether the [parochial school] system is producing Catholics first and Americans second..."

... Something more can usefully be said here about the two lines of development in these Religion Clauses cases which I have suggested. One line began (in the Twentieth Century phase) in a somewhat confused way (as in *Gobitis*) but settled down into a fairly clear line (as in *Barnette, McCollum*, and *Engel*). The other line seemed to begin a clear fashion (with Justice Black's emphatic language in *Everson*) but has been rather confused ever since. The former line deals with situations which invite individual resistance, in that it deals with governmental arrangements which depend, or seem to depend, upon compulsion. Not that there has not been considerable support in public opinion for such compulsion, but resistance to it does draw upon something deep and even noble in the American character...

The "free exercise of religion" would not necessarily be af-

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Cases such as *Gobitis* and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1962) provide interesting displays of the loss of a sense of proportion (that is, prudence) on the part of officials both in the States involved (Pennsylvania and West Virginia) and among their supporters on the United States Supreme Court. See also supra notes 38 and 47 and accompanying text.


affected adversely even by a general program of the Federal Government to contribute to the religious life of the United States. Indeed, there have been numerous things we have done and supported as a community to aid religious life in this country. Thus, it was conceded [by the Supreme Court in 1970] that tax exemption of church-owned property is clearly a form of indirect support for religious organizations. Such tax exemption was upheld in that case, but on the novel premise that taxation of church property would result in "excessive governmental entanglement with religion." I doubt that it ever occurred to the American people in the founding period that a general tax exemption for churches created either an establishment problem or a free exercise problem. But then I doubt that it ever occurred to many Eighteenth-Century Americans that their political institutions could do without a healthy religious life.

At the heart of this way of reading the Religion Clauses of the First Amendment is, of course, an opinion as to how the Constitution itself should be read. Carelessness in reading one part of the Constitution, especially something as vital as the First Amendment, promotes and ratifies carelessness in reading the Constitution as a whole. Or rather, perhaps, the failure to perceive how carefully crafted the Constitution as a whole is lulls and misleads those who set out, in circumstances where partisanship is easily excited, to interpret various constitutional provisions—and so they do not consider that there is anything in the Constitution which requires rigorous thought and a disciplined imagination. It is no wonder, then, that we hear talk of a "growing Constitution"—which means, in effect, that there is no Constitution by which we are truly bound and from which we can continually learn.

Among the matters in need of repeated consideration when one approaches the Constitution is the problem of the status of judicial review, the problem of the proper spheres of the courts and of legislatures under the Constitution. Also critical here is the distinction between the constitutional and the just, which I have several times touched upon in these lectures here in Memphis. By and large, policy determinations should be left to legislatures—which means, among other things, that legislatures may, from time to

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130. Anastaplo, The Religion Clauses of the First Amendment, supra note 112, at 173-75, 180, 186-87. Thus, there are three separate passages strung together here from my article.
time, use their undeniable constitutional powers unjustly. But, then, courts may do so also—as may be seen, for example, in the notorious *Dred Scott* case\(^{131}\)—and so the question remains what each branch of the government can do best.

Or, to put all this another way, just as each form of government may have an appropriate voice,\(^{132}\) so may each branch of government under our form of government have an appropriate capacity.

\(\nu\)

I return now, after these general observations upon constitutional government, to the Religion Clauses of the First Amendment.

Can religion be noticed by the government, can it be taken account of? I suggested, in my discussion last night of the conscientious-objectors issue, that government can (and in some instances might well) take account of the religious opinions of prospective conscripts, as those opinions bear upon their qualifications as soldiers. There is, I have also suggested, no constitutional necessity that Congress should take account of such claims, but rather a sound policy determination to be made here.

I have suggested as well that a person's constitutional claims may be disregarded (or overridden, so to speak).\(^{133}\) That is, government need not be intimidated or paralyzed by the fact that various activities indulged in by various people are justified by those people as flowing from, if not required by, their religious opinions.

This would mean, among other things, that frauds rooted in supposed religious opinions are eligible for prosecution. If courts can be trusted to determine the sincerity of conscientious objection claimants, cannot they be trusted to determine the sincerity and good faith of those among us who exploit religious sensibilities in order to cheat other people?\(^{134}\)

\(^{131}\) *Dred Scott v. Sandford*, 60 U.S. 393 (19 How.) (1857).

\(^{132}\) See *Dialogues*, supra note 54, at 1605.

\(^{133}\) This may be seen, for example, in the bigamy case and in the snake-handling and poison-drinking cases in which personal religious opinions and duties were overridden by traditional governmental concerns. See *Reynolds v. U.S.*, 98 U.S. 145 (1870); *State v. Massey*, 229 N.C. 734, 51 S.E. 2d 179 (1949); *State v. Pack*, 527 S.W. 2d 99 (1975); Anastaplo, *The Religion Clauses of the First Amendment*, supra note 112, at 208 n.62; *Noonan*, supra note 3, at 290; *Oaks, Separation, Accommodation and the Future of Church and State*, 35 De Paul L. Rev. 1, 19-20 (1985); supra note 46 and accompanying text.

\(^{134}\) See supra note 49 and accompanying text.
I have just considered whether religion can be noticed by government. I now consider, if only briefly, whether religion can be relied upon by the government. Can government make use of it? Is it necessary, or at least useful, for morality? Is its help in developing and preserving the morality of people taken for granted by government? Is it essential for a healthy community life? And, if it is essential or at least highly useful, may government take a legitimate interest in precisely what is taught by religion about social and political issues? What should happen, for example, if an influential sect in the community should inculcate doctrines which have a serious adverse effect upon the ability of that community to defend itself against foreign tyrants? Should not the responsible statesman undertake to modify such doctrines, at least in what they have to say about public-policy matters? And if religious beliefs are inextricably mixed up with political prescriptions, what then? May not the prescriptions be challenged, insofar as they are political, leaving it to the religious authorities to do what they have to do to salvage (preferably by separating out or otherwise modifying) their religious principles?

Has morality come to be seen as intimately connected with, if not even entirely dependent upon, religion, rather than being seen as something for which religion is useful? What can be done to promote morality, even as we curb moralism? The danger is that intellectuals, who all too often are unduly concerned about superstition, will leave the field for the moralistic and the less thoughtful—and then we will have only dogmatic pronouncements on both sides as old battles are staged. One danger from the moralistic is that they say and do silly things which stir up needless controversy and discredit public interest in morality. It has always been a serious problem for American statesmen how to restrain those believers who can give religion a bad name.

But these questions aside, the question remains whether religion can properly be supported by government under the American Constitution. The beginning of an answer is that religion is in fact supported in many ways by government—as we have already noticed in commenting upon tax exemptions. Should we face up to the supporting that government does do, thereby doing it properly and educating people as we do so?

In short, do we really want to keep religion out of politics, as well as politics out of religion? This is how I have spoken to this issue in my *Memphis State* article:
Does it not depend on particular circumstances and specific proposals what we as a people should do or support? The legitimate political and social interest in religion has something to do, of course, with the concern for morality which we have already touched upon. This concern has even found expression in such legislative enactments (of Constitutional stature) as the Northwest Ordinance of 1787, where it is said, “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” If Eighteenth-Century schools could properly be “encouraged” (and this clearly included financial support from the public treasury) in order to promote religion and morality, why cannot Twentieth-Century church-sponsored schools similarly be “encouraged” in order to promote morality and education, wherever the community deems it prudent to do so?135

It is interesting to notice, in this connection, that a recent opinion by the United States Supreme Court observed that “a State properly may regard all [public school] teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught.”136 This observation does seem to respect the old-fashioned notion that there is such a thing as “civic virtue and understanding,” and that it is legitimate for public servants to shape future citizens accordingly. Perhaps such “civic...understanding” should include a recognition of the vital place of religion in the lives of most people and in any free community which is to endure. Or, as I have put it in my Memphis State article:

To say, then, that there is to be no establishment of religion—in the sense of particular sects being favored over all the others—does not mean that there is not to be an overarching religious view of things among the citizens of the country. Indeed, it might be impossible to have “a people” without such a view.” If (as it has been argued) man is by nature “a religious animal,” the religious opinions and the religious life of a community cannot be simply ignored by the government of the day. Rather, the public and its servants must consider what contributes to the full development of a people. It should be evident that some governmental support of religion is consistent both with the lack of an establishment of religion and with the free exercise of religion. In fact, a healthy religious liberty may be impossible, or at least quite

unstable, without some sensible public (but not necessarily financial) support of religion. . . .

To point out that Americans have traditionally permitted (and expected) government support of religion does not mean that such support can never pose threats to the free exercise of religion. Nor does it mean that some sects would not, if they could, secure special privileges for themselves—and consider themselves entitled, perhaps even obliged, to attempt to do so.137

But because such sects may have to be put in their place from time to time does not mean that a fruitful collaboration between government and religion cannot be developed by prudent statesmen and civic-minded church leaders.138

Much of this collaboration could well take place on the State, rather than on the National, level—for the States still have in this country primary responsibility for the education and morals of people. And whatever we take the First Amendment to mean, when applied against Congress, we should take care not to use it to stifle the proper concerns of State governments. I return for the last time to my Memphis State Law Review article:

There does remain, it seems to me, a serious question whether the Fourteenth Amendment makes applicable against the States whatever it is that the First Amendment provides. It is commonly said that the Establishment Clause and the Free Exercise Clause of the First Amendment have long been made applicable against the States by the Fourteenth Amendment. And so it is said that it is "certainly too late in the day" to question this extension.

But, I must say, the Fourteenth Amendment was peculiarly framed if the intention of its framers was to have made applicable against the States the provisions of the Bill of Rights (such as those of the First Amendment) which had been originally directed only against Congress. Whatever may be supposed about some of the other articles in the Bill of Rights, would not more specific language than that of the Fourteenth Amendment be necessary to incorporate in it the First Amendment with its explicit concern only with Congressional conduct?

This point is particularly to be emphasized with respect to the Establishment Clause. Congress is told in the First Amendment that it must in no way concern itself with religious establishments; but it is prohibited only from laying restraints (not from removing or reducing State or common-law restraints) on the

137. Anastaplo, The Religion Clauses of the First Amendment, supra note 112, at 187, 188.
138. See supra note 41 and accompanying text. See also infra note 148.
free exercise of religion, on freedom of speech, or on freedom of
the press. How can the States be limited by the application
against them of a provision which was in large part intended . . .
to protect them from Congressional interference with whatever
religious establishments those States chose to have?¹³⁹

All this is related, of course, to what I said yesterday, in the first
of these three lectures here in Memphis, about religion really being
one form of law, a form of law developed and made good use of by
a healthy community. But we, however, are well on the way to
allowing religion to become intensively personal, something which
is not supposed to have much to say about public affairs. Is such a
descent into a radical privacy inevitable, or at least highly likely,
wherever individuality is made so much of? One can well wonder
whether anything can be done to head off this dubious
development.

vii.

To argue as I have in these lectures is to advocate a proper edu-
cation, an education which permits sensible people to see questions
and problems as they truly are and to use prudence in bringing to
bear upon their solution all the resources a community has to offer,
including whatever spiritual assets it may plausibly lay claim to.

I draw now, in closing these three Memphis talks, upon observa-
tions I made some years ago in the course of a study of Lincoln’s
Gettysburg Address:

We may detect these basic problems in our current church-
and-state concerns: are we most explicitly concerned today about
“the separation of church and state” because it is an epoch when
the blending of these two by the creative statesman is much more
difficult than it has ever been among us? The particular legisla-
tive measures and judicial decisions which have aroused contro-
versy among us in recent decades may relate merely to essentially
desperate skirmishes in a battle already over. One faction has a
victory which it may not yet know it has won; the other has suf-
f ered a defeat which it may be futilely trying to reverse. The
victor overestimates the strength of political institutions; the van-
quished underestimates the relentless skepticism of modern
relativism . . .

The problem of “church and state” may have become so acute
because we are at last in an era when the relation between the
state and the church is coming to reflect more than formal or

¹³⁹. Anastaplo, The Religion Clauses of the First Amendment, supra note 112, at 189-
90.
legal separation. What had once been taken for granted—a seemingly inexhaustible quarry of religious sentiment independent of government control or concern—has had to be abandoned. The attempt to encourage by law what had once been produced by the community at large raises far-reaching issues of public policy and constitutional law. With these remarks I trust I have suggested, however tentatively, that "whole"—both political and personal—in which religion and the law can be assigned their proper places.

VII. THE MORAL MAJORITY: THE NEW ABOLITIONISTS

And every man that striveth for mastery is temperate in all the arts.

—St. Paul

I had looked forward to being here, on this occasion, with Irving Dilliard, my predecessor in this lecture series on human rights. But he has been obliged to return to Harvard University for a special reunion of Nieman Fellows. I have enjoyed, for more than a quarter century now, his support and encouragement in my instructive encounter with the Illinois bar about which so much has been said in the generous introduction of me this afternoon. Mr. Dilliard is, in many respects, a classic American type, not the least in his ability as a journalist to figure out ways to be helpful to those whose causes he considers himself obliged to champion. He is, in short, a man with old-fashioned morality who takes his civic duties seriously.

Another classic American type is, of course, Elijah Lovejoy, whose memory is honored by this society and this lecture series. This talk is, in a way, about the movement from Lovejoy to Lincoln as seen in contemporary terms, that movement which began with Jefferson, a Jefferson who saw his people saddled with the

141. This talk was given to the Elijah P. Lovejoy Society, St. Louis, Missouri, April 26, 1981.
institution of slavery, a great evil which it seemed dreadful either to perpetuate indefinitely or to abolish immediately.

The abolitionists of Lincoln's day and the Moral Majority of our day share various attributes which I should like to examine with you. For one thing, each group has been dubious about various orthodox constitutional interpretations of its day and about the political "establishment."

ii.

I need not dwell, before this society, on the obvious merits of the old abolitionists. They were deeply troubled by the evil of African slavery in this country. They did not see slavery withering away. Rather, it seemed to them to be growing—and the repeal of the Missouri Compromise, the resort to "Popular Sovereignty," and the Dred Scott decision all seemed to confirm their fears of an ever more vigorous expansion of the slave power on the North American continent.

The abolitionists invoked something deep in the human soul and in the American regime, a regime with roots in the "created equal" language of the Declaration of Independence. They struck out against slavery and even against the Constitution, laws and compromises or deals which, it seemed to them, made slavery possible if not even permanent.

Yet the abolitionist position could be seen by a Lincoln as, in some ways, making matters worse. For one thing, it threatened to abandon the Southern States to slavery and to a revived slave trade, unimpeded by the Government of the United States.144

iii.

The new abolitionists—the Moral Majority and many Christian fundamentalists, whatever they may call themselves—also have obvious merits. They stand for old-fashioned moral standards and for the fact that there are standards, not just chance opinions or tastes, by which we should take our bearings.

Their standard—or the way they understand old-fashioned standards—have led them to take such stands on moral and religious issues as the following: They endorse (1) voluntary prayer in public schools, (2) the right to life (which means, legal opposition to any unrestricted right to abortion), (3) something called a family

144. See G. Anastaplo, HUMAN BEING AND CITIZEN, supra note 87, at 203; Anastaplo, Abraham Lincoln's Emancipation Proclamation, supra note 31.
Church and State

protection act, (4) support of Christian education, (5) new tax deductions for church and charitable giving, and (6) parental supervision of sex education for elementary students. They oppose what they consider to be (7) promotion of homosexuality, (8) federal control of all church youth camps and conference grounds, (9) support for the religion of secular humanism, and (10) any constitutional amendment (that is, the Equal Rights Amendment) to eliminate all legal differences between men and women.\(^{145}\)

A further indication of the tone and terms of the Moral Majority appeal may be gotten from a full-page advertisement they ran in the *Wall Street Journal* on March 25, 1981. The headline for this recent advertisement is a statement by the president of the organization, “They have labeled Moral Majority the Extreme Right because we speak out against Extreme Wrong!” The concluding section of the advertisement reads:

Now is the time for all Americans to stand up for what is right in our nation and attempt to change that which is harmful and injurious.

Millions of Americans have already joined Moral Majority, Inc. and have pledged their time, talent, and treasure to the rebuilding of this Republic.

The pornographers are angry. The amoral humanists are livid. The abortionists are furious. Full-page ads, employing McCarthy-like fear tactics, are appearing in major newspapers. The sponsors of these ads, of course, are attempting by these means to raise funds for themselves.

The opposition has every right to legally promote their goals and attack ours. But, certainly, we have that same right.

Therefore, we invite you to join our ranks. Moral Majority, Inc. is a non-profit organization and does not give tax-deductible receipts for contributions. It is supported by Americans who are willing to invest in their country. We are spending millions of dollars at this time to return this nation to the values and principles on which it was built.

No doubt, the positions taken by the Moral Majority may be seen by many as efforts to resist change of any kind. But each of their positions can be put in such a way as to have a considerable appeal. I have suggested that these new abolitionists (like the old

abolitionists before them) do invoke something deep in the human soul and in the American regime. Consider, for example, the blatant sexuality all around us, which is anything but a celebration of healthy sexual desire and activity. Thus, our neighborhood grocer in Chicago can casually put on display magazine covers that would have been available a decade or two ago only in the sleaziest establishments. The significant thing is not that an obtuse merchant operates thus but that he is permitted to do so by a rather staid neighborhood (no longer confident enough of its moral judgment to resort to protest or to boycott). This means, among other things, that a minority is making choices for us all, since that minority's tastes and purchases as "liberated" people taint us all and lead to an obvious lowering of standards all around us.

There are various ways in which the new abolitionists resemble the old abolitionists: they tend toward "single issue" politics; they are made up, in large part, of the clergy (not all the clergy, to be sure); they see political issues in Biblical terms; they are susceptible to what may be called an Armageddon complex, with a great war considered feasible, if not even desirable; and yet they are, in a sense, self-centered. What these similarities mean bears thinking about—but first, I should say more about the Moral Majority itself.

iv.

I do not need, before this society, to dwell upon the more obvious defects of the Moral Majority, not the least of which is that they, like the old abolitionists before them, run the risk of making matters worse, if only by giving morality a bad name—by making it seem hopelessly puritanical in tone and far too limited in scope.

But just as Lincoln made use of the abolitionists—for he did need them and did make use of them—, so can the Moral Majority be made use of by astute leaders among us, but only by those who, like Lincoln, know what they are doing.

I have suggested, thus far, that these elements in the community are needed: they are easy to ridicule and to fear and, eventually, to discredit—but they do speak, however cruelly at times, to vital issues. It is no surprise, I have also suggested, that they do emerge from time to time: something would really be wrong with us if they did not emerge, just as something would have been wrong in pre-Civil War America if there had been no abolitionist passion at all, however misdirected it might have at times been.

In any event, we can be grateful that our abolitionists have ap-
peared in the form they have, if only in that they can be usefully dealt with in their contemporary form.

v.

What is at the heart of the limitations of these people—that is, of both the old abolitionists of the Nineteenth Century and the new abolitionists of our time?

At the heart of their limitations, I suggest, is the dubious status of prudence among them. Prudence tends to be seen by them as an unworthy, if not an immoral, surrender of principle. This attitude makes effective compromise difficult; it makes it hard for them to grasp that enduring whole in the light of which much of one's conduct should be regulated.  

Related to this limitation is the suspicion among the abolitionists, new as well as old, of old-fashioned (or, some would say, genuine) political life. Sloganeering and crusades, however much an impact they can have for a while on political life, are not politics—and such an approach cannot endure. Rather, it invites counteraction and unthinking recrimination.

I should at once add, however, that it is not an argument against the Moral Majority that it sometimes does seem to be a single-issue cause: some issues are big enough to matter on their own, issues such as the status of slavery in America in the 1830s or such as the status of Jews in Germany in the 1930s. But how best to deal with such an issue may be much more complicated than the ardent moralist can discipline himself to work out.

The limitations of the abolitionists (old and new) are made worse in the community because of their perceptions of their most extreme opponents. Indeed, each side is largely ignorant of the other side in such controversies. Thus, the abolitionists and the slaveowners did not really know each other. Thus, also, the Moral Majority and sophisticated liberals do not really know each other. This has been evident to me as I have talked at length with leading figures on both sides of this controversy. The Moral Majority sees liberals as Big Brother, intruding upon private lives and trying to impose offensive moral standards upon ordinary people—and so they can tell me that “the people who work, who hold society together, have a stomachful.” Liberals, on the other hand, can see

146. Is there not something Wilsonian and hence dangerous about this approach when it is applied to foreign relations? On the “whole,” see supra note 140 and accompanying text.
the Moral Majority as “mindless barbarians,” as aggressive, intolerant and dangerous.

If the abolitionists (new as well as old) do not know their opponents, this means (among other things) that they do not know the community as a whole—and hence they cannot truly know themselves. Compare Lincoln’s approach: he did know what was behind each extreme of his day and had some sympathy for each, however much he differed from each either as to objective or as to method. He also knew, once war began, that he needed to keep both conservative legalists and radical abolitionists together if the effort to preserve the Union was to be successful, that Union which alone could keep slavery from having its way. Prudence meant, among other things, that Lincoln could not, without jeopardizing the common cause, give either the legalists or the abolitionists all that they wanted. His master stroke in this endeavor may have been the way the Emancipation Proclamation was developed.\footnote{See supra note 31.}

The Moral Majority cannot be given their due, and made salutary use of, if one notices merely their defects and their merits. The astute leader among us must be aware, also, of what accounts for their strengths and weaknesses. He must, for instance, be aware of what is solid rock as well as of what is quicksand in their foundations—and why.

I have already referred to the attitude about prudence and politics that is at the heart of the limitations of the Moral Majority. But there are additional factors which help account for their attitude toward prudence, and it is to these that I now turn.

The Moral Majority do stand against hedonism and for the family, in their espousal of moral standards—and these sentiments can contribute to a sound foundation in moral discourse. But it has not been generally noticed that at bottom the Moral Majority also stand for a radical individualism, especially if the “individual” is extended (as it is in the traditional perception) to include one’s own family. Personal liberty is made much of by them, at least so long as offensive uses of that liberty are not flaunted in public. Insofar as the Moral Majority is a majority, it is a majority made up of individuals who make much of their personal autonomy.

This means, then, that they stand for the individual as against the community with respect to such matters as education and mo-
rality. Or, put another way, they do not seem to appreciate the extent to which the individual (or his family or his church) depends upon the political community.

That is, they seem to believe that it is enough if government is not used against their moral standards. What they do not see, in their considerable reliance upon exhortation, is the extent to which a viable morality depends upon a sound public opinion, and how that in turn depends upon law, written or unwritten. For many people, what the law says is an important, perhaps the most important, indication of and guide to what is right and wrong. True, the law cannot prescribe or ensure the very best—but it can prevent the worst and prepare the way for the best, even as it provides for the good and decent.

One consequence of the emphasis of the Moral Majority upon individuality is that they do not face up to the extent that the very definition or determination of one's property and of one's family, and hence even the legitimacy of one's children, depends upon some community with its laws. This means, among other things, that each person is for them somehow on his own, that all taxes, except for national defense and internal security, are suspect, and that all welfare services are dubious. Callousness, if not meanness of spirit and vindictiveness, is all too often the result of this approach—and truly political men know better.

The approach of the Moral Majority to everyday problems tends to be piecemeal. They do recognize certain things on television as corrupting, but they cannot appreciate the extent to which the entire television industry, even on its best behavior, is a calamity and should be shut down. (Perhaps the only sustained good from television in this country is the considerable contribution it has made to racial justice.) To call for the abolition of broadcast television in our circumstances is to take seriously the duty of the government in shaping the language, moral standards, and objectives of the community.

vii.

The Moral Majority people can of course be disturbed by specific programs on television, but they do not attack television as such. But then, are not various of their leaders themselves largely "media creations"? Certainly, they make considerable use of television—and they may be permanently tainted by its hucksterism,
its superficiality, and its hit-and-run tactics.\textsuperscript{148}

To the extent that the Moral Majority are dependent upon the media, as the New Left were in the 1960s, they are somewhat superficial and hence probably ephemeral—with slogans and catch phrases, not thoughtful, extended statements, setting forth their positions. Both speakers and audiences are thereby limited, and the very nature of politics is affected.

In any event, one would expect that any influence grounded upon such flimsy stuff is bound to be exaggerated, or at least that it cannot be sustained.

However all this may be, the Moral Majority will have their troubles. They will have troubles partly because they do not make enough allowances for people's passions and foibles and for the need for considerable good-natured hypocrisy in any healthy community. They are and are not a majority: they are a majority, perhaps, with respect to some of the aspirations they voice; they are not a majority with respect to performance. Most of us do not do, all of the time, the things the Moral Majority espouse.

The Moral Majority will also have their troubles because, as their ambivalence about television indicates, they accept much, if not most, of the modern technological development. They, as moderns and as capitalists, accept by and large a way of life which inevitably makes for an ever-higher standard of living, for considerable liberty, for innovation, and for mobility. The free enterprise upon which we so much depend means, for all its advantages, that unpredictable change is virtually guaranteed.

When we look at comparable moral and political conservatives in other lands, we can perhaps better appreciate the dilemmas and plight of the Moral Majority in this country:

1) Consider, first, what is happening in South Africa, where the whites who want a higher and higher standard of living must make more and more use of African labor, labor which must be trained at ever higher levels, thereby making it increasingly difficult to keep them in political subjection or even to keep them socially sep-


The President of an Evangelical Bible School in Chicago has observed, "Jesus is truth and reality [while] television is images and fantasy. The opportunities in media evangelism are mind-boggling, but there are also dangers." Chicago Tribune, Jan. 27, 1981, § 1, at 8.
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arated from the whites.149

2) Consider, next, the Muslims of the Middle East and North Africa, who also want a high standard of living. This requires them to redefine the old prohibitions, especially with respect to paying or collecting interest—prohibitions which stand in the way of full-scale economic development along Western lines. Such redefinition, as well as other changes in the way of life that are permitted, seem to be undermining long-established customs of the Islamic peoples.

3) Consider, finally, the Russians who can no longer, at least in their cities, maintain the comprehensive repression that Stalin relied upon. For them, too, industrialization and modernization have meant that the ways of the West, bad as well as good, have had to be imported. In addition, minimum efficiency in any economic system operating on a large scale requires more respect for due process and the rule of law (and hence for a free market) than Russian autocracy is accustomed to.

The Moral Majority, and people like them, face similar dilemmas—the troublesome dilemmas faced by anyone who wants to eat his cake and have it too. Their moral attitudes remind one of communities such as the Amish—but they are not willing to make the genuine sacrifices with respect to “life style” that some Amish have been noted for. In this sense, then, the Moral Majority are doing little more than fighting a rearguard action: an enduring moral revitalization among us would have to probe deeper than they are prepared to go, looking to such matters as the status of individualism, the proper function of the community in legislating morality, and the significance in moral matters of technological, economic, and other innovations. Whether their considerable reliance upon Biblical language and authority can suffice is itself a major question. If our community is to be soundly constituted and prudently governed, must not some among us look to nature, to natural right, and to that informed judgment which knows how to make use of religious sensibility and of traditional guides?

Sloganeering, television, and advertising campaigns are no substitute for thinking things through—and for educating some to assess sensibly the many glittering prospects held out before us. One illustration reminds us of what “progress” can mean. I am struck, each time I visit the small town in Southern Illinois where I grew up after my earliest years in St. Louis, by the abandoned look of

the downtown area in that town, and in many of the neighboring
towns. People have been enticed to spend their money at fancy
shopping centers. Because merchants have been permitted to open
such shopping centers, and to exploit the American infatuation
with the automobile, the vital centers of the towns have been de-
stroyed, centers to which youngsters could walk of an evening and
where they could easily mingle with each other and with the adults
of the community. Instead, everyone is on the road—out of sight
of neighbors and beyond the practical control of families. In such
circumstances, it is no wonder that the old moral rules are sub-
verted. Does it make much sense to concern oneself with the
rules themselves if one is not also prepared to deal with the social
and economic developments, as well as the institutionalized greed,
that make those rules so vulnerable? But the Moral Majority, who
are often businessmen at heart, will tell us that it is not the job of
government to tell us how to live or how to use "our" property.
This is only to admit that they do not understand the basis of the
morality which they have inherited and which they, properly
enough, are concerned to preserve and to pass on to their children.

I do not mean to suggest that the Moral Majority people have no
notion of what is happening and why. I do mean to suggest that
their unexamined principles stand in the way of the serious reforms
for which they yearn.

Such people, no matter how confident and belligerent they some-
times sound, are very much on the defensive. I sense, when listen-
ing to them, that they are aware of their vulnerability.

For one thing, they do not want to appear ridiculous. They do
not want to be the William Jennings Bryans of their generation,
completely out of step with the modern age. Thus, they do not
support official censorship, but settle instead for economic boy-
cotts. In addition, they again and again repudiate anything that
might be condemned as "McCarthyism." They recognize that
their credibility depends upon their ability to show that they are
respectful of differing opinions.

150. See Anastaplo, Law, Lawyers, and Property: The Open Society and Its Limita-
tions, in ORDER, FREEDOM AND THE POLICY: CRITICAL ESSAYS ON THE OPEN SOCIETY
35 (G. Carey ed. 1986). Extensive notes for that essay may be found in the version pub-

151. See, e.g., the Moral Majority advertisement quoted in supra section iii of this
talk (in which reference can be made to "McCarthy-like fear tactics").
Nor do they want to seem racist, however deadset they may be against court-ordered busing. (I note in passing that the case for the neighborhood school, and against busing of school children, is far stronger than all too many liberals admit.) Particularly significant, it seems to me, is the Moral Majority's repeated insistence that they are not anti-Semitic; this is often coupled with their strong support of the State of Israel. Here, too, it is evident that they are aware of the repudiation that awaits them if they succumb to that fringe of so-called moralists among us who hate Jews. The Moral Majority are trying to say the right things about race relations, about segregation, and about toleration of dissent among us. They should be taken at their word, thereby reinforcing among them the sentiments they have been obliged to endorse.

The question remains, then, of how it is best for liberals to deal with these people and their inevitable successors over the years, to deal with them even if these people may be in principle against “deals.” Their moral concerns, their calls for “moral sanity,” should be respected and made use of; their naivete and their errors should be anticipated and guarded against. There is, I repeat, something healthy in their old-fashioned appeal, however self-righteous and hence self-defeating it may all too often seem.

Certainly, they should not be pushed, or responded to, in such a way as to make morality even more fragile than it is today. Certainly, also, the more enlightened among us should not permit moral concerns to be left to the unenlightened, just as patriotism and the flag were left not too many years ago. And it would be salutary for the enlightened to remind the community that morality can be considerably more complicated than the Moral Majority makes it out to be; for one thing, morality should include a lively concern for social justice and for peace—about which, too, the Bible, as well as sound politics, has a good deal more to say than one would gather from the pronouncements of the curiously self-centered Moral Majority.

ix.

Prudence, I have suggested, points to reasonable accommodation—to an accommodation guided by those who do think, who are calm and perceptive, something which the new abolitionists (like the old abolitionists before them) have sometimes found it difficult to be.

How should we proceed?

1) We should recognize that our country is so large and so com-
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Plicated that a multitude of good and bad examples of just about anything can be found all around us. We should also recognize that it takes a lot to do much to such a large country—to do much either for better or for worse. A relaxed approach, not a strident tone, is called for. Certainly, excitement and indignation should be held in check.

2) We should not permit superficial reporting to deceive us as to what is happening in the country and as to what its leaders are like. Thus, the editorial-page editor of the Washington Post observed during a discussion on the University of Chicago campus this past week that Mr. Reagan's performance in office thus far has shown a man "who is smart, who knows how to take over a government, and who knows a whole lot of things we thought he didn't," whereas the press had generally characterized him as a man who was too old, who was not smart enough, and who was the prisoner of "too narrow a band of the political spectrum."152 I recall that in many discussions with liberal friends in 1980, well before the election, I had to assure them (seeing that Mr. Carter was bound to lose) that Mr. Reagan as President would be nowhere near as bad as they sometimes seemed to enjoy expecting him to be.

3) In any event, we should remember that the people we view with alarm—whether they be the Moral Majority or Mr. Reagan—are, after all, fellow human beings. Consider, for example, the statement made by the President a few days ago about the man who had shot him: he voiced the prayer that his assailant "can find an answer to his problem. He seems to be a very disturbed young man. . . . I hope he'll get well, too."153 The compassion exhibited here is not unlike that which we have heard over the years from the social workers, the judges and psychiatrists that Mr. Reagan once excoriated as soft on crime.

Mr. Reagan's temperate language should be taken at face value—as we commend it and hope that sensible things will now be done by his administration about international tensions and about the size, disposition and possible use of nuclear weapons. At the very least, we are very much in need of much more moderate lan-

152. Lecture by Meg Greenfield, University of Chicago (April 1981). The recent Iran arms-contra aid fiasco has obliged the President's men, if only in his defense, to portray Mr. Reagan as out of touch with critical developments in his own administration.

153. New York Times, April 23, 1981, at B12. The President's reference to "a very disturbed young man" was consistent with the position taken by the successful defense in the trial of Mr. Reagan's assailant. Mr. Reagan also observed about his assailant, "He comes from a fine family. They must be devastated by this." Id.
guage than we have become accustomed to in our political discourse during the past two decades.

Temperance in discourse reflects, among other things, the recognition that this is indeed bound to be an imperfect world and that we must often choose between unattractive alternatives. We as citizens really have to trust our fellow Americans to be sensible, by and large, most of the time—and to be patient as we wait for the pendulum to swing our way, when the time seems out of joint, as it no doubt does seem to be on occasion.

VIII. NATURE AND THE ENLIGHTENMENT

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

—The Duke of Albany

The influence of the European Enlightenment in the United States may be seen in such sentiments as those of Thomas Jefferson in his First Inaugural Address of 1801, when he could celebrate the fact that there had been “banished from our land” that “religious intolerance” “under which mankind [had] so long bled and suffered.” It is in this context that he expresses the hope that Americans would avoid as well “a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions” as religious intolerance.

These are sentiments which most Americans then and since would endorse. Both religious intolerance and political intolerance have been “banished from our land,” or at least have been reduced far more than they have been reduced for an extended time in most if not all other countries of the world during the past two centuries. These Jeffersonian sentiments are reflected in the two sets of provisions in the First Amendment, those providing for religious liberty and those providing for freedom of speech, of the press and of assembly. They are reflected as well in the power given Congress in

154. This talk was given to a Conference on the Enlightenment, Rochester Institute of Technology, Rochester, New York, January 10, 1986.


156. See Anastaplo, Aristocratic Imperatives in a Democratic Age: The Jeffersonian Heritage, in Mr. Justice Black, His Generous Common Sense, and the Bar Admission Cases, 9 Sw. U.L. REV. 977, 1042 (1977). Compare supra note 62 and accompanying text; See also supra note 75.
the Constitution of 1787 to "promote the Progress of Science and useful Arts."

To see all this as influenced by the Enlightenment is not to say that the Enlightenment was the primary shaper of the opinions of Americans about religion and politics. Nor is it to say that Americans went as far as Europeans dedicated to the Enlightenment did in opposing with vigor the claims of religion or the demands of the political order.

ii.

Perhaps no European expressed with more intensity, or over a wider range of subjects, the vigor of opposition to established institutions that Voltaire did. His career spanned decades, during which he made use of most literary forms to voice the resistance he believed necessary for human happiness. He was, in his various manifestations, a most learned man, something which is quite clear in the *Philosophical Dictionary* that he put together. It is evident there that it is not a naive man who is talking, but rather one who is quite familiar with much then available to be known by learned men and women in the West. He seems to have had an opinion—and an informed opinion—about virtually everything.

It is also evident from such writings that there had been, for decades, indeed for centuries, considerable prejudice and cruelty and gross inefficiency in the conduct of human affairs. Voltaire proved an unrelenting critic of established ways, as he stood, with a fierce passion, for truth and justice against error and injustice. He has obviously influenced many American intellectuals, ranging from Tom Paine in the Eighteenth Century, to Ralph Ingersoll in the Nineteenth Century, and to Clarence Darrow in the Twentieth Century. Among the consequences of the Voltaire influence is that it has become almost a matter of principle for many intellectuals not to be obliged to exhibit any allegiance to any religious order, perhaps not even to any political order.

Voltaire's intensity, and the way he was idolized by educated people, suggest how ferocious, sometimes even awful, life had been at the hands of spiritual and political leaders for much too long in the West.¹⁵⁷

¹⁵⁷. See, e.g., supra Part I of this article, on the trials of witches. See also G. ANASTAPLO, THE ARTIST AS THINKER, supra note 42, at 482-85.
The arguments developed by Voltaire in his *Philosophical Dictionary* are presented in a more dramatic, and a more popular form, in his short novel, *Candide*, which is said to be his most famous book. It is one of those books which, once having been published (as this was in 1759), never goes out of print. Often, as now, it is available in several editions.

The story of Candide is well known, the story of an attractive and resilient young man who encounters one disappointment after another as he tries to secure his true love. In the course of his adventures he is exposed to a remarkable range of human folly everywhere he travels, in the New World as well as in the Old, among Christians as well as among non-Christians (including Muslims and Jews).

One learns from *Candide*—in fact, one becomes aware early in the book—that virtually all established institutions are corrupt, often perverse and highly destructive of human happiness. It must have been evident to Voltaire’s reader that there was little to be said for, and much to be said against, virtually all of the institutions with which he was familiar in his day.

One can see in this novel the seeds both of the widespread suspicion by intellectuals of what we now know as the Establishment and of the decided preference by intellectuals for the Open Society, a form of organization which places the minimum of communal restraints upon human endeavours. One is left by the novel with the teaching that the only practical alternative the decent human being has is to step aside from organized social effort and simply tend his private affairs, living perhaps with a few intimates. The reader is taught that the political order, including the reliable rule of a sensible and humane law, should not be depended upon. That is the way things have long been and will continue to be. Whether a serious revolution, of enduring significance, can be worked for and expected remains to be seen.

There is no doubt for Voltaire that a revolution is needed. The contemporary political and social order, all over Europe, is hopelessly corrupt.

Why does he see things thus? It may be, of course, that he sees things this way because they are that way all over Europe. Or is

there something about the political-religious order under which he happens to live which inclines him to the opinions he has?

It can be instructive to compare, if only in passing, a novel published in 1749, only a decade before Candide: Henry Fielding's Tom Jones, another story of an attractive and resilient young man who responds with grace and perseverance to one massive challenge after another. In both of these novels about an exiled hero, there is a woman for whom the hero yearns and with a view to whom his life is ordered. So similar are the two books in critical respects that one is moved to wonder whether Voltaire knew the Fielding novel and whether he set out to provide an alternative account of what the world is like.

There is a vital difference between the books. Tom Jones is so presented as to suggest that life can be good, that virtue tends to be rewarded, and that vice tends to be punished. And so the career of Tom Jones is offered up with warmth and zest and good spirit. There is no suggestion of the need for a radical reformation of society—and this probably reflects quite different constitutional experiences and social circumstances. Perhaps, also, this reflects quite different opinions about everyday political life, its nature and its possibilities. Things are so different in Fielding's England that a prosperous country squire can turn out to be humane and effective in the exercise of his social and personal powers.

Fielding and his readers have a decent constitutional order in view which is more or less realized in the England of their day. (This order includes a proper place for the religious life. Compare how Thomas More would assess the English system.) On the other hand, Voltaire insists that there is little if anything to redeem the existing order—and no substantial hope that it will get better, either in the Old World or in the New. Instead he holds up as a model (to be looked to in the event of revolution?) the regime of El Dorado, in the light of which all that is then available is exposed as hopelessly wanting.

The first thing to notice about El Dorado ("the Golden"—the idyllic country hidden among mountains in South America) is that it is virtually inaccessible. It takes a "miracle" for Candide and his companion to get there—and no one else can reasonably hope to follow them there. Unfortunately, the description of El Dorado does not provide much if any guidance for anyone attempting to imitate that regime, since the emphasis is put on various attractive
institutions, with little said either about how such institutions are to be established or about how human nature is to be dealt with in establishing and perpetuating such institutions. Thus, the visitor can wonder, "What, then, is this country, unknown to the rest of the world, where all of nature is of a kind so different from ours?" All this reinforces the impression one has that Voltaire's power lies in his role as a critic, not in any capacity as founder of everyday institutions or as defender of whatever may be good in what may already exist.

Various topics are discussed, we are told, by Candide and a wise old man in El Dorado: 1) the history of the country and its relations with the rest of the world; 2) the form of government; 3) the customs (moeurs) of the country; 4) women; 5) public spectacles; 6) the arts; and 7) religion.

The most substantial discussions that we witness are with respect to the first and last topics. (With respect to the other topics, we are told merely that they discussed them.) One suspects that religion is for Voltaire the critical subject here, with a kind of deism emerging as the only defensible form of worship. One is obliged to be grateful to God, but one does not call upon him for favors. And Candide can be asked, "Can there be two religions?" Does not this mean, in effect, that reason, not revelation, should be the basis of religion? We should wonder what is being suggested about Providence here, as well as what is suggested about Providence in Tom Jones, where things do work out so well.

Of course, the rule of reason is argued for in El Dorado. Reasonableness is reflected, for example, in the king's wit; also, in his refusal to keep them there against their will. But then, Candide has travelled widely, which suggests that few countries of his time had serious restrictions upon travel. There is, however, little to guide us as to what reason calls for in practice. For example, we are not told how agriculture is organized to be as productive as it is in El Dorado. It is not enough to say that such things as gold should be despised. One can readily take this approach only when gold is as plentiful as mud?

Thus, it is far from clear where reason leads, however much is made of the importance of living according to reason.

159. Id. at 147.
160. Id. at 149-55.
Even so, Candide is dissatisfied in El Dorado. Two reasons are given by him: 1) Cunegonde, the woman he loves, is not there; and 2) If they stay, they will be like the others in El Dorado, but if they take out a good supply of the local pebbles (that is, gold), they will be the wealthiest men in Europe.\textsuperscript{161}

Are not these two considerations related to one another, the love for another and the desire to be distinctive? The love of a few known people provides one a certain distinctiveness, perhaps even a meaning to one's life. This may be a reflection of the Christian approach to things.

Cunegonde is Candide's goal throughout—but we never see what there is in her (aside from the accident of her noble birth) to warrant Candide's interest and passion. His interest in her tends, at times, to be merely carnal. Tom Jones's beloved, on the other hand, is presented as more attractive, in addition to being well born. Her name, Sophia, suggests the knowing that true love makes possible. Certainly, Fielding seems to take that love interest more seriously than Voltaire takes his. In any event, Tom Jones is not as silly, or as sentimental, about love as Candide is.

The topic of "women" had been central to the topics discussed in El Dorado. This may be related to the role of the natural (or the material?) in the ordering of any regime. Does Voltaire thus indicate the problems with even his best regime, just as "women," or desire, is critical to Plato's \textit{Republic}, in the sense that it must be rigorously (that is, unnaturally) excluded if there is to be a thoroughgoing rule of reason?\textsuperscript{162}

Since Cunegonde is not truly special, does not this point up the arbitrariness as well as the importance of what does happen to be one's own? And this means, among other things, that a certain self-centeredness does result.\textsuperscript{163}

And so we have in Voltaire's \textit{Candide} the conclusion that tending one's own garden, preferably in the company of the woman one happens to love and a few friends, is to be settled for. Where and what one's garden are may also be due to chance, it seems. The

\textsuperscript{161} \textit{Id.} at 159.

\textsuperscript{162} \textit{See}, \textit{e.g.}, \textit{PLATO, REPUBLIC} 449A-450C, 546A-547E, 549B-E.

\textsuperscript{163} \textit{See}, \textit{e.g.}, \textit{supra} Part VII, sections iii and vi.
return to the garden echoes the Garden of Eden, perhaps, but a much more modest and limited garden.

There does seem to be something anti-Establishment, if not even anti-social, about this retreat. Christian individuality is suggested. Such individuality is reflected in something I recently heard a radio preacher counsel his audience: "Don't do what the preacher tells you to do. Do what God tells you to do."

A kind of existentialism seems to emerge from Voltaire's approach. The challenges one confronts are determined largely by chance, and resoluteness is much to be prized, along with the recognition that there is a most limited role relied upon for the political and social order.

viii.

An existentialist approach may be in some respects a likely consequence of the Enlightenment, perhaps in company with liberal democracy. An alternative consequence also to be guarded against is totalitarianism. 164

Existentialism is a Continental more than an Anglo-American phenomenon. The different approaches here may be seen in the greatest writers. Thus, besides the comparison of Voltaire and Fielding we have touched upon, it could be useful to compare, in literature, Moliere and Shakespeare, and in philosophy, Descartes and Bacon.

Descartes saw the way to get to the truth to depend upon isolation and reductionism. Compare Bacon who, although he wanted to torture nature (to experiment) in order to wrest her secrets from her, yet did defer more to the common sense made so much of by the ancients. It is significant that he himself was a political man, very much part of the English Establishment.

As for Moliere, his art very much depended upon comic attacks on established ways and on human nature. Shakespeare, on the other hand, is much more part of the Establishment, so much so that his History Plays celebrate, even as they define and refine, the English regime. 165

Critical to a political approach, whether Shakespeare's or Bacon's, is the understanding that it is only sensible for the reason-

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165. See G. ANASTAPLO, THE ARTIST AS THINKER, supra note 42, CH. 1; Commentary, supra note 57, Lecture No. 7.
able man to know and to respect the limits of reason. That is, there is a recognition of the inevitable irrationality in the community at large, something which has to be reckoned with and provided for.

Of course, Voltaire senses this also, as may be seen in his recourse to a novel to promulgate the doctrines found in his *Philosophical Dictionary*. This suggests that he recognizes that the passions do have to be dealt with, that reason alone cannot suffice in ordering a community. But does he go far enough here, especially in using this recognition in assessing what is good in the long-established institutions of his day? Should not such institutions usually be expected to reflect nature and reason to some extent?

Why is English society, including religious institutions, dealt with so much more kindly by Fielding than French society is by Voltaire, aside from chance temperamental differences between these authors? Perhaps the English political order is superior. But Voltaire condemns how things are ordered everywhere (except for the unobtainable El Dorado), which suggests that his standards are much higher, perhaps too much higher for the proper ordering of a community which can endure. We can see in him what it means to be doctrinaire at the expense of experience and common sense. We can also see that the Enlightenment in this form, which may be its "purest" form, means perpetual revolution and perpetual war in the name of utopian politics and perpetual peace.

ix.

Consider the American alternative to all this, an alternative which exhibits considerable respect for law and for the institutions of the country. Such respect is promoted among us, with the Declaration of Independence and the Constitution providing authoritative guidance. Would Voltaire, on the other hand, regard any community statements from the past as authoritative?

The traditional American approach has also respected both the claims of religion and the usefulness of religion for the political order—more so than does Voltaire, of course, but also more so than does Jefferson. That is, Jefferson tends to be more doctrinaire, less prudent, than the typical Founding Father. Consider, also, how Lincoln makes use of religion, as seen in the Gettysburg Address and in his Second Inaugural Address.166 Such statesmanship suggests the limits of that Enlightenment which made so

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166. See Anastaplo, American Constitutionalism and the Virtue of Prudence, supra note 140, at 113-25. See also infra note 59 and accompanying text.
much of reason as to promote the expectation that society itself, or the people at large, could become philosophical.

What can all too easily happen, instead, is that a people and its leaders become less and less thoughtful as they try to control the ever-growing power made available to them by the technology grounded in modern science. Taken for granted by apostles of the Enlightenment is the assumption that there has been a steady intellectual, perhaps also moral, progress since Classical Greece and Rome. Thus, the Enlightenment can be seen, in practice, as endorsing the reliable growth of science and technology at the expense of philosophy and prudence. It can very much rely upon such a doctrinaire assessment of everyday institutions as may be seen in Voltaire, an assessment which contributes in all too many cases to a misreading in this country of the Religion Clauses of the First Amendment.

IX. REASON AND REVELATION

... [H]e who receives/Light from above, from the fountain of light,/ No other doctrine needs . . .

—Jesus

I trust that you, as informed Hindus, will be tolerant of me as I venture to discuss once again your marvelous Bhagavad Gita, something which will always be a mystery for me. There are problems and difficulties enough when one attempts to deal only with one's own, let alone an ancient text written in Sanskrit.

Still, it may help one to see one's own better if one looks at how others deal with perennial human questions. It may especially help one to see one's own better if one is stimulated to notice what one takes for granted in one's own, something which may be easier to notice when one is obliged to recognize what one simply does not know about the presuppositions, vocabulary and inclinations of others. One may sometimes be more apt to notice what one depends upon in one's own thought when one senses what there is that is vital to the thought of others that one has but the haziest notion of.

167. This talk was given to the Hindu Study Group, Rochester, New York, March 22, 1986.
168. J. Milton, Paradise Regained pt. IV, 288-90. See Anastaplo, Seven Questions for Professor Jaffa, supra note 3, app. A.
My comments here draw upon queries put to me by Dr. Mani after she read my article on the *Bhagavad Gita*. I suggest in that article that there is very little in the *Gita* about virtue in the traditional Western sense. I have observed, with Aristotle, that the truly virtuous man enjoys (or at least is not unduly pained by) doing what he should do.

But Dr. Mani wonders, in commenting upon the *Gita* (at III, 35), "Is the Western sense of virtue different from Krishna's insistence that one should do one's appointed duty, putting one's heart and soul into it, however distasteful it may be?" She draws support from Radhakrishnan's commentary here, "Better is one's own law though imperfectly carried out than the law of another carried out perfectly. Better is death (in the fulfillment of) one's own law, for to follow another's law is perilous." Further support is found by her in the passage immediately after the one just quoted from the Radhakrishnan commentary, which reads (still commenting on III, 35):

There is more happiness in doing one's own work even without excellence than in doing another's duty well. Each one must try to understand his psychological make-up and function in accordance with it. It may not be given to all of us to lay the foundations of systems of metaphysics or clothe lofty thoughts in enduring words. We have not all the same gifts, but what is vital is not whether we are endowed with five talents or only one but how faithfully we have employed the trust committed to us. We must play our part, manfully, be it great or small. Goodness denotes perfection of quality. However distasteful one's duty may be, one must be faithful to it even unto death.

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170. The text commented upon here is, "Better one's own *dharma*, though imperfect, than another's well performed. Better death in [the fulfillment of] one's own, for another's law is dangerous." *BHAGAVAD GITA* pt. III, at 35.

The *Gita*'s mystical character is suggested by this summary of the action:

The war between the Pandavas and the Kauravas, two great opposing parties, is about to ensue. Arjuna, one of the Pandava brothers, develops second thoughts about the purpose and justness of this war. He conveys his doubts to Krishna, his charioteer. Krishna answers; but he does so not merely as a fellow warrior and friend but as a spiritual preceptor instructing his pupil. Still more: Krishna is none other than God, Vishnu himself; [later on] he reveals himself in his full divine glory to Arjuna.

The *BHAGAVADGITA* at 219 (K. Bolle trans. 1979).


172. Id. at 147.
I am not certain what "happiness" means here, keyed as it is to doing one's duty, if it should be sometimes, perhaps often, expected that doing one's duty will be "distasteful." Why is something distasteful? Is it not because not all of one's heart and soul is in its execution—and how can one be truly happy in such circumstances? Would not one be even happier if one's duty should be intrinsically pleasurable?

That one's duty is distasteful suggests to the Aristotelian that one does not truly understand why this should be one's duty. This may in turn be because something is ultimately wrong with the duty that one has been assigned. On the other hand, Aristotle's assumption that virtue is typically accompanied by pleasure reflects a condition which finds both one's character (including one's desires) to be in good shape and one's understanding (including one's judgment) to be sound.

Arjuna, on the other hand, is not required by Krishna either to use his judgment on this great occasion or to enjoy what he is obliged to do. He has to be reminded not of what his duty is (he is already all-too-aware of that) but rather of how one should respond to the duty one happens to have. However extended the explanation given to Arjuna by the divine Krishna, he is not expected to act on the basis of that which he understands; rather, he is expected to perform the duty which he has been shown (one way or another) to be truly his.

iii.

Constant effort by intelligent beings (divine as well as human), it would seem, is considered to be necessary in order to keep things going. Arjuna must and will do what he is obliged to do in order to permit things to work out as they should. He has no real choice in his circumstances; nor need he understand what he is doing or why.

On the other hand, genuine understanding depends for the Westerner upon grasping what it is that nature prescribes. It also depends, if that understanding is to be soundly grounded, upon grasping what the nature is of that nature which guides mankind.

But, I have suggested, to say as it is said in the Gita that the god must keep working to prevent chaos means, in effect, that there is no nature. The god's constant effort would not be needed if nature,
in the Western sense of the term, governed the universe.173

Dr. Mani, on the other hand, suggests that "'Nature' in the Gita is similar to nature in the Judeo-Christian tradition." She may well be correct, in that the Judeo-Christian tradition can also be considered to be able to do without nature as something which is independent of an intelligent will. Thus, I am suggesting, the ancient Greek (or non-Biblical) notion of nature looks to something which is independent of the guidance provided by revealed religion. (The word nature appears not at all in the Hebrew Bible and relatively late, and only after Greek influences take hold, in the New Testament.)

I have been invited to say something more to you about the Greek conception of nature. The independence (if not even self-sufficiency) of nature may be traced back to its origins: the Greek word, phusis, is rooted in generation and growth. Thus, the seed of an organism provides guidance for the changes it will have to make to become the mature organism it will be, always or usually, if conditions are right. The organism is somehow "on its own."

Nature as a guide for human action which is based on choice is more complicated. One does have to use one's reason, something provided by nature, to figure out what it is that nature prescribes. Is not deference toward "one's own" somehow critically different from reliance upon nature? The Krishna notion of duty in the Gita does depend upon one's knowing what is indeed one's duty. But knowing what one's duty is does not seem to require much inquiry. Arjuna does not question what his family, or caste, duty is: that, at least, he is aware of from the outset of this colloquy with the god.

Insofar as Arjuna resists doing the duty that he is generally expected to do, is it not because nature suggests to him that he act otherwise than duty calls for? Is it not natural that one should not want to kill one's teachers, especially if they are also older and respected relatives, even if they should be serving in the ranks of the enemy in a civil war?

iv.

To emphasize one's own (such as one's caste-based duty as a warrior) is, from a Western point of view, to leave one beholden to chance. After all, what determines what is one's own? Are not the

causes here distant and hidden, perhaps in principle indetermi-
nable? Is not this the way the philosopher is apt to see it?

Of course, an Aristotle might say, it is pious to respect what does
happen to be one's own, such as one's parents. But, for him, the
truth is to be respected even more than one's own. One's own can
be critically different from the natural, or from that which can be
worked out naturally. Allegiance to one's own, even when one's
own is "determined" by nature, is different from doing that which
nature provides guidance for doing.

I have suggested that there is no place for nature, precisely un-
derstood, in the Hindu scheme of things. Now I must suggest that
there may be no place there for chance either. All this is related to
my further suggestion that philosophy is not the proper term to use
in describing the remarkable account of the universe that Hindus
developed thousands of years ago at "the dawn of history."

v.

Philosophy, as it emerged (somewhat later) in ancient Greece,
depends upon an explicit awareness of nature and upon a system-
atic inquiry into the very nature both of nature and of understand-
ing. Philosophy recognizes that, in practise, chance can play a
significant role in human affairs, testifying to the limit of man's
ability to collect all particulars which may be relevant in a
situation.

Dr. Mani usefully distinguishes Western thought and Hindu
thought (both of which she and many others do find it convenient
to call "philosophy") in a manner which is quite useful for our
inquiry:

The etymological meaning of the word "philosophy" is "the love
of wisdom" which implies a pursuit of this love in abstraction, in
the satisfaction of intellectual curiosity about first things. By and
large, Western philosophy has followed this tradition, and has
cconcerned itself with theories about being, reality, and truth. I
think I am not mistaken in characterizing Western philosophy as
being in the nature of intellectual speculation. Indian philosophy,
on the other hand, has a more practical aim. Its goal is to help
man realize rather than merely know the highest reality. To
quote Heinrich Zimmer, the primary concern of Western philos-
ophy, with the exception of a few ancient philosophers, has been
the purveying of information, while that of Indian philosophy
has been transformation.\footnote{174}

\footnote{174. L. Mani, The Self in Vedanta and Buddhism 1 (unpublished paper).}
For the West, it must be "admitted," philosophy is ultimately devoted to contemplation, not to action. Action can include that transformation of the soul that Indian thought makes so much of. Is not a system of thought based upon revelation likely to lead to an emphasis upon action? Revelation does not attempt to provide access to truth in the way that is required if one is truly to understand, however profound and important revealed truths may be.

Philosophy, then, makes much of questioning, whereas revelation primarily calls for acceptance. May not questioning inquire even into the status one is born into, that very status which seems to both the divine Krishna and the dutiful Arjuna to be decisive for one's career? Philosophy, on the other hand, is in principle to be resorted to ("practised") by anyone competent enough to do so. Of course, one's circumstances and training may very much limit one's ability to become a philosopher.

An indication of the profound difference between the philosophical approach and the Hindu approach may be seen in the Socratic provision in Plato's Republic that those children of artisans who can be identified as being of a philosophical nature should be taken from their parents and trained for philosophy and, hence, for rule in the very best city.\textsuperscript{175} Compare the Hindu approach which can accept as permanent, \textit{in this life}, the caste one is assigned to, something which is eloquently challenged in Mulk Raj Anad's \textit{Untouchable} novel.\textsuperscript{176} You will recall that novelist's effort to depict the human sensibilities of the latrine cleaner who is moved by the message of liberation he hears from Mohandas Gandhi. Gandhi's message emboldens him to permit himself, although an outcaste, to respond to the feeling that would otherwise have been suppressed within him by deference to the prevailing orthodoxy—the feeling that he has the aspiration and the right to fulfillment, in this life, of every other man.\textsuperscript{177}

\textsuperscript{175} Confucianism, too, reaches for talent wherever it can be found, as does the Christian priesthood. See Anastaplo, \textit{An Introduction to Confucian Thought}, GREAT IDEAS TODAY 132 (1984). On the limits of even the very best city, see ANASTAPLO, \textit{The Constitutionalist}, supra note 1, at 278-81; Anastaplo, \textit{Seven Questions for Professor Jaffa}, supra note 3, app. B.

\textsuperscript{176} M. ANAD, \textit{UNTOUCHABLE} (1956).

\textsuperscript{177} Gandhi's own well-known devotion to the \textit{Gita} is somewhat puzzling, and not only because of his pacifism. He systematically challenged others to reconsider various duties traditionally believed to have been prescribed by revelation, something which the \textit{Gita} is hardly known to do.
It should go without saying that not every man can become a philosopher. Nor need we decide whether philosophy is higher or better than the calling of the pious man acting in conformity with the duty divinely assigned him in this life. I am concerned here only to suggest that the way of Krishna and the way of Socrates are different, however tempting it may be to use the word “philosophy” to describe both modes of thought.

The difference between the two ways is reflected in the fact that philosophy is, in certain respects, inferior to such a calling as that prescribed by Hindu thought. Philosophy has been recognized, almost from its outset in the West, as dangerous: it can sometimes be subversive of the community. On the other hand, the highest wisdom for a Hindu is to recognize and acknowledge what he should obey. Krishna does make an effort to instruct Arjuna, but his primary objective is not to make certain that Arjuna will understand but rather to make certain that Arjuna will do his duty not unwillingly.

It was only natural, a Westerner would say, that Arjuna should resist doing what his well-established duty as a hereditary warrior called for. But is not the Westerner who speaks thus “corrupted,” in effect, by philosophy, even when he is not a philosopher? The Hindu, in urging a man always to do his assigned duty, would remind him that one is never in a position to assess fully the significance or consequences of one’s deeds. Thus, it is presumptuous to try to figure out what one should do from time to time.

The Westerner, on the other hand, would invoke the virtue of prudence, something else which seems to be not unrelated to the emergence of philosophy. Of course, the Westerner will concede, we cannot be absolutely certain of the consequences of this or that act—but we can make reliable assessments, including an assessment of how much we need to know in order to be able to act responsibly. Consider Socrates’s account in the Apology about his resistance to demands made upon him by both democratic and oligarchic regimes. In neither case did he do more than delay slightly, if at all, the injustice that was being perpetrated. Consider, also, the Kantian approach to moral matters: is an unvarying adherence to fixed rules called for in order to secure a certainty that otherwise seems unavailable in moral matters?

Suppose that there is something both to what I have suggested about the philosophical mode of thought and to what I have suggested about any mode of thought (Hindu or otherwise) grounded in revelation. Further questions naturally come to mind. What is the influence of the doctrines connected with reincarnation upon the teachings about duty laid down by the Indian form of revelation? How do these doctrines affect, for instance, the Hindu sense of "oughtness" or duty with respect to one's own? Do not these doctrines continue to have a profound effect upon opinions about morality and happiness even among those Indians who have been so exposed to philosophy that they no longer have the basis for an old-fashioned acceptance of such doctrines?

Be all this as it may, the Westerner is inclined to say that the devout Hindu moves, for better or for worse, away from the natural (that which can be arrived at by human reason alone). The simply human is not the primary concern of Hindu thought, but rather a complete submission to the divine. Modern man finds this difficult to do, and not only because of his insistence upon "the separation of church and state."

The Westerner is obliged to notice that the millennia-long Hindu submission to the divine has helped produce among Indians a remarkable dedication to their way of life, something which many "liberated" Westerners, addicted to various desperate experiments, can naturally yearn for from time to time.

CONCLUSION

It can be instructive for anyone interested in Church and State relations today in this country to consider how religious freedom is approached elsewhere. The 1982 United Nations Declaration on this subject can be instructive, especially when its sophisticated approach is compared with any old-fashioned statement which is moved ultimately by a respect both for common worship of the divine and for the salvation of souls.

The primary concern of this Declaration seems to be with the

179. Compare the arguments in support of reincarnation in Plato's *Meno* and *Phaedo*, arguments which Socrates knows to be somewhat contrived. See G. ANASTAPLO, HUMAN BEING AND CITIZEN, supra note 87, at 82-86; Anastaplo, Book Review, 32 REVIEW OF METAPHYSICS 773 (1979).

180. *Declaration on the Elimination of All Forms of Intolerance and Discriminations Based on Religion or Belief*, General Assembly Resolution 55 (XXXVI 1981), 21 I.L.M. 205 (1982), reprinted in BASIC DOCUMENTS: SUPPLEMENT TO INTERNATIONAL LAW
elimination of intolerance and discrimination—and hence much more with peace and human dignity than with the divine or with salvation. Human dignity is seen in terms of freedom of choice, including the right to be left completely alone with respect to one’s religious preferences.\textsuperscript{181}

The framers of the Declaration, since they hoped to secure the assent of many peoples with a variety of religious traditions, obviously found it easier to agree upon what was to be avoided than upon what was to be aspired to. The less said about the divine or how to approach or to serve the divine, the better in their opinion. The extreme religious diversity to which they had to accommodate themselves resembles that which is developing in the United States at this time.

But, one must wonder, does a concern with religious freedom make much sense—can it be serious—if the divine and one’s worship of the divine are not themselves taken with the utmost seriousness? Is not some sense of the divine vital to any enduring concern with religious freedom? Otherwise, why should anyone be any more concerned about this freedom than about, say, the freedom to buy and sell as one chooses or the freedom to drive where and how one chooses? These, too, can lead to catastrophies if not properly regulated.

The concerns of this world, including that concern with individual dignity which may be more closely related to self-preservation and comfort than to spiritual interests, dominate the Declaration. There is a critical reservation on behalf of social order. But just as religious freedom must be subordinated to the domestic social order, so the domestic social order in turn must be subordinated somewhat to international concerns. Deference to the brotherhood of man ultimately takes precedence, not a dedication either to one’s country or to the divine. One must be left free to communicate

\textsuperscript{181.} There appears to be one significant change in the body of the Declaration from the Draft Declaration of March 10, 1981: in Article I, the Draft Declaration had twice spoken of one’s “freedom to have or to adopt a religion or belief of [one’s] choice.” In the final Declaration, “or to adopt” is removed from the two places it had been in Article I. The emphasis now seems to be upon the religion one has, with less of an acknowledgment than formerly of the process by which one acquires the religion one happens to have. (Perhaps it was decided that the references to “choice” sufficiently recognized the power to “adopt.”) In addition, the Declaration now has a preambular statement. For the text of the Draft Declaration, see \textit{Religious Freedom Reporter} 321-23 (Dec. 1981).
with others of like faith elsewhere. A worldwide community seems to be indicated as somehow supreme.

One purpose of the domestic social order, it would seem from the Declaration, is that it should be in the service of that individuality which is permitted to flourish once sufficient provision has been made for self-preservation and for social necessities. A respect for individuality, or human dignity, is taken to mean that the community is not to concern itself with the spiritual development of citizens, lest someone be moved by government in a direction he might not otherwise have chosen to go.

This approach to these matters can have an unsettling effect. Each human being is essentially autonomous, however much support he might seem to derive from communion with others of like belief elsewhere. One must wonder whether there is in the Declaration any awareness that human happiness, including one's moral and spiritual development, usually depends upon the calibre of religious beliefs and practices generally accepted in one's community. Is not a community, including the legal and social sanctions normally available to a healthy community, required for the establishment, refinement and perpetuation of salutary beliefs and practices with respect to the most important matters?

The approach evident in the Declaration assumes that each human being is substantially on his own in choosing his religious allegiances, as if each always has naturally within himself a reliable basis for choice. (This attitude about choice may itself be the result, at least in part, of one particular kind of religious tradition and religious training.) Of course, it is taken for granted in the Declaration that, by and large, a child's beliefs will usually be those of his parents. But does not all this presuppose that one's parents, or others before them, were once able to choose effectively on their own?

A useful way to get even further into the implications of the assumptions of the Declaration is to consider the last two of the nine "freedoms" used there to illustrate "the right to freedom of thought, conscience, religion or belief." The last of these freedoms is the freedom, already referred to, to "establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels." This is not unrelated to the next-to-last freedom listed.

That is the freedom to "observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief." This freedom means, among other things, that
there can be—that a government is obliged to recognize and respect—a variety of communities within a country's borders. But, it can be argued, a country is defined in part by the holidays it observes, by the ceremonies most (if not all) of its people share, especially those holidays and ceremonies which reflect and reinforce opinions of citizens about the most serious matters.

Thus, the country is, as we have anticipated, called into question by the Declaration in two ways: a country is required to permit within its borders largely self-defining communities to determine in significant respects the opinions of various citizens with respect to faiths and practices which very much affect what people regard as vital; a country is also required to permit international associations similarly to influence citizens within its borders. Another way of putting this is to say that one's country is neither to be truly unified nor to be one's only country. Whether this is good or bad depends on how the balance is struck by prudent statesmen and a sensible people between civic duties and personal aspirations.

It almost goes without saying that we need not assume that the framers of the United Nations statement were aware of the considerations and consequences of the Declaration I have touched upon here. In this respect, they may be modern intellectuals who can be, with the best of intentions, subversive of the deepest aspirations of the human soul. Their intentions do include the humane desire to eliminate, or at least to dampen down, religious conflict both within and between countries.

Much contemporary Church and State discussion among us seems to assume, in the same spirit, that there are far more important concerns for mankind than the salvation of souls and any common worship of the divine. It remains to be seen whether such a taming, if not displacement, of both religion and community produces even more dangerous human beings (if only in reaction) than those people who are wholeheartedly dedicated to the service of Country and God.182

182. See supra note 52 and accompanying text. A sample of dangerous reaction to (as well as exploitation of) modernism is exhibited in Leni Riefenstahl's film, *Triumph of the Will*. Another such sample is exhibited in the Russian Bolsheviks' response to that modernist atrocity, the First World War. Such developments can sometimes make the comprehensive conscientious objection discussed in supra Part V seem almost statesman-like. See Anastaplo, How to Read the Constitution of the United States, 17 Loy. U. Chi. L.J. 1, 55 (1985) (Utopia or Tyranny: The Universal Declaration of Human Rights).

On the civic uses of holidays, see Stone, Professor Harry V. Jaffa Divides the House, 10 U. Puget Sound L. Rev. 471, 500 n.102 (1987). On the tension between the autonomy of the individual and the requirements of the community, see also supra note 1.